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GENERAL STATUTES OF
NORTH CAROLINA
OF 1943

1951 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, S. G. ALRICH, W. M. WILLSON
AND BEIRNE STEDMAN

Volume 1

Place in Pocket of Corresponding Volume of Main Set

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1951

THE GENERAL STATUTES OF
NORTH CAROLINA
OF 1948

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THE MICHIE COMPANY

Volume 1

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Printed in the State of North Carolina
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Preface

This Cumulative Supplement to volume 1 contains the general laws of a permanent nature enacted at the 1945, 1947, 1949 and 1951 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. The index, appearing in volume 4 of the Cumulative Supplement, is confined mainly to new laws and such amendatory laws as are not reflected in the original index. In addition, the index includes many references enlarging upon the treatment of certain topics found in the original and recompiled volumes of the General Statutes.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Division of Legislative Drafting and Codification of Statutes of the Department of Justice, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Preface

Scope of Volume

Constitutions:

Amendments to the Constitutions of North Carolina and of the United States adopted or proposed since the publication of the General Statutes.

Statutes:

Permanent portions of the general laws enacted at the 1945, 1947, 1949 and 1951 Sessions of the General Assembly affecting Chapters 1 through 27 of the General Statutes.

Annotations:

Sources of the annotations:

- North Carolina Reports volumes 223-233 (p. 312).
- Federal Reporter 2nd Series volumes 134 (p. 417)-186 (p. 744).
- Federal Supplement volumes 49 (p. 225)-95 (p. 248).
- United States Reports volumes 318-340 (p. 366).
- Supreme Court Reporter volumes 63 (p. 862)-71 (p. 473).
- North Carolina Law Review volumes 22 (p. 280)-29 (p. 226).

Constitution of North Carolina

ARTICLE I

Declaration of Rights

§ 1. The equality and rights of persons.—That we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

Meaning of "Liberty."—The term "liberty," as used in this section and § 17 of this article, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731.

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8.

Statute providing for the licensing and supervision of photographers (G. S. chap. 92) is violative of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731.

§ 2. Political power and government.

Cited in *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930.

§ 7. Exclusive emoluments, etc.—No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

Purpose.

The state cannot authorize city to donate property, or to grant privileges to one class of citizens not enjoyed by all, except in consideration of public services. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 285, 162 A. L. R. 930, citing *Brown v. Board of Com'rs*, 223 N. C. 744, 28 S. E. (2d) 104, 106.

Motivation of Legislation.—The constitutional limitation contained in this section, has been frequently invoked by supreme court to strike down legislation conferring special privileges not in consideration of public service, but where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege, legislation has been upheld. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 286, 162 A. L. R. 930.

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

An expenditure by a municipality for special training of a police officer does not grant an exclusive emolument or privilege to the officer contrary to this section. *Green v. Kitchin*, 229 N. C. 459, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Services in the armed forces during war are "public services" within the meaning of this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253; *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 285, 162 A. L. R. 930.

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Exempting corporations chartered prior to a certain date from the proscription against emptying into streams substances inimical to fish violates this section. *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860. See § 113-172.

Contract to Relieve Railway of Expense of Removing Tracks Held Valid.—The state highway commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom. The railway company was operating under a franchise having twenty more years to run, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks. The city entered into a contract with the railway company providing that in consideration of abandonment of its franchise along said street the city would acquire for it an alternate right of way and would remove the track from the street. The court held that the promise by the city to remove the tracks did not constitute a special emolument not in consideration of public service. *Boyce v. Gastonia*, 227 N. C. 139, 41 S. E. (2d) 355.

Statute including deputy sheriffs within term "employee" as used in Workmen's Compensation Act (G. S. § 97-2) held consonant with the provisions of this section. *Towe v. Yancey County*, 224 N. C. 579, 31 S. E. (2d) 754.

Gratuity to Individual for Adjusting Claim Is Unauthorized.—This section constitutes a specific constitutional prohibition against gifts of public money, and the legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. *Brown v. Board of Com'rs*, 223 N. C. 744, 745, 28 S. E. (2d) 104.

§ 11. In criminal prosecutions.—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses, with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

For comment on right of confrontation, see 28 N. C. Law Rev. 205.

Information as to Accusation.

The constitutional right of the accused in a criminal prosecution, to be informed of the accusation against him and to confront his accusers and witnesses with other testimony, carries with it, not only the right to face one's "accusers and witnesses with other testimony," but also the opportunity fairly to present one's defense. *State v. Utley*, 223 N. C. 39, 25 S. E. (2d) 195.

Confrontation—Does Not Apply to Civil Actions.—The right accorded defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 380, 26 S. E. (2d) 904.

Same—Not Denied by Refusing Motion to Continue.—There is no denial of prisoner's right to confrontation by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the state's solicitor agreed that he would not, and did not offer evidence as to fingerprints. *State v. Rising*, 223 N. C. 747, 28 S. E. (2d) 221.

The constitutional right to be represented by counsel is further implemented by § 15-4. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

A defendant has the constitutional right to be repre-

sented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an inescapable duty to assign counsel to a person unable to employ one. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

Contemplates Reasonable Opportunity to Prepare Defense.—The constitutional guarantee of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520, discussed in 27 N. C. Law Rev. 544.

The constitutional right to be represented by counsel contemplates not only that accused shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294.

After the convening of the term the trial court ordered a special venire from another county to try a negro charged with rape. Counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race, and the court refused the request of counsel for time to investigate and secure evidence in support of such challenge to the array, but counsel obtained evidence from members of the special venire and bystanders of the courtroom tending to sustain the challenge. It was held that as it appeared that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial was awarded for the denial of defendant's constitutional right to be properly represented by counsel. *Id.*

But the denial of a continuance is not prejudicial error where the record fails to show that it would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

And Depends upon Nature of Offense.—In capital felonies the provision relative to counsel is regarded as not merely permissive but mandatory. This is indicated by § 15-5 and by numerous decisions of the supreme court. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdiction to regard these provisions as guaranteeing the right of persons accused to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's rights. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

In cases less than capital the propriety of providing counsel depends upon the circumstances of the individual case, within the sound discretion of the trial judge. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

And defendant's ignorance and unfamiliarity with legal matters are not alone sufficient to render appointment of counsel mandatory in a prosecution for less than a capital offense. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

Self-Incrimination—Scope of Protection.—

The constitutional inhibition against self-incrimination is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560.

Same—Forced Production of Incriminating Documents Not Allowed.—

The introduction in evidence of incriminating papers taken from the defendant at the time of the arrest does not infringe the constitutional guarantee against self-incrimination, under this section, and when he takes the stand in his own behalf he waives his constitutional right against self-incrimination. *State v. Shoup*, 226 N. C. 69, 35 S. E. (2d) 697, distinguishing *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667, appearing in the original, where defendant was required in open court to hand over incriminating documents.

As to compelling accused to speak so that witness may identify his voice, see note, 27 N. C. Law Rev. 262.

When Motion for Continuance Presents Question of Law.—When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, 14th Amend. U. S. Constitution, Art. I, sec. 17 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N. C. 321, 26 S. E. (2d) 322.

Cited in *State v. White*, 225 N. C. 351, 353, 34 S. E. (2d) 139.

§ 12. Answers to criminal charges.—No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases. (Const. 1868; 1949, c. 579.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1950.

This section sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. *State v. Lewis*, 226 N. C. 249, 250, 37 S. E. (2d) 691.

§ 13. Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

The word "jury" as here used signifies a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. *State v. Emery*, 224 N. C. 581, 583, 31 S. E. (2d) 858.

A jury of ten men and two women does not suffice as a jury of "good and lawful men" within the meaning of this section. *Id.*

Failure of defendant in a criminal prosecution to exhaust his peremptory challenges does not affect his right to attack an illegally constituted jury. *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858.

Cited in *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.); *State v. White*, 225 N. C. 351, 34 S. E. (2d) 139; *State v. Crandall*, 225 N. C. 148, 154, 33 S. E. (2d) 861 (dis. op.).

§ 14. Excessive bail.

Cross Reference.—See annotations under § 14-3.

Cruel and Unusual Punishment.—

A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

A sentence which finds complete sanction in a valid legislative enactment cannot be deemed violative of this constitutional provision forbidding the infliction of cruel or unusual punishments. *State v. Stansbury*, 230 N. C. 589, 55 S. E. (2d) 185.

A sentence to 18 months labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. *State v. White*, 230 N. C. 513, 53 S. E. (2d) 436.

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of this section. *State v. Crandall*, 225 N. C. 148, 150, 33 S. E. (2d) 861.

§ 15. General warrants.

Ordinarily even the strong arm of the law may not invade one's dwelling except under authority of a proper search warrant. *In re Walters*, 229 N. C. 111, 47 S. E. (2d) 709.

A warrant must sufficiently identify the person accused. *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609.

§ 16. Imprisonment for debt.

Imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order which has been willfully disobeyed so as to constitute contempt of court. *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118.

Quoted in *Moose v. Barrett*, 223 N. C. 524, 27 S. E. (2d) 532.

§ 17. No person taken, etc., but by law of land.

Cross References.—As to validity of statute prohibiting

discharge of deleterious matter into streams, see note to § 113-172. As to meaning of term "liberty," see § 1 of this article.

The term "law of the land" means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. *State v. Chesson*, 228 N. C. 239, 45 S. E. (2d) 563. See *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

Due Process of Law.—The term "law of the land" as used in this section is synonymous with "due process of law." *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731. See *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. (2d) 593.

Under this section no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process of law are interchangeable terms. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

Restraints upon Police Power.—"Law of the land" under this section in relation to the exercise of the state police power, imposes flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained. *State v. Whitaker*, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Notice and Opportunity to Be Heard Required.—The essential elements of the "law of the land" are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

Under "the law of the land" clause of this section a judgment cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

An adjudication affecting the marital status and finally determining personal and property obligations must be preceded by notice and an opportunity to be heard. *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138.

The intent and purpose of the statutes in regard to service of summons is to give notice and an opportunity to be heard, and where service is had upon a statutory process agent who is not in fact an agent or officer of defendant corporation, the imputation of the negligence of such process agent to the corporation so as to preclude it from moving to set aside a default judgment against it for surprise and excusable neglect would be a denial of due process of law. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Tax Statute Not Providing for Notice and Hearing.—An act which permits the governing board of a town to list, value and revalue all property within its limits separately and independently of § 105-333 without providing for notice and hearing as to such valuations, and without setting up precise standards for evaluation, contravenes due process of law and is unconstitutional. *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369.

The legislature may make classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Legislative bodies may make classifications for the application of regulations provided the classifications are practical and apply equally to all persons within a class, since the constitutional mandate prescribing discrimination requires only that there be no inequality among those within a particular group or class. *State v. Trantham*, 230 N. C. 641, 55 S. E. (2d) 198.

Compensation Required if Private Property Taken.—Private property may not be taken even for a public use without compensation. *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. (2d) 107.

Forfeiture of property and vesting its title in another for tax delinquency by mere legislative declaration is the taking of property without due process of law. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

Exclusion of Negroes from Grand Jury.—The evidence disclosed that the names of Negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of Negroes were without exception rejected. It was held that the motion of defendant, a Negro, to quash the indictment found by a

grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of Negroes from the grand jury deprived him of his constitutional rights. *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537.

Zoning Regulations.—The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. *Kinney v. Sutton*, 230 N. C. 404, 53 S. E. (2d) 306.

Statutes declaring that the right to work shall not be dependent upon membership or non-membership in a labor union, and prohibiting certain agreements between employers and labor organizations (§§ 95-78 to 95-84), do not violate this section. *State v. Whitaker*, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Statute making certain war veterans eligible for license to practice barbering without standing an examination does not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8.

Statute providing for licensing and supervision of photographers (G. S. chap. 92) is violative of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731.

When Motion for Continuance Presents Question of Law.—Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal, but when the motion is based on a right guaranteed by the Federal and State Constitutions, 14th Amend., U. S. Const., Art. I, section 11 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N. C. 321, 326, 26 S. E. (2d) 322.

Quoted in *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858.

Cited in *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215; *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129; *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860; *Worley v. Pipes*, 229 N. C. 465, 50 S. E. (2d) 504.

§ 19. Controversies at law respecting property.

—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. No person shall be excluded from jury service on account of sex. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

As to less than unanimous jury verdicts in civil cases, see 27 N. C. Law Rev. 539.

In General.—

The ancient mode of trial by jury has been preserved in our present Constitution. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904.

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356.

The word "jury" is to be given the signification which it had when the Constitution was adopted, i. e., a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. *State v. Emery*, 224 N. C. 581, 583, 31 S. E. (2d) 858.

Right Not Unqualified.—

The right to trial by jury applies exclusively to actions in which legal rights are involved. *State v. Great Southern Trucking Co.*, 223 N. C. 687, 695, 28 S. E. (2d) 201 (con. op.)

Cited in *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129.

§ 26. Religious liberty.—All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any

case whatever, control or interfere with the rights of conscience. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices. *State v. Massey*, 229 N. C. 734, 51 S. E. (2d) 179.

§ 31. Perpetuities, etc.

The common-law rule against perpetuities is recognized and enforced in this state. The rule is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention. Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect, or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. *Mercer v. Mercer*, 230 N. C. 101, 52 S. E. (2d) 229.

As against Private Trusts.—The rule against perpetuities applies to private trusts. And when a private trust violates the rule the court will not limit the duration of the trust but will declare the whole trust invalid. *Mercer v. Mercer*, 230 N. C. 101, 52 S. E. (2d) 229, holding devise of property in trust void because violative of rule.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8.

Statute relating to licensing and supervision of photographers (G. S. 92) tends to create a monopoly in violation of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731.

§ 35. Courts shall be open.

Editor's Note.—For comment on unborn child being a person within the meaning of this section, see 28 N. C. Law Rev. 245.

Disregarding Attempted Appeal from Nonappealable Order.—In order to promote the principle set forth in this section, courts may disregard an attempted appeal from a nonappealable interlocutory order and proceed with trial to avoid delay. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Private property may not be taken without compensation, even for a public use. *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. (2d) 107.

Quoted in *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330.

ARTICLE II

Legislative Department

§ 1. Two branches.

Delegation of Power to Determine Facts.—The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. *State v. Curtis*, 230 N. C. 169, 52 S. E. (2d) 364.

§ 13. Vacancies.

Proposed Amendment.—Session Laws 1951, c. 1003, proposed that this section be amended to read as follows: "If a vacancy shall occur in the General Assembly by death, resignation or otherwise, the said vacancy shall be filled immediately by the Governor appointing the person recommended by the executive committee of the county in which the deceased or resigned member was resident, being the executive committee of the political party with which the deceased or resigned member was affiliated at the time of his election."

§ 28. Pay of members and presiding officers of the General Assembly.—The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of fifteen dollars (\$15.00) per day for each day of their session, for a period not exceeding ninety days; and should they remain longer in session they shall serve without compensation. The compensation of the presiding officers of the two houses shall be twenty dollars (\$20.00) per day for a period not exceeding ninety

days. Should an extra session of the General Assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty-five days. (Convention 1875; 1927, c. 203; 1949, c. 1267.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1950.

The amendment of this section proposed by Session Laws 1947, c. 361, failed of adoption at the general election held on November 2, 1948.

§ 29. Limitations upon power of General Assembly to enact private or special legislation.

Municipal Board of Control is a creature of the General Assembly within the provisions of this section. *Hunsucker v. Winborne*, 223 N. C. 650, 27 S. E. (2d) 817.

Statute including deputy sheriffs within term "employee" as used in Workmen's Compensation Act (G. S. § 97-2) held consonant with the provisions of this section. *Towe v. Yancey County*, 224 N. C. 579, 31 S. E. (2d) 754.

Court Created Prior to Adoption of Section.—Since this section forbidding the passage of "any local, private, or special act or resolution relating to the establishment of courts inferior to the superior court" did not become a part of the Constitution of North Carolina until it was adopted by the qualified voters of the State in the general election in 1916, the General Assembly of 1913 acted within constitutional limits in creating the special court of North Wilkesboro by private act. In re *Wingler*, 231 N. C. 560, 58 S. E. (2d) 372.

Cited in *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215; *State v. Mitchell*, 225 N. C. 42, 33 S. E. (2d) 134; *Roberts v. McDevitt*, 231 N. C. 458, 57 S. E. (2d) 655.

§ 30. Inviolability of sinking funds.

Expenditure of Surplus Unencumbered Funds.—Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. *Johnson v. Marrow*, 228 N. C. 58, 44 S. E. (2d) 468.

§ 31. Use of funds of Teachers' and State Employees' Retirement System restricted.—The General Assembly shall not use, or authorize to be used, nor shall any agency of the State, public officer or public employee use or authorize to be used the funds, or any part of the funds, of the Teachers' and State Employees' Retirement System except for Retirement System purposes. The funds of the Teachers' and State Employees' Retirement System shall not be applied, diverted, loaned to or used by the State, any State agency, State officer, public officer or employee except for purposes of Retirement System: Provided, that nothing in this section shall prohibit the use of said funds for the payment of benefits, administrative expenses and refunds as authorized by the Teachers' and State Employees' Retirement Law, nor shall anything in this provision prohibit the proper investment of said funds as may be authorized by law. (1949, c. 821.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1950.

ARTICLE III

Executive Department

§ 1. Officers of the executive department; terms of office.—The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the

State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January. (1943, c. 57.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

Stated in *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799.

§ 6. Reprieves, commutations and pardons.

After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way, as the power of pardon, parole or discharge during the term of imprisonment is by this section the exclusive prerogative of the Governor. *State v. Lewis*, 226 N. C. 249, 37 S. E. (2d) 691, 693.

§ 11. Duties of the Lieutenant-Governor.—The Lieutenant-Governor shall be president of the Senate but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly. (1943, c. 497.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

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

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

§ 14. Council of State.—The Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Agriculture, Commissioner of Labor and Commissioner of Insurance shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose, exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney General shall be, ex officio, the legal adviser of the executive department. (1943, c. 57.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

ARTICLE IV

Judicial Department

§ 2. Division of judicial powers.

Cited in *In re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372.

§ 8. Jurisdiction of Supreme Court.

Remedial Writs Controlling Proceedings of Inferior Courts.—The supreme court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663.

Writ of Error Coram Nobis.—The supreme court, in its supervisory power, has authority to entertain a petition for permission to apply to the superior court for a writ of error coram nobis. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857; *State v. Daniels*, 231 N. C. 17, 56 S. E. (2d) 2. As to allowance of petition where trial court failed to appoint counsel, see note to § 15-4.

Writ of Certiorari.—

Where the case is not one in which the alleged error appears on the face of the record proper, which might be corrected in supreme court's supervisory power under this section, but it is to review a ruling of the court entered on motion after trial, as well as an application for certiorari, it was held that since the case was one in which the state had no right of appeal, a dismissal must necessarily follow. *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313.

Stated in *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823.

Cited in *State v. Biggs*, 224 N. C. 23, 29 S. E. (2d) 121 (dis. op.); *Fuquay v. Fuquay*, 232 N. C. 692, 62 S. E. (2d) 83.

§ 9. Claims against the State.

Only Way State Can Be Sued.—

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by Art. III, Const. of U. S.; this section, Const. of North Carolina. *Dalton v. State Highway, etc., Comm.*, 223 N. C. 406, 27 S. E. (2d) 1.

§ 10. Judicial districts for Superior Courts.—The General Assembly shall divide the State into a number of judicial districts which number may be increased or reduced and shall provide for the election of one or more Superior Court judges for each district. There shall be a Superior Court in each county at least twice in each year to continue for such time in each county as may be prescribed by law. (Const. 1868; Convention 1875; 1949, c. 393.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1950.

§ 11. Judicial districts; rotation; special Superior Court judges; assignment of Superior Court judges by Chief Justice.—Each judge of the Superior Court shall reside in the district for which he is elected. The General Assembly may divide the State into a number of judicial divisions. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. The General Assembly may provide by general laws for the selection or appointment of special or emergency Superior Court judges not assigned to any judicial district, who may be designated from time to time by the Chief Justice, to hold court in any district or districts within the State; and the General Assembly shall define their jurisdiction and shall provide for their reasonable compensation. The Chief Justice, when in his opinion the public interest so requires, may assign any Superior Court judge to hold one or more terms of Superior

Court in any district. (Const. 1868; Convention 1875; 1915, c. 99; 1949, c. 775.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1950.

As to rotation of superior court judges, see leading article in 27 N. C. Law Rev. 181. See also, § 26 N. C. Law Rev. 334.

The Power of Special and Emergency Judges Is Defined, etc.—

Under this section, the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445.

This section does not confer or authorize the legislature to confer any "in chambers" or "vacation" jurisdiction upon special judges assigned to hold a designated term of court. *Shepard v. Leonard*, 223 N. C. 110, 113, 25 S. E. (2d) 445.

Cited in *In re Advisory Opinion*, 225 N. C. 772, 39 S. E. (2d) 217; *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

§ 12. Jurisdiction of courts inferior to supreme court.

Superior Court.—

The legislature has full authority to provide for appeals to the superior court by licensees whose driving licenses have been suspended or revoked by the discretionary action of the department of motor vehicles. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696. See § 20-25.

Cited in *In re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372.

§ 13. In case of waiver of trial by jury.

In Civil Actions.—The right to trial by jury in civil cases may be waived. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79; *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904. As to waiver in reference cases, see note to § 1-189.

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356.

Special Proceeding to Establish Boundary Line.—As to defendant's waiver of jury trial by failure to tender pertinent issues, see *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79.

Quoted in *Burnsville v. Boone*, 231 N. C. 577, 58 S. E. (2d) 351.

§ 21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior courts.

Applied in *Ingle v. State Board of Elections*, 226 N. C. 454, 38 S. E. (2d) 566.

§ 25. Vacancies.

Proposed Amendment.—Session Laws 1951, c. 1082, proposed that this section be amended to read as follows: "All vacancies occurring in the offices provided for by this article of the constitution shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly that is held more than 30 days after such vacancy occurs, when elections shall be held to fill such offices."

Associate Justice of Supreme Court.—This section of the constitution requires that vacancies in the office of associate justice of the Supreme Court shall be filled by the appointment of the Governor, and that "the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices." *In re Advisory Opinion*, 232 N. C. 737 (appx.), 61 S. E. (2d) 529.

§ 27. Jurisdiction of justices of the peace.

Cross References.—

As to punishment for assault, see annotations under section 14-33.

Jurisdiction of Justice.—

In accord with original. See *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644.

In summary proceeding in ejectment, based upon affidavit that defendant had entered into possession of house and lot and refused to vacate the house, justice of peace had no jurisdiction in absence of allegation that relationship of landlord and tenant existed and that defendant was holding over. *Howell v. Branson*, 226 N. C. 264, 37 S. E. (2d) 687.

ARTICLE V

Revenue and Taxation

§ 3. State taxation.

Editors Note.—

For a brief discussion of this section, see 25 N. C. Law Rev. 504.

Meaning of "Public Purpose."—A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500. As to what are "public purposes," for which a municipality may levy taxes, see 25 N. C. Law Rev. 504.

"Public purpose, as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion." *Nash v. Tarboro*, 227 N. C. 283, 287, 42 S. E. (2d) 209, quoting *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803.

Wide Latitude Accorded Taxing Authorities.—The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by this section of the constitution of North Carolina. *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N. C. 307, 59 S. E. (2d) 819.

There can be no lawful tax which is not levied for a public purpose. *Nash v. Tarboro*, 227 N. C. 283, 42 S. E. (2d) 209.

The fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

An expenditure by a municipality for special training of a police officer is for a public purpose. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Municipal Airport Is Public Purpose.—The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of this section, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby. *Turner v. Reidsville*, 224 N. C. 42, 29 S. E. (2d) 211; *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215.

The cost of constructing and maintaining a hotel is not a public purpose, within the meaning of this section. *Nash v. Tarboro*, 227 N. C. 283, 290, 42 S. E. (2d) 209.

The construction, maintenance and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation under this section. *Trustees of Watts Hospital v. Board of Com'rs*, 231 N. C. 604, 58 S. E. (2d) 696.

The word "trades" as used in this section means any employment or business engaged in for gain or profit. *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. (2d) 646.

The purchase of horses or mules for the purpose of resale, at wholesale or retail, is a trade within the meaning of this section, and the imposition of a license tax on such trade is valid. *Id.*

Quoted in *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369.

Cited in *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. (2d) 789.

§ 4. Limitations upon the increase of public debts.

Proposed Amendment.—The amendment of this section proposed by Session Laws 1947, c. 784, failed of adoption at the general election held on November 2, 1948.

The provisions of this section now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue bonds, and its provisions are superimposed upon the limitations contained in article 7, § 7, and in article 5, § 6, of the Constitution. *Coe v. Surry County*, 226 N. C. 125, 36 S. E. (2d) 910, 912.

Bonds are outstanding within the meaning of this section until actually paid and canceled, or delivered to the county for cancellation. *Coe v. Surry County*, 226 N. C. 125, 36 S. E. (2d) 910, 912.

Thus, where county bonds were payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county made available funds for payment thereof, the bonds were outstanding at the close of the latter year within the meaning of this section. *Id.*

In an election for the issuance of county bonds for a new school building, a necessary expense, a favorable vote of the majority of those voting is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. *Mason v. Moore County Board of Com'rs*, 229 N. C. 626, 51 S. E. (2d) 6.

Cited in *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N. C. 293, 301, 34 S. E. (2d) 430.

§ 5. Property exempt from taxation.

Assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition of this section exempting property belonging to the State or to municipal corporations from taxation. *Raleigh v. Raleigh City Administrative Unit*, 223 N. C. 316, 26 S. E. (2d) 591.

§ 6. Taxes levied for counties.

Proposed Amendments.—The amendment of this section proposed by Session Laws 1947, c. 421, failed of adoption at the general election held on November 2, 1948.

Session Laws 1951, c. 142, proposed that this section be amended to read as follows: "Taxes levied for counties.—The total of the State and county tax on property shall not exceed twenty cents (20c) on the one hundred dollars (\$100.00) value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by Article 9, Section 3, of the Constitution: Provided, further, the State tax shall not exceed five cents (5c.) on the one hundred dollars (\$100.00) value of property."

Ordinarily Expenses of Holding Courts and Maintaining Jails, etc.—

In accord with original. See *Atlantic Coast Line R. Co. v. Duplin County*, 226 N. C. 719, 40 S. E. (2d) 371.

Regularly Recurring Expenditures in Performance of Governmental Duty.—A purpose which involves a regularly recurring expenditure in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government, is a general rather than a special purpose within the meaning of this provision. *Southern R. Co. v. Mecklenburg County*, 231 N. C. 148, 56 S. E. (2d) 438.

Expenditures for maintenance of a rural police force is for a continuing expense in furtherance of an indispensable function of county government, and therefore is for a general county purpose within the meaning of the constitutional limitation on the tax rate for such purposes. *Southern R. Co. v. Mecklenburg County*, 231 N. C. 148, 56 S. E. (2d) 438.

Levy for Public Welfare.—The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by this section, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, and any levy for public welfare or poor relief, in excess thereof, was held invalid. *Atlantic Coast Line R. Co. v. Beaufort County*, 224 N. C. 115, 29 S. E. (2d) 201.

Levy for Home for Aged.—Under this section Cumberland County is authorized by the Act of 1923 to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. *Atlantic Coast Line R. Co. v. Cumberland County*, 223 N. C. 750, 28 S. E. (2d) 238.

Upkeep of county buildings and upkeep and maintenance of county home for the aged and infirm are general expenses and must be covered in the fifteen-cent levy limited for general purposes. *Atlantic Coast Line R. Co. v. Duplin County*, 226 N. C. 719, 40 S. E. (2d) 371.

ARTICLE VI

Suffrage and Eligibility to Office

§ 1. Who may vote.—Every person born in the United States, and every person who has been

naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (Const. 1868; Convention 1875; 1899, c. 218; 1900, c. 2; 1945, c. 634, s. 2.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

§ 2. Qualifications of voters.

"Residence" Defined.—

In accord with 1st paragraph in original. See *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12.

This constitutional provision applies primarily to an incoming person who is not permitted to exercise political rights until after he has been in the state and the voting precinct for the prescribed periods. *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12.

And Not to a Citizen Temporarily Absent.—This constitutional provision is not designed to disfranchise a citizen of the state when he leaves his home and goes into another state or into another county of this state for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12.

ARTICLE VII

Municipal Corporations

§ 1. County officers.

Cited in *Southern R. Co. v. Mecklenburg County*, 231 N. C. 148, 56 S. E. (2d) 438.

§ 7. No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (1947, c. 34.)

II. GENERAL CONSIDERATION.

Editor's Note.—This section was amended by vote at the general election of November 2, 1948. For a brief comment on the amendment, see 25 N. C. Law Rev. 395.

Rule and Exception Thereto.—Under this section approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is the exception. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702.

Function Must Be Public.—A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. *Brown v. Board of Com'rs*, 223 N. C. 744, 28 S. E. (2d) 104.

Where appropriations were made by two cities and county to airport authority out of funds not derived from ad valorem taxes and funds were free from other specified purpose or legal commitment, no question of credit or taxation in violation of this section is involved. *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803, distinguishing *Sing v. Charlotte*, 213 N. C. 60, 195 S. E. 271.

Cited in *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. (2d) 789.

III. NECESSARY EXPENSES.

A. General Considerations and Applications.

Legislative Declaration and Municipal Commissioners Finding That Tax Is for Necessary Expense, etc.—

In accord with original. See *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702.

What Are "Necessary Expenses."—

Where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the state's delegated sovereignty, the expense is a necessary expense within this section, and may be incurred without a vote of the people. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Bonds for establishing and maintaining playgrounds, in populous, industrial city, for its children, are for a necessary expense within the meaning of Art. VII, § 7 of the

North Carolina Constitution and it is not required that the issuance of the bonds be submitted to a vote of qualified electors of the municipality. *Atkins v. Durham*, 210 N. C. 295, 186 S. E. 330.

The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, within the meaning of this section, and the expenditure of funds for this purpose derived from a tax imposed without a referendum will be enjoined by the courts. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702.

The Legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel. *Nash v. Tarboro*, 227 N. C. 283, 290, 42 S. E. (2d) 209.

Operating and Improving Airport.—

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with this section. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215.

An expenditure by a municipality for special training of a police officer is a necessary expense within the meaning of this section. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

B. School Bonds or Taxation.

As to school district bonds or taxes for athletic stadium, see *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56.

§ 12. Debts in aid of the rebellion not to be paid.

Editor's Note.—The word "remembered" in the second line of the Editor's Note in the original should read "re-numbered."

ARTICLE VIII

Corporations Other than Municipal

§ 1. Corporations under general laws.

Legislature May Create Corporation for Public Purpose.—The legislative power as to state and political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution or that of the United States, and there is no constitutional limitation on power of the General Assembly to create a corporation for a public purpose. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 284, 162 A. L. R. 930.

§ 4. Legislature to provide for organizing cities, towns, etc.

In General.—

Municipal corporations derive their powers almost solely from legislative enactment under this section, and are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702.

The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature. *Rhodes v. Asheville*, 230 N. C. 134, 52 S. E. (2d) 371; *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460.

ARTICLE IX

Education

§ 2. General Assembly shall provide for schools; separation of the races.

Duty on Legislature.—

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to the pertinent constitutional provisions as to uniformity, as provided in this section, and length of term, as provided in the following section. *Coggins v. Board of Education*, 223 N. C. 763, 28 S. E. (2d) 527.

Quoted in *Epps v. Carmichael*, 93 F. Supp. 327.

§ 3. Counties to be divided into districts.

Legislative Function.—

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity, as provided in the preceding section,

and length of term, as provided in this section. *Coggins v. Board of Education*, 223 N. C. 763, 28 S. E. (2d) 527.

§ 5. County school fund; proviso.

This section was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes. *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56.

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education. *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56.

An agreement under which a graded school district, without monetary consideration, was to transfer in fee to a municipality a tract of school property, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association, did not constitute a diversion of school property in contravention of this section. *Id.*

The "clear proceeds" of a forfeiture are defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and process against the bondsman usual in the practice. *Hightower v. Thompson*, 231 N. C. 491, 57 S. E. (2d) 763.

§ 7. Benefits of the University.

The right of succession by escheat to all property, when there is no wife or husband or parties entitled to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by this section, and extended by several statutes which are now G. S., 116-20 through 116-25. *Board of Education v. Johnston*, 224 N. C. 86, 88, 29 S. E. (2d) 126.

§ 8. State Board of Education.—The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in section five of this article, shall, from and after the first day of April, one thousand nine hundred and forty-five, be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts, which may be altered from time to time by the General Assembly. Of the appointive members of the State Board of Education, one shall be appointed from each of the eight educational districts, and two shall be appointed as members at large. The first appointments under this section shall be: Two members appointed from educational districts for terms of two years; two members appointed from educational districts for terms of four years; two members appointed from educational districts for terms of six years; and two members appointed from educational districts for terms of eight years. One member at large shall be appointed for a period of four years and one member at large shall be appointed for a period of eight years. All subsequent appointments shall be for terms of eight years. Any appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board. The board shall elect a chairman and vice chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the ap-

pointive members shall be provided by the General Assembly. (Const. 1868; 1941, c. 151; 1943, c. 468.)

Editor's Note.—This section was amended by vote at general election of November 7, 1944.

Quoted in Session Laws 1945, c. 530, s. 1.

Cited in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

§ 9. Powers and duties of the board.

Quoted in Session Laws 1945, c. 530, s. 1.

ARTICLE X

Homesteads and Exemptions

§ 2. Homestead.

A Constitutional Right.—The right to a homestead is guaranteed by the constitution. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Waiver of Right.—Homestead is a right created for the benefit of the judgment debtor, and therefore other judgment creditors cannot complain of a waiver by the debtor of this right in designated realty as to a particular judgment. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead to the end that the property might bring the highest price possible, and the joinder of the judgment debtors in the sheriff's deed to the purchaser, constitute an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and is a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

Only Residents Entitled to Homestead.—Evidence held insufficient to support finding by the court that judgment debtor is resident and entitled to homestead. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219.

Duration of Homestead.—The homestead as allowed lasts during the life of the owner thereof; and, after his death, it lasts during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Presumption of Continuance.—Once acquired the homestead is presumed to continue. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Allotment Unnecessary.—See note to § 1-369.

The only way property may lose its homestead character, after the homestead has been allotted, is by death, abandonment or alienation. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Homestead interest in land is terminated by the owner's removal from the state. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219.

Cited in Sample v. Jackson, 225 N. C. 380, 35 S. E. (2d) 236.

§ 6. Property of married women secured to them.

Wife May Not Convey Real Estate by Estoppel.—By this section and the laws of this State a married woman is incapable of making a valid conveyance of her real estate without the written assent of her husband and privy examination duly taken and certified. Hence, she may not convey it by estoppel, fraudulently divest herself of coverture, if such characterization be preferred. *Buford v. Mochy*, 224 N. C. 235, 239, 29 S. E. (2d) 729.

In view of the above holding it would seem that the power of a married woman to effect a conveyance of her real property by estoppel in pais is delimited by this section of the Constitution. *Merchants, etc., Bank v. Sherrill*, 231 N. C. 731, 58 S. E. (2d) 741.

The renunciation of a will is not a conveyance which requires the written assent of the husband, as provided in this section. *Perkins v. Isley*, 224 N. C. 793, 32 S. E. (2d) 588.

Statute providing that earnings and damages from personal injury are wife's property (G. S. § 52-10) should be read in the light of this section. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611.

§ 8. How deed for homestead may be made.—

Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed;

but no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife. (1943, c. 662.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

ARTICLE XI

Punishments, Penal Institutions, and Public Charities

§ 1. Punishments; convict labor; proviso.

Cited in State v. Stansbury, 230 N. C. 589, 55 S. E. (2d) 185.

ARTICLE XII

Militia

§ 1. Who are liable to militia duty.

Stated in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

§ 3. Governor Commander-in-chief.

Officers in the militia are liable to be called out to suppress riots or insurrection, "and to repel invasion." *In re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567.

ARTICLE XIV

Miscellaneous

§ 3. Drawing money.

Legislative Authority Required.—

Moneys paid into the hands of the state treasurer by virtue of a state law become public funds for which the treasurer is responsible and may be disbursed only in accordance with legislative authority. *Gardner v. Board of Trustees*, 226 N. C. 465, 38 S. E. (2d) 314.

§ 7. Holding office.—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes. (1943, c. 432)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

Purpose.—

This section was never intended to discourage public officials from assuming military leadership in time of emergency. *In re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567.

Under this section, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. *In re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217, 221.

Definition of Public Office.—An office is a public station, or employment, conferred by appointment of government and the term embraces the idea of tenure, duration, emolument, and duties. *In re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217, 229.

Where the office which judge proposed to accept carried with it some of the attributes of sovereignty, and perforce invested him with governmental authority, he would be holding an office or place of trust or profit under the United States, or a department thereof, within the meaning of this section. *Id.*

Effect of Acceptance of Similar Office.—

Under this section which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. The acceptance of a second office, which is forbidden or incompatible with the office already held, operates ipso facto to vacate the first. *In re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567.

One who holds an office or place or trust under authority of this state forfeits such office or place of trust when he accepts another office or place of trust which is forbidden by this section or is incompatible with the office or place of trust already held, and the acceptance of the second forbidden or incompatible office or place of trust, operates

ipso facto to vacate the first. In re Advisory Opinion, 226 N. C. 772, 39 S. E. (2d) 217, 221.

§ 8. Intermarriage of white and negroes prohibited.

Persons within Prohibited Degree.—Every person who has

one-eighth negro blood in his veins is within the prohibited degree set out in this section and § 51-3. State v. Miller, 224 N. C. 228, 29 S. E. (2d) 751.

Stated in Epps v. Carmichael, 93 F. Supp. 327.

Constitution of the United States

AMENDMENT XXII

§ 1. No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative

from holding the office of president or acting as president during the remainder of such term.

§ 2. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the congress.

The twenty-second amendment was certified by the administrator of general services on March 1, 1951, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

The General Statutes of North Carolina of 1943

1951 Cumulative Supplement

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1-330. [Repealed.]

1-331, 1-332. [Transferred.]

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Art. 2. General Provisions.

§ 1-11. How party may appear.

This Right Is Alternative.—

In accord with original. See *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242, 243.

This section cannot be construed to mean that litigant may not first appear in person and then later through counsel. *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242, 243.

Thus, litigant who elects to employ counsel at any stage of proceedings may not be deprived of his services for the reason he has theretofore appeared in person and it is error for the court to undertake so to do. *Id.*

However, a party is entitled to appear in propria persona, and when a defendant insists upon this right notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence. *State v. Pritchard*, 227 N. C. 168, 41 S. E. (2d) 287.

Stated in *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227.

Cited in *In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749.

Art. 3. Limitations, General Provisions.

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

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764.

§ 1-17. Disabilities

This section has no application to a proceeding to set aside a void judgment of foreclosure. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31.

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

Where the defendant is a nonresident of the state the statute of limitations has not run. *Lassiter v. Powell*, 164 F. (2d) 186.

Stated in *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145.

§ 1-22. Death before limitation expires; action by or against executor.

Purpose of Filing Claim.—If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

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

Evidence Sufficient to Overrule Motion to Nonsuit.—Where plaintiff showed that shortly after the defendant's steamship collided with bridge, proceedings were instituted in the United States district court, in which it was ordered that all suits arising out of the collision be stayed, and immediately after plaintiff's claim was dismissed in that court for want of jurisdiction, it instituted present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 226 N. C. 371, 38 S. E. (2d) 214.

§ 1-25. New action within one year after nonsuit, etc.

The words "new action," "new suit," and "original suit." In accord with original. See *Bourne v. Southern Ry. Co.*, 224 N. C. 444, 31 S. E. (2d) 382.

Where action begun prior to the bar of the applicable statute of limitations is dismissed for want of service of process on the defendant, a second action on the same cause of action commenced within twelve months after the dismissal, but after the expiration of the statutory limitation, is barred. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819.

Nonsuit Operates as Res Adjudicata, etc.—

While ordinarily a party against whom a judgment of nonsuit has been rendered may commence a new action within one year, where a judgment of nonsuit has been entered, and a new suit has been commenced between the same parties based on substantially identical allegations and supported by substantially identical evidence, and these facts are found by the court, the judgment in the former action will be held res adjudicata and a bar to the maintenance of the second suit. *Smith v. McDowell Furniture Co.*, 232 N. C. 412, 61 S. E. (2d) 96.

Judgment of Nonsuit on Merits of Case, etc.—

A judgment of nonsuit does not bar a subsequent action on the same cause instituted within one year unless the evidence is substantially identical, and therefore the plea of res judicata to the second cause cannot be determined from the pleadings alone. *Craver v. Spough*, 227 N. C. 129, 41 S. E. (2d) 82.

Effectiveness of doctrine of lis pendens ought to prevail so long as equities have not themselves been determined or dismissed, but by appropriate statute are kept within the care of the law and the prospective adjudication by the court. It is difficult to see how this section, intended to accomplish this result, could be made effective in any other way. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510.

Where a decree of dismissal expressly reserves to plaintiff right to begin another proceeding, such grant of authority continues the operation of the lis pendens. A fortiori, this section, giving such permission as a matter of law, must be read into every final judgment of nonsuit entered by any court, and of this law all persons affected must take notice. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510.

Applied in *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 226 N. C. 371, 38 S. E. (2d) 214.

§ 1-26. New promise must be in writing.

III. PART PAYMENT.

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

§ 1-30. Applicable to actions by state.

Section Abrogated Common Law Maxim.—

The maxim is no longer in force in this state, except as otherwise provided by statutory exceptions. *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606.

When Statute Does Not Apply.—

Notwithstanding the inclusive provisions of this section it has been uniformly held that no statute of limitations runs against the state, unless it is expressly named therein. *Raleigh v. Mechanics, etc., Bank*, 223 N. C. 286, 293, 26 S. E. (2d) 573.

§ 1-31. Action upon a mutual, open and current account.—In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (Rev., s. 376; Code, s. 160; C. C. P., s. 39; 1951, c. 837, s. 1; C. S. 421.)

Editor's Note.—The 1951 amendment changed the catch-line of this section from "Action on open account".

§ 1-32. Not applicable to bank bills.

The annotation under this section in the original should be deleted.

Art. 4. Limitations, Real Property.

§ 1-36. Title presumed out of state.

Plaintiff Must Rely upon Strength of Own Title.—In actions involving title to real property, the state not being a party, title is conclusively presumed out of the state without presumption in favor of either party, and plaintiff must rely upon the strength of his own title. *Smith v. Benson*, 227 N. C. 56, 40 S. E. (2d) 451.

May Show Title Out of State.—

In accord with original. See *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463.

Stated in *Ramsey v. Ramsey*, 224 N. C. 110, 29 S. E. (2d) 340.

Cited in *Vance v. Guy*, 224 N. C. 607, 611, 31 S. E. (2d) 766.

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

I. GENERAL NOTE ON ADVERSE POSSESSION. A. General Consideration.

Definition.—

Possession of real property to be adverse must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. *Vance v. Guy*, 223 N. C. 409, 413, 27 S. E. (2d) 117.

Effect of Holding Portion of Land under Colorable Title.

—Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. *Vance v. Guy*, 223 N. C. 409, 413, 27 S. E. (2d) 117.

Where the title deeds of two rival claimants lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *Vance v. Guy*, 224 N. C. 607, 611, 31 S. E. (2d) 766. See *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101.

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, each deed constitutes color of title as to the lappage under the lines and boundaries called for in the deed, but seven years' use and occupancy of the lappage by respondent or those under whom she claims, ripens title in her even though her deed was executed subsequent to the deed for the adjacent lot, there being no evidence of actual occupation of any part of the lappage by the owner of the adjacent lot. *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101.

Persons in possession pursuant to foreclosure of tax sale certificate conveying only title of life tenant may not maintain that their possession is adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under § 105-410 is not automatic but must be judicially determined in an appropriate proceeding. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

B. Character of Possession.

Sufficiency of Possession.—In actions between individual litigants when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. *Ward v. Smith*, 223 N. C. 141, 142, 25 S. E. (2d) 463.

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed. *Winstead v. Woolard*, 223 N. C. 814, 28 S. E. (2d) 507.

Where Remaindermen Not Parties.—Plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant and in which the remaindermen were neither parties nor brought before the

court in any manner sanctioned by law. It was held that while commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant, and plaintiffs were entitled to possession during the continuance of the life estate, which possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717.

II. NOTE TO SECTION 1-38.

Cross Reference.—See note to § 1-39.

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263, 264.

Character of Possession under Section.—

Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey so that grantee and those claiming under her who immediately went into possession and remained in exclusive possession thereof for "12 or 15 years" acquired title by their adverse possession under color, if not by their deed. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263, 265.

Compulsory Reference.—An action in ejectment in which defendants plead the twenty and the seven year statutes of limitation is not subject to compulsory reference pursuant to § 1-189. *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632.

Applied in *Layden v. Layden*, 228 N. C. 5, 44 S. E. (2d) 340; *Hughes v. Oliver*, 228 N. C. 680, 47 S. E. (2d) 6; *Grady v. Parker*, 230 N. C. 166, 52 S. E. (2d) 273.

Cited in *Parham v. Henley*, 224 N. C. 405, 30 S. E. (2d) 372; *Perry v. Alford*, 225 N. C. 146, 33 S. E. (2d) 665; *Ramsey v. Nebel*, 226 N. C. 590, 39 S. E. (2d) 616; *Smith v. Benson*, 227 N. C. 56, 40 S. E. (2d) 451; *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446.

§ 1-39. Seizin within twenty years necessary.

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, § 1-38. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521.

Cited in *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632.

§ 1-40. Twenty years adverse possession.

Tenants in Common—Possession of One Possession of All.—

The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. *Parham v. Henley*, 224 N. C. 405, 30 S. E. (2d) 372.

One may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner. *Wallin v. Rice*, 232 N. C. 371, 61 S. E. (2d) 82.

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession, under this section, the user not being under color of title. *Ramsey v. Nebel*, 226 N. C. 590, 39 S. E. (2d) 616.

A grantee cannot tack adverse possession of predecessor in title as to land not embraced within the description in his deed, and therefore where he has been in possession for less than twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. *Ramsey v. Ramsey*, 229 N. C. 270, 49 S. E. (2d) 476; *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79.

Recovery of Right of Way Not Used for Railroad Purposes.—The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover for that part of the right of way no longer used for railroad purposes until the expiration of twenty years. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N. C. 589, 61 S. E. (2d) 700.

In an action to establish a resulting trust instituted shortly after the guardian's death upon evidence that the

lands were conveyed to the guardian personally but were paid for with guardianship funds, it is error to enter non-suit upon the plea of laches and the statutes of limitations upon evidence that the guardian remained in possession for over forty years and devised same to plaintiffs by will when defendants offer evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there is no evidence of disavowal of the trust or adversary holding during the life of the guardian. *Cassada v. Cassada*, 230 N. C. 607, 55 S. E. (2d) 77.

Compulsory Reference.—An action in ejectment in which defendants plead the twenty and the seven year statutes of limitation is not subject to compulsory reference under § 1-189. *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632.

Cited in *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101.

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

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (a) the date of beginning or recommencing of the operation or use, (b) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (c) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (d) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (Rev., s. 386; Code, s. 146; C. C. P., s. 25; 1945, c. 869; C. S. 432.)

Editor's Note.—The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 355.

Cited in *Owney v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900.

§ 1-43. Tenant's possession is landlord's.

Loyalty Is to Title and Not to Landlord.—The rule that tenant's possession is possession of the landlord, and that tenant under lease may not maintain an action against his landlord involving title during the period of lease without first surrendering the possession he has under the lease, does not apply where after the renting title of landlord has terminated or has been transferred either to third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263, 265.

Where tenant acquired the title of his landlord tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to

surrender possession to him before asserting title thus acquired. *Id.*

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title.—The rule that the possession of the tenant is possession of the landlord, precluding adverse possession by tenant without first surrendering the possession he has under the lease, obtains only when tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title, and does not obtain where tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting, and relying upon that title, as acquired in due course by them. The strength of his title is the foundation of their claim. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263, 265.

§ 1-45. No title by possession of public ways.

Cited in *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606.

Art. 5. Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

Effect of Failure to Plead Particular Section.—Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was barred under the provisions of this section, is a sufficient pleading of statute of limitations, although no specific reference is made to the particular sections of the statute applicable. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610.

Burden of Proof.—Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, non-suit is proper. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610.

Quoted in *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606.

Cited in *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227.

§ 1-47. Ten years.

I. IN GENERAL.

Editor's note.—

See 22 N. C. Law Rev., 146 for comment touching on this section.

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. First Citizens Bank and Trust Co.*, 223 N. C. 642, 27 S. E. (2d) 636.

Applied in *Layden v. Layden*, 228 N. C. 5, 44 S. E. (2d) 340; *Bell v. Chadwick*, 226 N. C. 598, 39 S. E. (2d) 743; *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

Cited in *Raleigh v. Mechanics, etc., Bank*, 223 N. C. 286, 26 S. E. (2d) 573; *Lee v. Rhodes*, 231 N. C. 602, 58 S. E. (2d) 363.

III. SUBS. (2) SEALED INSTRUMENTS.

When Statute Begins to Run—Coupons of Bonds.—

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610, distinguishing *Knight v. Braswell*, 70 N. C. 709.

Application to Bills, Notes, etc.—

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of ten years. *Lee v. Chamblee*, 223 N. C. 146, 25 S. E. (2d) 433.

Where action was instituted on note under seal on 10 February, 1943 and last payment had been made upon the note on 1 October, 1933, the action was not barred by this section as the statute commenced again to run from the day when the last payment was made. *Sayer v. Hender-*

son, 225 N. C. 642, 35 S. E. (2d) 875, citing Green v. Greensboro Female College, 83 N. C. 449, 454, 35 Am. Rep. 579.

IV. SUBS. (3) MORTGAGE FORECLOSURE.

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. Smith v. Davis, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

When Statute Defense to Right to Redeem.—Where the mortgagee is permitted to remain in actual possession of mortgaged land, as mortgagee, for a period of ten years and the mortgage debt has not been paid and no action to foreclose or redeem has been instituted in the meantime, title to the premises will be deemed to be in him, and the ten-year statute of limitations if properly pleaded and relied upon, will be a complete defense to an action to redeem. Anderson v. Moore, 233 N. C. 299, 63 S. E. (2d) 641.

The institution of suit to foreclose by the mortgagee in possession tolls the operation of this section and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. Anderson v. Moore, 233 N. C. 299, 63 S. E. (2d) 641.

Bar of Right to Redeem Bars Right to Accounting.—When the right to redeem is barred by this section the right to enforce an accounting is likewise barred. Anderson v. Moore, 233 N. C. 299, 63 S. E. (2d) 641.

Applied in McCollum v. Smith, 233 N. C. 10, 62 S. E. (2d) 483.

V. SUBS. (4) REDEMPTION OF MORTGAGE.

Applied in Hughes v. Oliver, 228 N. C. 680, 47 S. E. (2d) 6.

§ 1-48: Transferred to § 1-54, paragraph 6, by Session Laws 1951, c. 837, s. 2.

§ 1-51. Five years.

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights of way or use and occupancy. Carolina, etc., Ry. Co. v. Piedmont Wagon, etc., Co., 229 N. C. 695, 51 S. E. (2d) 301, discussed in 27 N. C. Law Rev. 579.

This section has no application to an action in ejectment by the owner of the fee to recover that part of the right of way no longer used by the railroad company or its lessee for railroad purposes. Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. (2d) 700.

§ 1-52. Three years.

11. For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of one thousand nine hundred and thirty-eight and amendments thereto, said act being an act of congress. (Rev., s. 395; Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4; 1945, c. 785; C. S. 441.)

Editor's Note.—The 1945 amendment added subsection 11. As the rest of the section was not affected by the amendment it is not set out.

I. IN GENERAL.

This section is not applicable to an action specifically brought under provisions of § 105-414. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722.

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of this section and not by § 1-56. Reynolds v. Whiting Mach. Works, 167 F. (2d) 78.

Where the three year statute of limitations is pleaded in an action to recover for silicosis contracted by plaintiff as the result of alleged negligence of defendant in failing to use reasonable care to provide a reasonably safe place to work, an instruction which fails to limit recovery to those injuries proximately resulting from negligent acts of defendant committed within three years next before the institution of the action, must be held for error. Bane v. Palmer Stone Works, 232 N. C. 267, 59 S. E. (2d) 812.

Applied in Craver v. Spaugh, 227 N. C. 129, 41 S. E. (2d) 82; Henderson v. Henderson, 232 N. C. 1, 59 S. E. (2d) 227.

Cited in King v. Richardson, 136 F. (2d) 849 (dis. op.); State Highway, etc., Com'n. v. Diamond Steamship Transp. Corp., 226 N. C. 371, 38 S. E. (2d) 214.

II. SUBSECTION ONE—CONTRACTS.

Application to Sealed Instruments—In General.—Civil action, to recover on six promissory notes under seal executed December 3, 1929, and maturing one each year for five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or ten year statute of limitation in § 1-47. Bell v. Chadwick, 226 N. C. 598, 39 S. E. (2d) 743.

Same—Sureties.—

The three-year statute of limitations is applicable to sureties on sealed instruments as well as on instruments not under seal. Lee v. Chamblee, 223 N. C. 146, 25 S. E. (2d) 433.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. Hertford Bkg. Co. v. Stokes, 224 N. C. 83, 86, 29 S. E. (2d) 24.

Claims for Services.—In absence of special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. Grady v. Faison, 224 N. C. 567, 31 S. E. (2d) 760.

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon the oral contract to devise when the action is instituted more than three years after the death of the promisor, and the statute of limitations is pleaded in bar. Dunn v. Brewer, 228 N. C. 43, 44 S. E. (2d) 353.

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First Citizens Bank and Trust Co., 223 N. C. 642, 27 S. E. (2d) 636.

Cited in Sayer v. Henderson, 225 N. C. 642, 35 S. E. (2d) 875.

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

An action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

IV. SUBSECTION THREE—TRESPASS UPON REALTY.

Action in Tort for Continuing Trespass.—Plaintiffs alleged that construction of dam caused progressive injury to their land from improper drainage, and that the mere construction was the cause of the injury. It was held that the action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. Tate v. Western Carolina Power Co., 230 N. C. 256, 53 S. E. (2d) 88.

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Same—Sufficiency of Evidence.—

See Small v. Dorsett, 223 N. C. 754, 28 S. E. (2d) 514.

Action to Remove Cloud from Title.—The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. Cauble v. Trexler, 227 N. C. 307, 314, 42 S. E. (2d) 77.

When Statute Begins to Run.—The three year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence, and conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. Lee v. Rhodes, 231 N. C. 602, 58 S. E. (2d) 363.

A cause of action to set aside an instrument for fraud accrues, and limitations begin running, when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered. Vail v. Vail, 233 N. C. 109, 63 S. E. (2d) 202.

The mere registration of a deed, containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the

facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202.

Defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land. Defendant surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor. The grantor died some three years and seven months thereafter. There was nothing to rebut the inference that she retained possession of the property until her death. It was held that there being nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, is not barred. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202.

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202.

Cited in *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446; *Holt v. Holt*, 232 N. C. 497, 61 S. E. (2d) 448.

§ 1-53. Two years.—Within two years—

1. All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon; provided, however, that the provisions of this paragraph shall not apply to claims based upon bonds, notes and interest coupons, except claims based upon bonds, notes and interest coupons of a county, city, town, township, road district, school district, school taxing district, sanitary district or water district which mature on or after March first, one thousand nine hundred forty-five, and which have been incorporated in and are subject to the terms of a plan of composition or refinancing of indebtedness providing for exchange of bonds and adjustment of interest thereon and pursuant to which any bonds have been exchanged, shall be presented within two years after maturity or, if such bonds, notes and interest coupons have matured subsequent to March twenty-second, one thousand nine hundred thirty-five but prior to March first, one thousand nine hundred forty-five, such claims shall be presented within two years after March first, one thousand nine hundred forty-five, or the holders of any such claims shall be forever barred from recovery thereon, and any such claims shall be presented to the officer or officers charged by law with the payment of the same or with providing for such payment.

2. An action to recover the penalty for usury.

3. The forfeiture of all interest for usury.

4. Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under § 28-173 of the General Statutes of North Carolina. (Rev., s. 396; Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2; C. S. 442.)

Editor's Note.—

The 1945 amendment added the exception to the proviso of paragraph 1.

The 1951 amendment, which added subsection 4, applies only to actions where the death occurs subsequent to March 13, 1951.

As to necessity for presenting tort claims, see 27 N. C. Law Rev. 145.

Whether this section is limited to claims founded on contract or applies equally to those sounding in tort, *quære?* *Rivers v. Wilson*, 233 N. C. 272, 63 S. E. (2d) 544.

§ 1-54. One year.—Within one year an action or proceeding—

1. Against a public officer, for a trespass under color of his office.

2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

3. For libel, assault, battery, or false imprisonment.

4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. For a widow's year's allowance.

6. For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern. (Rev., s. 397; Code, s. 156; C. C. P., s. 35; 1885, c. 96; 1933, c. 529, s. 1; 1951, c. 837, s. 2; C. S. 443.)

Editor's Note.—The 1951 amendment added the words "or proceeding" after the word "action" near the beginning of this section, struck out the words "an application", formerly appearing at the beginning of paragraph 5, and transferred, renumbered and rewrote former § 1-48, making it paragraph 6 of this section.

Art. 5A. Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, ten years.—An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued. (Rev., s. 399; Code, s. 158; C. C. P., s. 37; 1951, c. 837, s. 3; C. S. 445.)

I. IN GENERAL.

Editor's Note.—The 1951 amendment rewrote this section and inserted the article heading.

Cited in *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610; *Lee v. Rhodes*, 231 N. C. 602, 58 S. E. (2d) 363.

II. ACTIONS TO WHICH APPLICABLE.

An action for relief against an executor must be filed within ten years after the action accrues. *King v. Richardson*, 136 F. (2d) 849, 867 (dis. op.).

An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within ten years from the date of the accrual of the cause of action. *Jarrett v. Green*, 230 N. C. 104, 52 S. E. (2d) 223.

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of § 1-52 and not by this section. *Reynolds v. Whitin Mach. Works*, 167 F. (2d) 78.

Art. 6. Parties.

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

I. REAL PARTIES IN INTEREST.

A. In General.

Stated in *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

C. Actions Concerning Realty.

Reformation of Deed of Trust.—

In an action to reform a deed, all parties claiming an interest in the land or any part thereof, purported to have been conveyed by the instrument sought to be reformed, and whose interest will be affected by the reformation of the instrument, are necessary parties to the action. *Kemp v. Funderburk*, 224 N. C. 353, 355, 30 S. E. (2d) 155.

Lease of Hunting Rights.—The grantor of land reserved the hunting rights and later leased them. Defendant successor to grantee refused to permit the lessee to enter upon the property for the purpose of hunting. It was held that the lessee and not the lessor was the proper party to maintain an action against defendant for damages. *Jones v. Neisler*, 228 N. C. 444, 45 S. E. (2d) 369.

III. ASSIGNMENTS.

Effect in General.—

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. *American Surety Co. v. Baker*, 172 F. (2d) 689.

The assignee of a nonnegotiable instrument for value and in good faith before maturity nevertheless takes same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. *Iselin & Co. v. Saunders*, 231 N. C. 642, 58 S. E. (2d) 614.

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific performance. *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N. C. 23, 51 S. E. (2d) 916.

§ 1-64. Infants, etc., sue by guardian or next friend.

Distinction between Next Friend and Guardian ad Litem.—A next friend is appointed to bring or prosecute a proceeding in which the infant suitor is plaintiff or seeks to assert some positive right, while a guardian ad litem is appointed to defend, and the distinction between them in legal effect is substantial and not merely formal. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31.

Thus, while a next friend, in the prosecution of some positive relief for an infant suitor, may be called upon to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim, a next friend of minor heirs at law seeking to set aside a tax foreclosure is not required to defend a mortgage foreclosure asserted by an intervener in the action, and his representation of the minors in such unrelated and independent cause does not legally exist. His office as next friend becomes functus officio. *Id.*

Cited in *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458.

§ 1-65. Infants, etc., defend by guardian ad litem.

As to minor veterans, see § 165-16.

Where Minors Not Represented by Guardian Ad Litem in Suit to Enforce Tax Lien.—In a suit to enforce a tax lien by foreclosure where the affidavit, orders and notices appear sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law, both adult and minors, under § 1-98, yet the minors, if any, not having been represented by a guardian ad litem would not be bound by the judgment of confirmation rendered in the action. *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 512, 27 S. E. (2d) 548.

Exception that judgment was rendered before sufficient time had elapsed after notice as prescribed by this section was held not borne out by the record. *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845.

Cited in *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-66. Appointment of guardian ad litem in actions begun by publication.

Cited in *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548; *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-67. Guardian ad litem to file answer.

Where, in an action for divorce against a person who has been declared non compos mentis, process has been duly served in accordance with § 1-97 (3). Guardian ad litem under this section must answer, and demurrer on the ground that marital relation is so personal only the spouse may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable. *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458.

Cited in *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548; *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-68. Who may be plaintiffs.

Editor's Note.—

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

Applied in *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751.

Stated in *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

Cited in *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

§ 1-69. Who may be defendants.

Editor's Note.—

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

Applied in *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751; *Owen v. Hines*, 227 N. C. 236, 41 S. E. (2d) 739.

Cited in *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

§ 1-70. Joinder of parties; action by or against one for benefit of a class.

Editor's Note.—For discussion of class actions, see 26 N. C. Law Rev. 223.

Provisions of Chapter Controlling.—Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

Extent of Abrogation of Common Law.—It is clear that the General Assembly has by the provisions of this section abrogated the common law in respect of the parties to an action at law to the extent, and only to the extent, that (1) when the question is one of common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all; and (2) when an unincorporated association of the kind or character enumerated, is engaged in issuing certificates and policies of insurance, or either, and doing business in this State, it may sue or be sued in any action concerning such certificates and policies, or either, without naming any of the individual members composing it. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

An unincorporated fraternal association may not, as such, maintain an action at law—but the provisions of this section are open to its members. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

Cited in *Smoke Mount Industries v. Eureka, etc., Ins. Co.*, 224 N. C. 93, 29 S. E. (2d) 20.

§ 1-73. New parties by order of court.

Scope of Section.—This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party,

or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. *Moore v. Massengill*, 227 N. C. 244, 246, 41 S. E. (2d) 655, citing *McDonald v. Morris*, 89 N. C. 99.

This section does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action. *Moore v. Massengill*, 227 N. C. 244, 245, 41 S. E. (2d) 655.

Requisite Interest of New Party.—To entitle one to the benefits of this section allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. *Griffin & Vose v. Non-Metallic Minerals Corp.*, 225 N. C. 434, 35 S. E. (2d) 247.

Discretion of the Court.—As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. *Service Fire Ins. Co. v. Horton Motor Lines*, 225 N. C. 588, 35 S. E. (2d) 879.

The fact that plaintiff alone, without joinder of the owner, could not maintain the action does not limit the discretionary power of the judge. *Id.*

Continuance for Bringing in Necessary Parties.—Nonsuit on the ground of want of necessary parties is improper, but if other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. *Plemmons v. Cutshall*, 230 N. C. 595, 55 S. E. (2d) 74.

Where one partner is sued individually for a tort committed by him in the course of the partnership business, the court even after judgment may direct that the other partner be made a party. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892.

In action by purchaser against real estate brokers to recover earnest money paid, wherein the seller was a necessary party to a complete determination of the controversy, denial of motion for his joinder as additional party defendant was held reversible error. *Lampros v. Chipley*, 228 N. C. 236, 45 S. E. (2d) 126.

Applied in *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751.

§ 1-74. Abatement of actions.

Death, Resignation or Removal of Representative.—Once personal representative of estate is duly appointed, if such representative dies, resigns or is removed, the law contemplates a continuity of succession until estate has been fully administered, and upon death, resignation or removal of representative, who has properly brought action for wrongful death, action does not abate. *Harrison v. Carter*, 226 N. C. 36, 40, 36 S. E. (2d) 700, 164 A. L. R. 697.

§ 1-75. Procedure on death of party.—When a party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him within thirty days after the service of the summons, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeeding term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has thirty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term. For good cause shown, the clerk may extend the time of filing such answer to a day certain, but the clerk shall not extend such time more than once, nor for a period of time exceeding twenty days, except with the consent of the parties. (Rev., ss. 416, 417, 418; 1887, c. 389; 1949, c. 46; C. S. 462.)

Editor's Note.—The 1949 amendment substituted in the second sentence the words "within thirty days after the service of the summons" for the words "on a day named in the summons, which must be at least twenty days after its service." It also substituted "thirty days" for "twenty days" in the third sentence and added the last sentence. For brief comment on 1949 amendment, see 27 N. C. Law Rev. 438.

Art. 7. Venue.

§ 1-76. Where subject of action situated.

4. Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded. (Rev., s. 419; Code, s. 190; 1889, c. 219; C. C. P., s. 66; 1951, c. 837, s. 4; C. S. 463.)

I. IN GENERAL.

Editor's Note.

The 1951 amendment rewrote paragraph 4, which formerly read, in its entirety, "Recovery of personal property". As the rest of the section was not changed by the amendment, only paragraph 4 is set out.

Applied in *Holden v. Totten*, 224 N. C. 547, 31 S. E. (2d) 635.

V. RECOVERY OF PERSONAL PROPERTY.

Recovery as Sole Object.

If an action be one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. *House Chevrolet Co. v. Cahoon*, 223 N. C. 375, 26 S. E. (2d) 864.

Section Does Not Apply to Actions for Monetary Recovery.—This section applies only to action for the recovery of specific tangible articles of personal property and not to actions for monetary recovery. *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751.

§ 1-77. Where cause of action arose.

Cross References.

See note to § 1-82.

Action against Municipality Is Action against Public Officer.

In accord with original. See *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27.

Venue of Action against Municipality.

In accord with original. See *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27.

Cited in *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736; *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751.

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

Applicable to All Actions against Administrators.

This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27.

It was the intent of the legislature to require all actions against the executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, if not, then in the plaintiff's county. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

The provision of this section that an action upon an official bond shall be instituted in the county where the bond is filed, if the principal or any one of the sureties on said bond resides in said county, is controlling. Actions against executors and administrators in their official capacity, when not upon an official bond filed in some other county, must be instituted in the county where the executor or administrator qualified. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

Applies to Actions against Not by Administrators.

See *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

Motions for Change of Venue.—The right of an administratrix in regard to motions for change of venue under this section may not be invoked by another party to the action. *Herring v. Queen City Coach Co.*, 231 N. C. 430, 57 S. E. (2d) 307.

The fact that an individual is joined as a defendant with an executor or administrator, and that the individual de-

defendant is a resident of the county in which the cause of action is brought was held not to affect the executor or administrator's right to removal to the county in which it qualified. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

§ 1-79. **Domestic corporations.**—For the purpose of suing and being sued, the principal office of a domestic corporation, as shown by its certificate of incorporation pursuant to G. S. 55-2, is its residence. (Rev., s. 422; 1903, c. 806; 1951, c. 837, s. 5; C. S. 466.)

Editor's Note.—

The 1951 amendment rewrote this section, making the principal office of a domestic corporation, rather than its principal place of business, its residence.

Principal Place of Business.—The residence of a corporate executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office and not the county of its qualification. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377.

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

A corporate administrator instituted suit in the county of its qualification and in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office. It was held that the action was properly removed upon motion to the county in which the corporate administrator maintains its principal office and in which defendant resides. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377.

Domesticated foreign corporations are residents of the state for purposes of venue of the state courts. *Hill v. Atlantic Greyhound Corp.*, 229 N. C. 728, 51 S. E. (2d) 183.

A foreign corporation domesticated under § 55-118 may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this state. In such case § 1-80 does not apply. *Id.*

§ 1-80. **Foreign corporations.**

Cross Reference.—As to domesticated foreign corporations, see note to § 1-79.

§ 1-81. **Actions against railroads.**

Cited in *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

§ 1-82. **Venue in all other cases.**

Cross Reference.—As to domesticated foreign corporations, see note to § 1-79.

Construed with Other Provisions for Venue.—

Section 1-77 relates to particular cases, and this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, the former section expressing a particular intention will be taken as an exception to the general provision. *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 659, 32 S. E. (2d) 27.

Fiduciaries.—In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. *Hartford Acci., etc., Co. v. Hood*, 225 N. C. 361, 34 S. E. (2d) 204.

This section governs the venue of actions instituted by an executor or administrator in his official capacity. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377.

§ 1-83. **Change of venue.**—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

3. When the judge has, at any time, been interested as party or counsel.

4. When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons. (Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20; 1945, c. 141; C. S. 470.)

Editor's Note.—The 1945 amendment added subsection 4.

Section Relates to Venue Not Jurisdiction.—

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

Motion to Remove Cause Back to Original County.—The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county for the convenience of witnesses and the promotion of the ends of justice. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72.

Costs of Transporting Witnesses of Adverse Party.—

While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. *Nichols v. Goldston*, 231 N. C. 581, 58 S. E. (2d) 348.

Cited in *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222.

§ 1-84. **Removal for fair trial.**

Applied in *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834.

§ 1-86. **Additional jurors from other counties instead of removal.**

Applied in *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294.

§ 1-87.1. **Dismissal of action arising out of state when parties are nonresidents.**—For the convenience of parties and witnesses and in the interest of justice, any judge of any court in this state may dismiss without prejudice any civil action over which such court has jurisdiction if the court shall find that:

(1) The cause of action arose out of the state, and

(2) The defendant is a nonresident of this state, and

(3) The plaintiff is a nonresident of this state or the deceased person in behalf of whose estate the action has been instituted was at the time of his death a nonresident of this state. (1949, c. 676.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 438.

Art. 8. Summons.

§ 1-88. **Civil actions; how commenced.**—A civil action is commenced by the issuance of summons or, when service is to be had pursuant to G. S. 1-98 or 1-104, by the filing of the affidavit therein required. No summons need issue in a controversy without action or in case of a confession of judgment without action. (Rev., s. 429; Code, s. 199; C. C. P., s. 70; 1951, c. 892, s. 1; C. S. 475.)

Editor's Note.—The 1951 amendment rewrote this section, adding the provision in regard to service pursuant to sections 1-98 or 1-104.

Necessity for Service of Process.—While an action is com-

menced by the issuance of summons, defendant's rights are unaffected by the pendency of the actions until he is brought into court by proper service of process or acceptance of service or general appearance. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819.

Stated in In re Will of Winborne, 231 N. C. 463, 57 S. E. (2d) 795.

Quoted in Atwood v. Atwood, 233 N. C. 208, 63 S. E. (2d) 103.

Delivery to Sheriff Fixes Beginning of Action.—In a civil action, the delivery of summons and copy of complaint to the sheriff for service fixes the beginning of the action as of that date. *Raleigh v. Mechanics and Farmers Bank*, 223 N. C. 286, 26 S. E. (2d) 573.

Cited in Moore v. Moore, 224 N. C. 552, 31 S. E. (2d) 690; *Seawell v. Purvis*, 232 N. C. 194, 59 S. E. (2d) 572.

§ 1-88.1. When summons issued.—A summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do. The date the summons bears is prima facie evidence of the date of issuance. (1951, c. 892, s. 2.)

§ 1-89. Contents, return, seal.

Whenever a summons is issued for service under the provisions of § 1-104 it may be served by the sheriff or other process officer of the county and state where the defendant resides at any time within thirty (30) days after the date of its issue. (Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343; 1939, c. 15; 1945, c. 664; C. S. 476.)

Editor's Note.—

The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Summons Loses Vitality if Not Served within Prescribed Time.—In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and if not served within that time the summons must be returned by the officer to the clerk with proper notation. Then, if plaintiff wishes to keep his case alive, he must have an alias summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes functus officio. There is no authority in the statute for the service of that summons on defendant after the date therein fixed for its return, and if plaintiff desires the original action continued, he must cause alias summons to be issued and served. *Green v. Chriemon*, 223 N. C. 723, 726, 28 S. E. (2d) 215. See *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103.

The sheriff's authority to serve a summons is derived from this section and this section limits the exercise of this authority to the ten-day period after the date of the issue of the summons. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103.

Ordinarily a sheriff's return that he has served the summons implies that he has discharged his official duty in that respect. But where he specifies the date of service, and it appears that the date was more than ten days after the date of issue of the summons, the force of such implication is entirely destroyed. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103.

The insurance commissioner is not authorized to accept service for foreign insurance companies under the provisions of § 58-150, the passive agency under this section being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. *Hodges v. Home Ins. Co.*, 232 N. C. 475, 61 S. E. (2d) 372.

Questions for Court.—What constitutes service of process, and whether upon a given state of facts service has been made are questions for the court. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103.

Applied, as to service after expiration of more than ten days, in *In re Walters*, 229 N. C. 111, 47 S. E. (2d) 709.

Cited in Washington County v. Blount, 224 N. C. 438, 31 S. E. (2d) 374; *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-94. When officer must execute and return.

The requirement that an officer having process in hand for service must note on the process the date received by him under this section and make due return thereof under § 162-14 are affirmative requirements of these sections. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177.

Cited in Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458.

§ 1-95. Alias and pluries.—When the defendant in a civil action or special proceeding is not served with summons within ten days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits and special assessment foreclosure suits brought under the provisions of § 105-301 and § 105-414, as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (Rev., s. 437; Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71; 1929, c. 237, s. 2; 1931, c. 264; 1945, c. 163; C. S. 480.)

Editor's Note.—

The 1945 amendment made the proviso applicable to special assessment foreclosure suits and inserted the reference to § 105-414.

Alias Summons Must Be Sued Out within Ninety Days.—

An alias or pluries summons must be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must." *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215.

Suing Out Alias or Pluries Summons to Prevent Discontinuance.—Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out alias or pluries summons if he desires to prevent a discontinuance. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819.

The duty is now imposed upon the plaintiff to sue out an alias summons if the original writ failed of its purpose or proved ineffectual; and likewise to sue out a pluries summons when the preceding writs have proved ineffectual, or there will be a discontinuance of the action. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

To "sue out" means "to obtain by application; to petition for and take out." *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

A plaintiff may apply orally or in writing to the clerk of the superior court for an alias or pluries summons and upon such application it is the duty of the clerk of the superior court to issue the writ. No order of court is necessary to authorize the clerk to issue an alias or pluries summons. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

An ordinary summons cannot be effective as an alias or pluries summons by the mere endorsement of the words "alias" or "pluries" thereon. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

Service Effective from Date of Original Process.—If the alias or pluries summons contains sufficient information in the body thereof to show its relation to the original summons, the legal service of such writ will be effective from the date of the original process. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

Return Sufficient Evidence of Non-Service.—Where the sheriff has served summons more than ten days after its issuance, his return is sufficient evidence of non-service to enable plaintiff to sue out an alias summons. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103.

Denial of Plea in Abatement in Second Action.—Where the original process is kept alive by the proper issuance of alias and pluries summonses, a plea in abatement in a second action instituted subsequent to the issuance of

the original process in the first is properly denied notwithstanding that process in the subsequent action is actually served prior to the service of pluries summons in the first. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586.

§ 1-96. Discontinuance.

When Discontinuance Occurs.—

In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and if not served within that time, the summons must be returned, with proper notation, and alias or pluries summons issued and served in accordance with the statute, otherwise the original summons loses its vitality and becomes *functus officio* and void. *Green v. Chrismon*, 223 N. C. 723, 23 S. E. (2d) 215.

§ 1-97. Service by copy.

5. Every nonresident individual who is engaged in business in this state and who conducts such business through an agent, employee, trustee, or other representative in this state, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust doing business in this state, shall be subject to process in any action or proceeding in any court of competent jurisdiction in this state arising out of or connected with such business in this state, and such process may be served upon such agent, employee, trustee, or other representative or upon any person in this state receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this state or upon any person residing in this state who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association, or business trust with respect to its business in this state. Within five days after such service the plaintiff or petitioner or his attorney shall send by registered mail to said nonresident individual at his last address, if known, a copy of the summons and a copy of the complaint or petition with a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur. Such service shall bind such individual as fully and effectually as if it had been made upon him personally. But no final decree shall be entered unless the presiding judge at the trial shall find as a fact that the plaintiff mailed by registered mail with the return receipt request to the last known address of the defendant a copy of the summons and complaint in the action. The return postal receipt shall be evidence of the mailing of said summons and complaint as herein provided for. (1945, c. 123.)

I. IN GENERAL.

Editor's Note.—

The 1945 amendment added the last two sentences of subsection 5. As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1943 amendment, see 25 N. C. Law Rev. 319.

Cited in *Washington County v. Blount*, 224 N. C. 438, 31 S. E. (2d) 374.

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Subsection 1 of this section was intended to facilitate service on a corporation, and to resolve any doubt as to who might be validly served. *Townsend v. Carolina Coach Co.*, 229 N. C. 523, 50 S. E. (2d) 567.

The primary purpose of the second sentence of subsection 1 was to provide a method of service on a domestic or foreign corporation when the officers of the corporation

reside at a great distance. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

And a person who receives money for a corporation need not be its employee or agent in order for service of process on such person to be effective. *Townsend v. Carolina Coach Co.*, 229 N. C. 523, 50 S. E. (2d) 567.

Summons against defendant bus company was served on a bus station employee who sold tickets for defendant as well as for others, and who was employed by third parties operating the bus station. Money collected for the tickets was received by the ticket seller as the employee of the operators and turned over by them to the defendant. It was held that the service of the summons on the ticket seller was sufficient. *Id.*

Neglect of Local Agent Not Imputed to Defendant.—Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station in compliance with § 1-97(1) but the ticket saleswoman failed to notify defendant, and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Service of scire facias on local agent of bonding company executing bond in behalf of corporate surety is service upon the corporation. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177.

B. Foreign Corporations.

In action by domestic corporation against defendant foreign corporation, which had removed all property from State except intrastate franchise, service of process upon one time lessee of franchise was invalid, and mere fact that lessee was process agent of his own corporation did not make him process agent of defendant nor was he a "local" agent within the meaning of this section. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419.

IV. SERVICE ON INSANE PERSONS.

Process in Divorce Action.—This section provides the method of service of process on insane persons generally in all classes of actions against them, and process in an action for divorce may be served under its provisions. *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458.

V. SERVICE ON UNINCORPORATED ASSOCIATION OR ORGANIZATION.

Right to Sue in Common Name.—Since an unincorporated fraternal association is given power to acquire and hold property in its common name by virtue of §§ 39-24 and 39-25 and may be served with summons and sued in the manner provided by subsection (6) of this section, such association has capacity to sue in its common name. It can hardly be questioned that if the association might be sued in its common name by service upon the process agent or the secretary of state, it follows as a corollary conclusion that it has also the capacity to sue. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 252, 59 S. E. (2d) 829.

Quoted in *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446.

Cited in *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

§ 1-98. Service by publication.—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an adoption proceeding instituted in this state, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

9. Where the action or proceeding is for the adoption of a minor child or children, residents of the state, whose parent or parents are necessary parties to the action or proceeding, and the said parent or parents are nonresidents of the state or

cannot, after due and diligent search, be found within the state.

10. Where the action is for annulment of marriage. (Rev., s. 442; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; 1947, c. 838; 1949, c. 85; C. S. 484.)

I. IN GENERAL.

Editor's Note.—

The 1947 amendment inserted in the preliminary paragraph the words "or that he is a proper party to an adoption proceeding instituted in this state." It also added subsection 9. The 1949 amendment added subsection 10. As subsections 1 through 8 were not affected by the amendments they are not set out.

For brief comments on the 1947 and 1949 amendments, see 25 N. C. Law Rev. 392, 27 N. C. Law Rev. 452.

For an article criticising certain aspects of the procedural divorce law and recommending changes thereof, see 25 N. C. Law Rev. 192.

Statute Strictly Construed.—The service of process by publication is in derogation of the common law and the statute making provision therefor must be strictly construed. The court must see that every prerequisite prescribed exists in the particular case before it grants the order of publication. Board of Com'rs v. Bumpass, 233 N. C. 190, 63 S. E. (2d) 144.

The affidavit on which the order of service by publication is made is jurisdictional, and it is always best to use the form suggested in the statute. The omission from the affidavit of those averments on which service of notice by publication is substituted for personal service would be fatal to the proceeding. But the statement in the affidavit that the applicant has a "good" cause of action, of a certain character, is not so classed. Neither this section nor § 1-99 requires the applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

The affidavit sufficient in form to support an order for service by publication is jurisdictional, and the affidavit must state the cause of action with sufficient particularity to disclose its nature and to enable the court to determine its sufficiency. Board of Com'rs v. Bumpass, 233 N. C. 190, 63 S. E. (2d) 144.

Same—Necessity for Averment of Due Diligence.—

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. Since this method of giving notice is out of the ordinary, a strict compliance with this section has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect. Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901.

An averment in an affidavit that "defendant . . . after diligent inquiry cannot be found in the state of North Carolina" is in substantial compliance with this section and supports an order for service by publication. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

Same—Amendment.—

While an affidavit, upon which substituted service is based, may be amended, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901.

Necessity That Minors Be Represented by Guardian.—

In a suit to enforce a tax lien by foreclosure, where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, under this section, yet, minors, if any, must be represented by guardian, or guardian ad litem, otherwise such minors are not bound by the judgments in the action. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

An action for specific performance under this section is in the nature of an action in rem, and a contract for the conveyance of real property may be enforced against a non-resident. In such cases the court has the power to determine who is entitled to the property and to vest title by decree in the party entitled to the same. Voehringer v. Pollock, 224 N. C. 409, 412, 30 S. E. (2d) 374.

Cited in Perkins v. Perkins, 232 N. C. 91, 59 S. E. (2d) 356.

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—

To make valid substituted service under this section, the

nonresident defendant not only must have property in the state, but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise. Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248.

§ 1-99. Manner of publication.

The cost of publishing a summons in a newspaper shall be in accordance with the provisions of § 1-596 of the General Statutes of North Carolina. (Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3; 1949, c. 205, s. 1; C. S. 485.)

Editor's Note.—For an article criticising certain aspects of the procedural divorce law, see 25 N. C. Law Rev. 192.

The 1949 amendment rewrote the second sentence. As the first sentence was not changed it is not set out.

The statutory provisions as to time and method of giving notice by publication are mandatory. And service of process by publication upon an individual nonresident is valid only when the provisions of the statutes authorizing constructive service have been strictly complied with. Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248. The primary purpose of the requirements as to publication is to give notice to the defendant, and publication in a newspaper of general circulation in the county is permitted as the most likely means available for that purpose. Hence, the minimum time prescribed is essential for establishing constructive notice. Publication for a period, or in a manner, less than that prescribed would be insufficient in law to bring the defendant constructively into court or justify a judgment based thereon. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Order of service of summons by publication held to conform to the requirements of this section. McLean v. McLean, 233 N. C. 139, 63 S. E. (2d) 138.

The expression "not less than once a week for four successive weeks" contemplates a publication once each week for four consecutive weeks, and this requires that the publications be spaced substantially at intervals of 7 days for four successive weeks. The four publications need not occupy the full period of 28 days and may be deemed completed with less than that number of days intervening between first and last publication when considered in connection with the statutory provision (§ 1-100) that service shall be deemed complete 7 days after last publication. Thus, under the statutes now in effect, a publication on the 1st, 8th, 15th and 22nd would be sufficient, though there be less than 28 days between the first and last publication. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

A publication on Saturday of one week and on Monday of each of the following three weeks, is insufficient to meet the requirements of the statute. Id.

The order for publication need not state that the newspaper is the one most likely to give notice to the person to be served. Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391, 394.

Presumption in Favor of Sufficient Publication.—An order for publication of notice of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made without specific adjudication in the order to that effect. Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391, 394.

This section does not require applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

A judgment rendered upon an insufficient publication of notice of summons and attachment is void and does not constitute a lien upon the lands of the judgment debtor. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Cited in In re Estate of Smith, 226 N. C. 169, 37 S. E. (2d) 127.

§ 1-100. When service by publication complete; time for pleading.—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of the last publication, and the party so served is then in court. Such party shall have twenty days thereafter in civil actions and ten days in special proceedings in which to answer or demur. (Rev., s. 444; Code, s. 227. C. C. P., s. 88; 1939, c. 49, s. 1; 1945, c. 158; C. S. 487.)

Editor's Note.—

The 1945 amendment substituted the words "seven days from the date of the last publication" for the words "the time prescribed by the order of publication."

As to effect of amendment, see 23 N. C. Law Rev. 331.

Validation of Certain Judgments.—For act validating certain judgments, orders, etc., in actions in which summons was served by publication without complying with § 1-100, as amended in 1945, see Session Laws 1947, c. 666. See also 25 N. C. Law Rev. 394.

Cited in *In re Estate of Smith*, 226 N. C. 169, 37 S. E. (2d) 127; *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-101. Jurisdiction acquired from service.

Service Confers Jurisdiction.—It is the service of summons and not the return of the officer that confers jurisdiction. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177.

Stated in *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795.

§ 1-102. Proof of service.—Proof of service of summons or service by publication must be—

(1) By the return of the sheriff or other proper officer; or

(2) By affidavit of publication, as provided by G. S. 1-600; or

(3) By the written admission of the party to be served; or

(4) By the written acceptance of service, which acceptance may be made in or outside the State, and such acceptance of service signed and acknowledged before some person authorized to take acknowledgments, shall constitute entry of appearance for all purposes. (Rev., s. 446; Code, s. 228; C. C. P., s. 89; 1951, c. 1005, s. 1; C. S. 489.)

Editor's Note.—The 1951 amendment rewrote this section.

Return Is Proof of Service.—The return merely perfects the record and furnishes proof of service for the guidance of the court. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177.

§ 1-103. Voluntary appearance by defendant.

Effect of General Appearance.—

A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction of the court. The same result follows when defendant obtains time within which to answer. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140.

Where the controverted matter of custody of his two children was originally presented to the juvenile court by appellant, it was held that he may not be heard to complain of irregularity, since the proceeding was instituted at his instance, and he was personally present in court for the hearing which he had invoked. *In re Prevatt*, 223 M. C. 833, 836, 28 S. E. (2d) 564.

§ 1-104. Personal service on nonresident.—When the place of residence of a person out of the state is known and the same is made to appear by affidavit or in a verified complaint, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the paper shall, in making his return, use a form of certificate substantially as follows:

State of
County of
Affidavit of
Service of Summons;
Clerk's Certificate
I, [Sheriff or other process officer]
of the county [or city] of, State of

....., being duly sworn, do certify that on the ... day of, 19... I served the summons and accompanying statement hereto attached by delivering a copy of the same to, the defendant(s) therein named. [Sheriff or other process officer]

I,, Clerk of the Court of the County [or City] of, State of, do certify that said court is a court of record having the seal hereto attached; that is well known to me as [Sheriff or other process officer] of said county [or city] of, and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on

This the ... day of, 19...
[L. S.]
Clerk of the
Court of the County [or City] of, State of

Provided, that in all cases where service of process has been made upon a nonresident based upon a verified complaint in conformity with the amendment set forth in this section, all such service of process is hereby declared to be lawful, legal and valid, and all orders, judgments and decrees based thereon are declared to be legal and valid and binding upon all of the parties thereto, and all proceedings based upon the same are hereby validated, except that this proviso shall not apply to pending litigation. Rev., s. 448; 1891, c. 120; 1943, c. 543; 1945, c. 139; C. S. 491.)

Editor's Note.—

The 1945 amendment inserted in line four the words "or in a verified complaint," and added the proviso at the end of the section. The amendment mentioned in the proviso refers to the insertion of the quoted words.

Cited in *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138.

§ 1-105. Service upon non-resident drivers of motor vehicles.—The acceptance by a non-resident of the rights and privileges conferred by the laws now or hereafter in force in this state permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such non-resident on the public highways of this state, or the operation by such non-resident of a motor vehicle on the public highways of the state other than as so permitted or regulated, shall be deemed equivalent to the appointment by such non-resident of the Commissioner of Motor Vehicles, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof, with a fee

of one dollar, in the hands of said Commissioner of Motor Vehicles, or in his office, and such service shall be sufficient service upon the said non-resident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Motor Vehicles to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause, and provided that entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said non-resident shall be deemed completed. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646.)

Editor's Note.—The 1951 amendment inserted the second proviso to the next to last sentence.

What Sheriff's Return Must Show.—When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. *Probst v. Hughes Trucking Co.*, 223 N. C. 490, 27 S. E. (2d) 152.

Amendment.—Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of this section, such process and the pleading is subject to amendment in accordance with the general rules. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

Service Held Sufficient.—Where the person sought to be sued, personally receives notice by registered mail of summons and complaint giving him unmistakable notice that it was he that was intended to be sued, although the process ran against a nonexistent corporation of the same name as the firm operated by him, it was held that the service in strict accord with this section is sufficient to meet the requirements of due process of law. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

Applied in *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742.

Quoted in *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Cited in *Hodges v. Home Ins. Co.*, 232 N. C. 475, 61 S. E. (2d) 372.

§ 1-107. Alternative method of service upon non-resident defendants.

Cited in *Probst v. Hughes Trucking Co.*, 223 N. C. 490, 27 S. E. (2d) 152; *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

§ 1-107.1. Service upon motor vehicle dealers not found within the state.—(a) The application for and obtaining of a license from the commissioner of revenue to engage in any business activity under the provisions of subsection (4) of § 105-89, relating to motor vehicle dealers, shall be deemed equivalent to the appointment by such licensee of the commissioner of revenue, or his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against such licensee resulting from any claim arising out of any business carried on or conducted pursuant to or authorized by said license, and said application for and obtaining of said license shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.

(b) Service of such process shall be made by leaving a copy thereof, with a fee of one dollar (\$1.00), in the hands of said commissioner of revenue, or in his office, and such service shall be sufficient service upon the said licensee provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or commissioner of revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c) The commissioner of revenue shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the commissioner of revenue, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

(d) Service of process may not be made by the method provided in this section unless the person on whom the service is to be made cannot, after due diligence, be found in this state, and that fact is established by affidavit to the satisfaction of the court or a judge thereof. (1947, c. 817, s. 1.)

Editor's Note.—For a brief discussion of this section, see 25 N. C. Law Rev. 392.

§ 1-108. Defense after judgment on substituted service.—The defendant against whom publication is ordered, or who is served under the provisions of §§ 1-104 through 1-107.1, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce or annulment or in an action for the foreclosure of county or municipal taxes, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. (1947, c. 817, s. 2; 1949, c. 256.)

Editor's Note.—

The 1947 amendment substituted "1-107.1" for "1-107" in line three of the first sentence. And the 1949 amendment inserted the words "or annulment" in lines six and seven. As the other sentences were not affected by the amendments they are not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 452.

Judgments by Default.—

A nonresident served by publication is entitled to an order setting aside a judgment by default of inquiry, upon good cause shown, within one year after rendition of the judgment or notice thereof, and such notice referred to in this section means actual notice, and therefore evidence disclosing that defendant did not have actual notice of the pendency of the action is sufficient to support the trial court's finding that he had no notice thereof. *Russell v. Edney*, 227 N. C. 203, 41 S. E. (2d) 585.

Section Not Applicable to Divorce Actions.—This section which permits a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to ac-

tions for divorce. *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138.

Applied in *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Art. 9. Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to counties, cities and towns; provided, further, that counties, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (Rev., s. 450; Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71; 1935, c. 398; 1949, c. 53; C. S. 493.)

Editor's Note.—The 1949 amendment inserted the word "counties" in lines five and six of subsection 3. As the rest of the section was not affected by the amendment it is not set out.

Stated in *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795.

§ 1-111. Defendant's, for costs and damages in actions for land.

Formal Order Fixing Amount of Bond Not Required.—Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364.

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, is held not strictly one in ejectment, and this section requiring defendant in ejectment actions to file bond, is inapplicable. *Bryant v. Strickland*, 232 N. C. 389, 61 S. E. (2d) 89.

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer stricken and judgment by default final rendered for failure of defendant to file bond. *Hodges v. Hodges*, 227 N. C. 334, 335, 42 S. E. (2d) 82.

Substantial Compliance with Section.—Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by this section, and the clerk accepts the bond and makes notation thereof on the records, there is a substantial compliance with the statute and plaintiff's remedy if he deems the bond insufficient is by motion in the cause. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364.

Waiver.—The requirement that the defendant must "execute and file" a defense bond, or in lieu thereof a certificate and affidavit as provided by § 1-112, may be waived unless seasonably insisted upon by the plaintiff. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796.

Applied in *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266; *Teel v. Johnson*, 228 N. C. 155, 44 S. E. (2d) 727.

§ 1-112. Defense without bond.

Cross Reference.—See note to § 1-111.

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266.

Art. 11. Lis Pendens.

§ 1-116. Filing of notice of suit.—In actions affecting the title to real property, the plaintiff, at the time of issuing the summons, or at any time after the time of filing the complaint, or when at any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, or at any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the

pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby. (Rev., s. 460; Code, s. 229; C. C. P., s. 90; 1917, c. 106; 1949, c. 260; C. S. 500.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the words "at the time of issuing the summons" in lines two and three. See 27 N. C. Law Rev. 475.

This section is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. *Whitehurst v. Abbott*, 225 N. C. 1, 5, 33 S. E. (2d) 129.

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. They are each record notices upon the absence of which a prospective innocent purchaser may rely. Id.

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. *Whitehurst v. Abbott*, 225 N. C. 1, 5, 33 S. E. (2d) 129.

Lis pendens notice under this section is not exclusive. Nor is it designed to protect intermeddlers. *Whitehurst v. Abbott*, 225 N. C. 1, 6, 33 S. E. (2d) 129.

"Action" as used in this section embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. *Whitehurst v. Abbott*, 225 N. C. 1, 5, 33 S. E. (2d) 129.

Applies to Action in Another County.—

The pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land is located. *Whitehurst v. Abbott*, 225 N. C. 1, 4, 33 S. E. (2d) 129.

§ 1-116.1. Extending time to file complaint when notice of suit already filed; issuance of notice with summons; when notice inoperative or cancelled.—

In all actions as defined in § 1-116 in which notice of pendency of the action is filed prior to the filing of the complaint, the plaintiff shall first obtain from the clerk a written order extending the date for filing the complaint as is provided in § 1-121 of the General Statutes of North Carolina. A copy of the aforesaid order of the clerk and a copy of the notice of the pendency of the action shall be served on the defendant, or defendants, at the time of the service of summons. Provided, that in all such cases if the complaint is not filed within the time fixed by the order or orders of the clerk, entered in conformity with the provisions of § 1-121 of the General Statutes of North Carolina, the notice of lis pendens shall become inoperative and of no effect. Provided further, that if the complaint is not filed within the time fixed by the order or orders of the clerk, the clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate marginal entry on the original record, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (1949, c. 260.)

§ 1-120.1. Article applicable to suits in federal courts.—The provisions of this article shall apply to suits affecting the title to real property in the federal courts. (1945, c. 857.)

Editor's Note.—As to lis pendens in federal courts, see 23 N. C. Law Rev. 330.

It would seem that the Advisory Committee notes under Rule 64 of Civil Procedure for the District Courts of the United States (1938 Edition, p. 139) support the validity of this statute.

Art. 12. Complaint.

§ 1-121. First pleading and its filing.

When the complaint is not filed at the time of the issuance of the summons the clerk shall, when the complaint is filed, make an order directing the sheriff to serve a copy of such complaint on each of the defendants by delivery of a copy thereof to each of them, and the sheriff shall within ten days make such service and make a written return, on the paper containing the order issued to him, showing the date of service and the date of return, or, if for any reason he is unable to make service, he shall show in his return the reason therefor. If the sheriff's return shows that service of copy of the complaint as provided above has not been made on a defendant because such defendant is not to be found in the county where the summons was originally served on him, and the plaintiff causes affidavit to be made and filed showing that such defendant cannot, after due diligence, be found in the state, it shall not be necessary to make, or attempt to make, service thereof on such defendant in any other manner. (Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2; 1927, c. 66, s. 3; 1949, c. 1113, s. 1; C. S. 505.)

Editor's Note.—The 1949 amendment rewrote the former last three sentences of this section to appear as the two sentences above. As the first three sentences were not changed by the amendment they are not set out.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 432.

Duty to Plead though Copy of Complaint Not Delivered.

—A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to him as required by this section, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140.

Amendment of Order Extending Time for Filing Complaint.—The trial court below permitted plaintiffs to amend order extending time to file complaint, served together with the summons, to show the nature and purpose of the suit as required by this section, and denied a motion to dismiss for want of proper service of process. The case was affirmed by an equally divided court. *Whitehurst v. Anderson*, 228 N. C. 787, 44 S. E. (2d) 358.

Cited in *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-122. Contents.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Material and Essential Rather than Collateral or Evidential Facts Must Be Stated.—The meaning of this section is that the complaint shall contain the material, essential, and ultimate facts upon which the right of action is based, and not collateral or evidential facts, which are only to be used to prove and establish the ultimate facts. *Chason v. Marley*, 223 N. C. 738, 28 S. E. (2d) 223.

This section prescribes an ideal pattern for the drafting of a complaint. The complaint should set forth the essential facts without alleging evidential facts better left for proof at the time of the trial. *Rhodes v. Jones*, 232 N. C. 547, 61 S. E. (2d) 725.

The function of the complaint is to state the ultimate and decisive facts which constitute the cause of action but not the evidence necessary to prove such issuable facts. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

Plaintiff need not set forth the full contents of the contract which is the subject matter of his action, nor incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts

which constitute his cause of action. The production of evidence to support the allegations thus made may and should await the trial. *Wilmington v. Schutt*, 228 N. C. 285, 45 S. E. (2d) 364.

Facts Supporting Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. In such case a motion to strike allegations that the injury was willful, wanton or malicious, is properly denied. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

Motion to Strike Out Redundant Matter, etc.—

Where, in an action attacking the administratrix and guardian in the administration of an estate on the ground of fraud, recitals and denunciations of fraud in matters not necessary to a statement of any cause of action set forth in the pleading should be stricken as a matter of right upon motion made in apt time. *Privette v. Morgan*, 227 N. C. 264, 41 S. E. (2d) 845.

IV. DEMAND FOR RELIEF.

This section contemplates that the complaint should set forth a demand for relief to which the plaintiff supposes himself entitled. *Griggs v. Stoker Service Co.*, 229 N. C. 572, 50 S. E. (2d) 914.

But Relief Is Granted in Absence of Prayer Therefor.—Notwithstanding this section, the decisions have consistently followed the rule that under the code of civil procedure the relief to be granted in an action does not depend upon that asked for in the complaint, but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. *Griggs v. Stoker Service Co.*, 229 N. C. 572, 50 S. E. (2d) 914.

§ 1-123. What causes of action may be joined.

I. IN GENERAL.

Editor's Note.—For a discussion of this section in connection with the right to join in one action that right of an injured person to sue for personal injury and the right of the personal representative to sue conferred by the wrongful death statute, see 25 N. C. Law Rev. 84.

For an article recommending this section be changed to conform to corresponding provision in Federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

Purpose of Section.—

In accord with original. See *Ezzell v. Merritt*, 224 N. C. 2, 31 S. E. (2d) 751.

The purpose of this section is to permit the consolidation of causes of action when the facts as to all may be stated as a connected whole, are so restricted in scope that they may be examined in relation to each other, and are directed to the same subject matter which constitutes one general right. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382, 384.

Same—Section Relating to Counterclaim.—The purpose and intent of subsection 1 of this section and subsection 1 of § 1-137, relating to causes which may be pleaded as counterclaims, are substantially the same, i. e., to permit the trial in one action of all causes of action arising out of one contract or transaction connected with the same subject of action, and therefore decisions on one of the statutes is authority on the other. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

This section should be liberally construed to the end that justiciable controversies may be expeditiously adjusted by judicial decree at a minimum of cost to the litigants and the public. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382, 383.

Joinder Is Subject to Restrictions.—The joinder of causes of action is not primarily instigated by the court, but is done on the initiative of the parties seeking to assert and enforce their rights by final judgment of the court; and while under the supervision of the court it is not a matter of discretion but is subject to the restrictions provided in this section. *Horton v. Perry*, 229 N. C. 319, 49 S. E. (2d) 734.

Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

Consolidation of Actions Distinguished.—There is a substantial difference between the consolidation of cases for the convenience of trial and the joinder of causes of action for judicial determination in their combined aspect. The

former is in the exercise of the inherent power of the court and, in applicable cases, in its discretion; but this may be exercised only for the purpose of trial, and in that declared purpose will be found its limitations;—it cannot annul or suspend the statute relating to joinder. *Horton v. Perry*, 229 N. C. 319, 49 S. E. (2d) 734.

The power of the court to allow amendments "material to the cause" as provided in § 1-163 is a broad and discretionary power, and the phrase should be construed in connection with § 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. In regard to a related new cause of action set up by amendment, the statute of limitations operates as of the time of the amendment and not the institution of the action. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

Provision Requiring Each Cause of Action to Be Stated Separately.—When a plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. *King v. Coley*, 229 N. C. 258, 49 S. E. (2d) 648.

Is Improperly Arranged as Printed in General Statutes.—The provision of this section requiring each cause of action to be stated separately, as printed in the General Statutes of 1943, is so arranged as to make it appear that it relates only to subsection 7. However, the history of the statute, as well as the language used, indicates that it applies to each and every case in which two or more causes of action are joined in the same complaint. The last sentence in subsection 7 should appear in a separate and distinct paragraph following that subsection. *King v. Coley*, 229 N. C. 258, 49 S. E. (2d) 648.

Effect of Dismissal upon Appeals from Preliminary Orders.—Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of defendants are dismissed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289.

Where Defect in Pleading Relates Merely to Misjoinder.—If the defect in the pleading, upon demurrer under this section, relates merely to misjoinder of actions, the court will, under § 1-132, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes and of parties, this procedure cannot be followed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289.

Cited in *Corbett v. Hilton Lbr. Co.*, 223 N. C. 704, 28 S. E. (2d) 250; *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617.

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The General Rule.—

In accord with original. See *Owen v. Hines*, 227 N. C. 236, 41 S. E. (2d) 739.

Where the matter is wholly distinct and did not stem out of the transaction set out in the original complaint and is not sufficiently correlated thereto, the real objection would be noncompliance with this section. *Nassaney v. Culler*, 224 N. C. 323, 326, 30 S. E. (2d) 226.

Each cause of action must relate to one general right, and each must be so germane to it as to be regarded as a part thereof. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382, 383.

The complaint is multifarious unless all the causes of action alleged therein arose out of one and the same transaction or series of transactions forming one course of dealing, and all tending to one end. *Id.*

If grounds of bill are not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end; if one connected story can be told of the whole, the complaint is not subject to attack by demurrer for misjoinder of causes of action. *Id.*

The word "transaction," as employed in this section, means something which has taken place whereby a cause of action has arisen, and embraces not only contractual relations but also occurrences in the nature of tort. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924.

The "subject of action" means the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. *Hancammon v. Carr*, 229 N.

C. 52, 47 S. E. (2d) 614. See *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924.

The connection with the subject of action must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

Causes of Action Not Properly Joined.—Although this section permits several causes of action to be united in the same complaint where they all arise out of the same transaction, it was held that causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing may not be properly joined in the same complaint. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708.

Same—Joinder of Causes of Action in Tort.—A cause of action to recover the balance of compensation due plaintiff under an express contract of employment is improperly united with a cause of action to recover damages for assault committed by defendant upon plaintiff when he visited the office of the defendant to discuss the matter and a cause of action to recover damages for false imprisonment of plaintiff by defendant growing out of the assault, since the action *ex contractu* is asserted in respect to the contract of employment and arose out of the wrongful breach thereof by defendant, while the causes of action in tort are addressed to the violation of right of liberty and security of person, constituting a different subject of action and arising out of a different transaction, i. e., the infliction of personal injuries; but the causes of action in tort may be properly joined since they arose at the same time out of the same transaction, and further, relate to the injuries to the person. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924.

Mental Incompetency and Undue Influence.—In action to set aside deed on ground of mental incompetency of grantor, and duress and undue influence on part of grantees, a demurrer for misjoinder of causes of action was properly overruled. Mental incompetency and weakness of mind are not too far apart psychologically or too radically inconsistent as to require assertion in separate actions. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510.

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Complaint alleging that plaintiff was injured by defendant's negligence and that thereafter defendant wrongfully discharged him is subject to demurrer for misjoinder as two causes of action have no interdependent connection and are not connected with same subject matter. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382, distinguishing *Hamlin v. Tucker*, 72 N. C. 502; *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416.

Art. 13. Defendant's Pleadings.

§ 1-125. When defendant appears and pleads; petition to remove to federal court; extension of time; clerk to mail answer to plaintiff.—The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under § 1-220, or to set aside a judgment under § 1-108. Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this state and the filing of a copy of the petition in the state court, the state court shall proceed no further therein unless and until the case is remanded; and in the event it shall be finally determined in the United States courts that the case was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the case to the state court, the defendant or defendants, or any other party who

would have been permitted or required to file a pleading had the removal proceedings not been instituted, will have thirty (30) days after the filing in such state court of a certified copy of the order of remand to file motions or demur, answer or otherwise plead. If the time is extended for filing the complaint, and a copy of the complaint, when filed, is served on the defendant, then, in such case, the defendant shall have thirty days after the date when the copy of the complaint was served on him, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final date fixed for filing the complaint, whichever is the later date, in which to plead. If the time is extended for filing complaint, and a copy of the complaint, when filed, is not served on the defendant, then, in such case, said defendant shall have thirty days after the date of the sheriff's return showing that service was not made of such complaint, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final day fixed for filing the complaint, whichever is the later date, in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record inferior to the superior court shall fix such return date at less than thirty (30) days. (Rev., s. 473; Code, 207; 1870-1, c. 42, s. 4; 1919, c. 304, s. 3; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; 1949, c. 808, s. 1; c. 1113, s. 2; C. S. 509.)

Editor's Note.—The first 1949 amendment inserted the present second sentence. The second 1949 amendment inserted the present third and fourth sentences in lieu of the former second sentence. For comment on amendments, see 27 N. C. Law Rev. 432.

Presumption That Copy of Answer Filed and Mailed to Plaintiff.—A pleading is "filed" when it is delivered for that purpose to the proper officer and received by him, and upon plaintiff's admission that answer had been filed, it will be presumed that copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by this section. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Where purported special appearance did not challenge the jurisdiction of the court and it could not be treated as a demurrer, the court properly concluded that it was not a valid plea, but having overruled it without finding that it was irrelevant and frivolous and made in bad faith for purpose of delay, leave to answer should have been granted. *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242, 243.

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266.

§ 1-126. Sham and irrelevant defenses.

Editor's Note.—For article on motion to strike pleadings, see 29 N. C. Law Rev. 3.

Applied in *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242.

Art. 14. Demurrer.

§ 1-127. Grounds for.

I. IN GENERAL.

Demurrer Does Not Admit Conclusions of Law.—

The office of a demurrer is to test the sufficiency of a

pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *General American Life Ins. Co. v. Stadiem*, 223 N. C. 49, 51, 25 S. E. (2d) 202.

Section Differs from § 1-183.—Under this section demurrer to plaintiff's pleadings challenges the sufficiency of the pleadings, and is different in purpose and result from demurrer to the evidence under § 1-183, which challenges the sufficiency of the evidence. *Coleman v. Whisnant*, 226 N. C. 258, 37 S. E. (2d) 693, 694.

Applied in *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510; *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222; *Bledsoe v. Coxe Lbr. Co.*, 229 N. C. 128, 48 S. E. (2d) 50.

Cited in *Montgomery v. Blades*, 223 N. C. 331, 26 S. E. (2d) 567; *Sandlin v. Yancey*, 224 N. C. 519, 31 S. E. (2d) 532; *Williams v. Gibson*, 232 N. C. 133, 59 S. E. (2d) 602.

II. LACK OF JURISDICTION.

Demurrer *ovo tenus* on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330.

IV. PENDENCY OF ANOTHER ACTION.

Availed of by Demurrer or Answer.—

The pendency of a prior action between the parties may be taken advantage of by demurrer if the pendency of the prior action appear on the face of the complaint, and by answer if it does not so appear. *Reece v. Reece*, 231 N. C. 321, 56 S. E. (2d) 641.

Where a prior action is pending between the same parties, involving substantially the same subject matter, the second action will be dismissed upon demurrer if the pendency of the prior action appears on the face of the complaint. But if the fact does not so appear, objection may be raised by answer (§ 1-133) and treated as a plea in abatement. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 334, 52 S. E. (2d) 892.

Speaking Demurrer.—A motion to dismiss on the ground of the pendency of a prior action between the parties cannot be treated as a demurrer when this fact does not appear upon the face of the complaint, since in such instance a demurrer would be bad as a speaking demurrer. *Reece v. Reece*, 231 N. C. 321, 56 S. E. (2d) 641.

V. DEFECT OF PARTIES.

Misjoinder of Parties and Causes.—There is a misjoinder both of parties plaintiff and of causes of action where two or more persons having distinct causes of action against the same defendants join as plaintiffs in one suit. But where there is only one party plaintiff there can be no misjoinder of parties plaintiff. *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492.

Where two plaintiffs institute one action against defendants for the recovery of their respective property alleged to have been destroyed by the negligence of defendants, and there is no allegation that each defendant had an interest in the property of the other, there is a misjoinder of parties and causes of action, and the cause is demurrable. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2.

Where, in an action instituted by copartners against lessors to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, the complaint alleges that the original lease was made to the copartners but prior to the acts complained of a new agreement was entered into under which one of the partners bought out the interest of the other and the agreement sued on was made solely with the remaining partner, it was held that there is but one party plaintiff to whom relief could be available on the facts alleged, and therefore dismissal on demurrer for misjoinder of parties and causes was improperly entered. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708.

VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

Misjoinder of Parties and Causes.—See cases cited under preceding analysis line of this note.

Amendment Eliminating Misjoinder.—In an action to quiet title, where the plaintiff was permitted to amend his complaint to eliminate a misjoinder of several causes of action, no basis for a demurrer remained. *Sparks v. Sparks*, 230 N. C. 715, 55 S. E. (2d) 477.

The Court May Divide the Several Misjoined Causes.—

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924.

Complaint Not Demurrable for Misjoinder.—A complaint alleging that defendants, officers and agents of a corporation, made fraudulent misrepresentations of fact as to the financial condition of the corporation, thereby inducing plaintiff to sell the corporation merchandise on credit, and that defendants thereafter secretly caused the corporation to convey its assets to them with the purpose of cheating and defrauding plaintiff and other creditors, and that the corporation was thereafter placed in receivership with virtually no assets, with prayer that plaintiff recover of defendants the amount lost through the extension of credit, was held to state only the one cause of action for actionable fraud on the part of defendants and is demurrable neither on the ground of misjoinder of causes nor the ground that it stated a cause of action to set aside the conveyances appertaining solely to the corporate receivers. *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492.

VII. FAILURE TO STATE SUFFICIENT FACTS.

Demurrer Tests Sufficiency of Pleading.—A demurrer on the ground that the complaint fails to state a cause of action tests the sufficiency of the pleading. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345.

Paragraph Setting Forth Additional Elements of Damage.—A demurrer to a single paragraph of a complaint on the theory that such paragraph attempts to set up a second, separate cause of action and fails to state facts sufficient for that purpose, is improvidently granted when the pleading considered as a whole sufficiently states but a single cause of action and the paragraph objected to merely sets forth additional elements of damage. *Moore v. Carolina Cas. Ins. Co.*, 231 N. C. 729, 58 S. E. (2d) 756.

Applied in *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115; *Johnson v. Salisbury*, 232 N. C. 432, 61 S. E. (2d) 327; *Hoppe v. Deese*, 232 N. C. 698, 61 S. E. (2d) 903.

Cited in *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. (2d) 789.

§ 1-128. Must specify grounds.

Notwithstanding any other provisions of this section, any such demurrer, upon ten days' notice to the adverse party, may be heard and passed upon out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (1919, c. 304, s. 4; Ex. Sess. 1921, c. 92, s. 5; 1949, c. 147; C. S. 513.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

For brief comment on amendment, see 27 N. C. Law Rev. 434.

Insufficient Demurrers.—A demurrer must distinctly specify the grounds of objection, and demurrer to the further defense and answer of defendant on the ground that it does not "constitute a counterclaim in that it does not state a cause of action" is insufficient. *Duke v. Campbell*, 233 N. C. 262, 63 S. E. (2d) 555.

Where further defense and answer are set up in unity in five paragraphs in the answer, a demurrer directed to a portion of one of such paragraphs for failure to set up a counterclaim is a nullity, since in such instance the demurrer must be to the whole of the further defense and answer. *Duke v. Campbell*, 233 N. C. 262, 63 S. E. (2d) 555.

Cited in *Early v. Farm Bureau Mut. Automobile Ins. Co.*, 224 N. C. 172, 29 S. E. (2d) 558.

§ 1-129. Amendment; hearing.

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite under § 1-153 or the court may allow an amendment. In re *Will of York*, 231 N. C. 70, 55 S. E. (2d) 791.

§ 1-131. Procedure after return of judgment.

Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the supreme court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within thirty days after the receipt of the

judgment, if there is no appeal, or within thirty days after the receipt of the certificate of the supreme court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; Ex. Sess. 1921, c. 92, ss. 7, 8; 1949, c. 972; C. S. 515.)

Editor's Note.—The 1949 amendment substituted "thirty days" for "ten days" so as to make the section consistent with § 1-125. For brief comment on amendment, see 27 N. C. Law Rev. 434.

Order Sustaining Demurrer Does Not Effect Dismissal.—Where the complaint fails to state a cause of action, order sustaining demurrer on this ground does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345.

Dismissal for Failure to Amend.—A failure to amend the complaint after judgment sustaining demurrer thereto works a dismissal. *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700.

Where the Supreme Court sustains demurrer ore tenus upon appeal, plaintiffs may apply for leave to amend their pleadings. *Perkins v. Langdon*, 231 N. C. 386, 57 S. E. (2d) 407.

Cited in *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535; *Barker v. Barker*, 232 N. C. 495, 61 S. E. (2d) 360; *Gill v. Smith*, 233 N. C. 86, 62 S. E. (2d) 546.

§ 1-132. Division of actions when misjoinder.

Where causes of action alleged in the complaint are improperly joined, the action need not be dismissed. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382, 384.

Misjoinder of Causes and Parties.—

If the defect in the pleading related merely to misjoinder of actions, the court might, under this section, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes of actions and of parties who have no community of interest, this proceeding cannot be followed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 485, 27 S. E. (2d) 289.

In a suit by a county against three defendants to foreclose a tax lien on five tracts of land, title to tracts 1, 2, and 3, being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest therein, the joinder of the third defendant, H. F., was mere surplusage and not fatal, as he was not a necessary party; but a joint demurrer for misjoinder of actions and parties should have been sustained, since there can be no division of the action under this section. *Moore County v. Burns*, 224 N. C. 700, 32 S. E. (2d) 225.

A demurrer should be sustained where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of this section. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2.

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924.

Where several causes of action have been improperly united, the cause will not be dismissed, but the court will sever the causes and divide the action. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708; *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345.

Causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, may not be properly joined in the same complaint and the causes should be severed upon demurrer. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708.

Cited in *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492.

§ 1-133. Grounds not appearing in complaint.

Pendency of Another Suit.—See note to § 1-127. One partner was sued individually for damages resulting in a collision occurring while driving a partnership vehicle in the course of the partnership business. Thereafter

the individual partners instituted suit in another county against the plaintiff in the first action to recover damages resulting to them out of the same collision. It was held that the parties to the two actions were identical for the purposes of a plea in abatement, and the second action was abated in the supreme court upon the plea, the remedy in the second action being by counterclaim in the first. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892.

Cited in *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222.

§ 1-134. Objection waived.

Demurrer after Answer.—

In accord with 1st paragraph in original. See *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751.

Answer Not Waiving Right to Demur.—The filing of answer to the original complaint does not waive defendants' right to demur to an amended complaint on the ground of misjoinder of parties and causes of action. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2.

Lack of Jurisdiction.—

Demurrer *ore tenus* on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330.

Art. 15. Answer.

§ 1-134.1. Special appearances eliminated.—No special appearance shall be necessary in order to present the objection that the court has no jurisdiction over the person or property of the defendant. Such objection may be presented either by motion or answer, and the making of other motions or the pleadings of other defenses simultaneously with the presentation of such objection shall not be a waiver of such objection: Provided, that the making of any motion or the filing of answer prior to the presentation of such objection shall waive it: Provided further that any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1951, c. 245.)

§ 1-135. Contents.

I. IN GENERAL.

The plea of *res judicata* cannot be presented by demurrer, unless the facts supporting it appear on the face of the complaint. It must be taken by answer. *Hampton v. North Carolina Pulp Co.*, 223 N. C. 535, 27 S. E. (2d) 538.

Narration of Evidence Held Irrelevant Pleading.—A denial in the answer of a material fact alleged in the complaint enables defendant to show any facts which go to deny the existence of the controverted fact, and therefore narration of evidence which defendant contends sustains his denial of the controverted fact is irrelevant pleading. *Chandler v. Mashburn*, 233 N. C. 277, 63 S. E. (2d) 553.

Cited in *Smoke Mount Industries v. Fisher*, 224 N. C. 72, 29 S. E. (2d) 128.

§ 1-137. Counterclaim.

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

Same Purpose as Subsection 1 of § 1-123.—See note to § 1-123.

Tort against Contract Claim.—

Under subsection 1 of this section, a cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided it arises out of the same transaction or is connected with the same subject of action. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

A cause of action in tort may be pleaded as a counterclaim to an action on contract only if it rests upon some wrong or breach of duty committed by plaintiffs in making or performance of the contract. *Id.*

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort

and is not "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of actions" within the purview of the statute. *Smith v. Smith*, 225 N. C. 189, 34 S. E. (2d) 148.

The "subject of the action" means the thing in respect to which plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

To be "connected with the subject of the action", the connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

The cross action must have such relation to plaintiff's claim that the adjustment of both is necessary to a full and final determination of the controversy. This means that it must be so interwoven in plaintiff's cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other. And mere historical sequence, or the fact that a connected story may be told of the whole, is not alone sufficient. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

Plaintiffs cashed a check for the payee upon his endorsement and gave the payee in exchange merchandise and money. The maker of the check stopped payment on it, and plaintiffs procured a warrant charging the maker with issuing a worthless check. The prosecution was not pressed on appeal from the recorder's court. Plaintiffs then instituted an action to recover on the check. It was held that defendant maker was not entitled to set up a cross action for abuse of process. *Id.*

Overtime and Payments under Fair Labor Standards Act.—A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. *Smoke Mount Industries v. Fisher*, 224 N. C. 72, 29 S. E. (2d) 128.

§ 1-138. Several defenses.

Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this section and Rule 20(2) of the supreme court. *Pearce v. Pearce*, 226 N. C. 307, 37 S. E. (2d) 904.

§ 1-139. Contributory negligence pleaded and proved.

Motion for Nonsuit.—While contributory negligence is an affirmative defense which the defendant must plead and prove, a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under § 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307. See *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190; *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538.

Art. 16. Reply.

§ 1-140. Demurrer or reply to answer; where answer contains a counterclaim.

Where an answer containing a counterclaim is not served on plaintiff or her attorney of record each allegation of the answer is deemed denied, and therefore defendant cannot be entitled to a default judgment on the counterclaim on the ground that no reply was filed thereto. *Lawrence v. Heavener*, 232 N. C. 557, 61 S. E. (2d) 697.

Applied in *Williams v. Thompson*, 227 N. C. 166, 41 S. E. (2d) 359.

§ 1-141. Content; demurrer to answer.

The right to reply is not restricted to cases in which defendant pleads a counterclaim, but a reply is proper if the answer alleges facts which, if established, entitle defendant to some relief. *Williams v. Thompson*, 227 N. C. 166, 41 S. E. (2d) 359.

Cited in *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535; *Smith v. Smith*, 225 N. C. 189, 34 S. E. (2d) 148.

Art. 17. Pleadings, General Provisions.

§ 1-144. Subscriptor and verification of pleading.

The requirement as to verification of subsequent pleadings may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796.

Plaintiff, filing verified complaint in an action in the nature of an action to quiet title, waives verification of the answer by filing reply and allowing the matter to go to two hearings before the referee and failing to interpose objection until after an adverse referee's report. *Id.*

Failure to Verify Amended Answer.—Where a verified complaint is filed and defendants file a verified answer, the fact that an amended answer, which merely amplifies the defense of the original answer, is not verified, does not justify the court in disregarding the defense. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266.

§ 1-145. Form of verification.

Instance of Sufficient Verification.

A petition in proceedings for contempt which is verified in accordance with the form prescribed by this section is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. *Safie Mfg. Co. v. Arnold*, 228 N. C. 275, 45 S. E. (2d) 577.

§ 1-149. When verification omitted; use in criminal prosecutions.

Action for Annulment of Marriage.—Where testimony of a witness as to her bigamous marriage with defendant is competent, the complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. *State v. Phillips*, 227 N. C. 277, 41 S. E. (2d) 766.

In prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. *State v. McNair*, 226 N. C. 462, 38 S. E. (2d) 514.

§ 1-150. Items of account; bill of particulars.

Discretion of Court, etc.—

In accord with original. See *Moss-Marlow Bldg. Co. v. Jones*, 227 N. C. 282, 41 S. E. (2d) 742.

The denial of a motion under § 1-153 to make a pleading more definite does not preclude defendant from applying for a bill of particulars. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408.

§ 1-151. Pleadings construed liberally.

In Favor of Pleadings.—

Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Corbett v. Hilton Lbr. Co.*, 223 N. C. 704, 709, 28 S. E. 250. See *Sandlin v. Yancey*, 224 N. C. 519, 31 S. E. (2d) 532; *Ferrell v. Worthington*, 226 N. C. 609, 39 S. E. (2d) 812, 815; *Winston v. Williams, etc., Lbr. Co.*, 227 N. C. 339, 42 S. E. (2d) 218; *McC Campbell v. Valdese Bldg., etc., Ass'n*, 231 N. C. 647, 58 S. E. (2d) 617.

A demurrer tests the sufficiency of a pleading, liberally construed and admitting the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom, and the demurrer will not be sustained unless the pleading is fatally defective. *King v. Motley*, 233 N. C. 42, 62 S. E. (2d) 540.

If in any portion of the complaint or to any extent it presents facts sufficient to constitute a cause of action or if facts sufficient for that purpose fairly can be gathered from it, the pleading will stand, "however inartificially it may have been drawn or however uncertain, defective

and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Presnell v. Beshears*, 227 N. C. 279, 281, 41 S. E. (2d) 835. See *Bryant v. Little River Ice Co.*, 233 N. C. 266, 63 S. E. (2d) 547.

Statement of Cause of Action.—

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. *Kemp v. Funderburk*, 224 N. C. 353, 355, 30 S. E. (2d) 155.

Where a complaint is attacked by a general demurrer asserting that it does not state facts sufficient to constitute a cause of action the complaint is construed to aver all the facts that can be implied by fair and reasonable intendment from the facts expressly stated. *Steele v. Locke Cotton Mills Co.*, 231 N. C. 636, 58 S. E. (2d) 620.

Answer Not Rejected Unless Fatally Defective.—

Both this section and the decisions of the Supreme Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Dickensheets v. Taylor*, 223 N. C. 570, 576, 27 S. E. (2d) 618, citing *Anderson Cotton Mills v. Royal Mfg. Co.*, 218 N. C. 560, 11 S. E. (2d) 550.

Cited in Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290.

§ 1-152. Time for pleading enlarged.

Answer Filed after Expiration of Time for Answering.—Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquires jurisdiction of the entire cause and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

§ 1-153. Irrelevant, redundant, indefinite pleadings.

If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. Any such motion to strike any matter out of any pleading may, upon ten days' notice to the adverse party, be heard out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (Rev., s. 496; Code, s. 261; C. C. P., s. 120; 1949, c. 146; C. S. 537.)

Cross References.—

In the last line of the 2nd paragraph in the original the "25" should be "55."

Editor's Note.—The 1949 amendment added the last sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 434.

For article on motion to strike pleadings, see 29 N. C. Law Rev. 3.

Defendant Not Deprived of Any Substantial Right.—Irrelevant, redundant or evidential matter may be stricken from the pleading upon motion of party aggrieved, and the order striking such matter from the pleading does not deprive defendant of any substantial right. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412.

Discretion of Court.—

In accord with 4th paragraph in original. See *Patuxent Development Co. v. Bearden*, 227 N. C. 124, 41 S. E. (2d) 85.

Ordinarily whether or not the trial judge grants a motion to make a pleading more definite, as provided in this section, is within his discretion. And where there is nothing on the record to indicate that the motion was denied as a matter of law, it will be presumed the judge denied it in his discretion. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408.

A motion to strike made before pleading or extension of time to plead, is made as a matter of right, while such

motion not made in apt time is addressed to the discretion of the court. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412.

Allegations to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

Motion to Make Pleadings More Definite and Certain.—

When a complaint alleges or attempts to allege a good cause of action but is defective in that it does not definitely and sufficiently set out all the essential, ultimate facts, or is inartificially stated, or is in general terms, demurrer will not lie if, when liberally construed, the allegations are sufficiently intelligible to inform the defendant as to what he is required to answer. The remedy is by motion to make the complaint more definite. *Davis v. Rhodes*, 231 N. C. 71, 56 S. E. (2d) 43.

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite under this section or the court may allow an amendment under § 1-129. *In re Will of York*, 231 N. C. 70, 55 S. E. (2d) 791.

A demurrer to a defective statement of a good cause of action comes too late after answer. The defendant, by answering to the merits, waives the defect which is not fatal but may be cured by amendment. He may, however, move to make the complaint more definite. *Davis v. Rhodes*, 231 N. C. 71, 56 S. E. (2d) 43.

Denial of motion to make pleading more definite does not preclude bill of particulars. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408.

Motion to Strike Upheld.—In action for damages that part of defendant's answer containing stipulation that plaintiff had taken nonsuit in prior action for same collision and paid costs, together with summons and complaint in former action was properly stricken from pleadings as not being germane to case. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412.

Where defendant has denied a material allegation of the complaint, narration in his "further answer and defense" of evidential matters tending to sustain defendant's denial of the controverted fact is irrelevant, and should be stricken upon motion aptly made. *Chandler v. Mashburn*, 233 N. C. 277, 63 S. E. (2d) 553.

Motion to Strike Denied.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, motion to strike allegations that the injury was willful, wanton and malicious, is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

When Denial of Motion to Strike Matter from Pleading Ground for Reversal.—The denying or overruling of a motion to strike matter from a pleading under the provisions of this section is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party. *Hinson v. Britt*, 232 N. C. 379, 61 S. E. (2d) 185.

Applied in *Parlier v. Drum*, 231 N. C. 155, 56 S. E. (2d) 383.

§ 1-159. Allegations not denied, deemed true.

Applications in Divorce Actions.—

In an action for divorce the charge of wilful abandonment of defendant by plaintiff and the defense of recrimination do not amount to a cross cause, and are deemed controverted by the adverse party. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492.

§ 1-160. Pleading lost, copy used.

Order of Substitution Not Reviewable.—

In accord with original. See *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548.

Art. 18. Amendments.

§ 1-161. Amendment as of course.

Editor's Note.—

For a discussion of this section, see 25 N. C. Law Rev. 76.

Where there is a misjoinder of parties and causes of action, plaintiff may move to file a substituted or amended pleading at any time before judgment is entered sustain-

ing the demurrer, but after such judgment is entered the court has no authority to entertain a motion for leave to file a new or amended complaint for the reason that there is no action pending in which the court has jurisdiction to entertain a motion. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345.

§ 1-162. Pleading over after demurrer.

Order sustaining demurrer for failure to state cause of action does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345.

Cited in *Gill v. Smith*, 233 N. C. 86, 62 S. E. (2d) 546.

§ 1-163. Amendments in discretion of court.

I. IN GENERAL.

Editor's Note.—For a discussion of this section, see 25 N. C. Law Rev. 76.

Liberal Allowance on Proper Terms—Exception.—

In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments to pleadings. Amendments, which are permitted in order to conform the pleading to the proof, are limited to those which do not change substantially the claim or defense. *Bank of Ashe v. Sturgill*, 223 N. C. 825, 28 S. E. (2d) 511.

Wide latitude is given the trial court to permit amendment to the pleading to conform to the evidence, even after verdict, but the allowance of an amendment after verdict in substantial disagreement with the evidence must be held for error. *Casstevens v. Casstevens*, 231 N. C. 572, 58 S. E. (2d) 368.

The power to permit amendments under this section is divided into two categories: First, amendments before trial or during trial when the adverse party is given opportunity to investigate and rebut any new matter, in which case the court may allow the insertion of allegations "material to the case," and second, amendments offered during or after trial, in which case the power to allow amendments is limited to those making the allegations conform to the evidence and does not extend to those bringing in a new cause of action or changing substantially the form of action originally sued on. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

The power of the court to allow amendments "material to the case" as provided in this section is a broad and discretionary power, and the phrase should be construed in connection with § 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. In regard to a related new cause of action set up by amendment, the statute of limitations operates as of the time of the amendment and not the institution of the action. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

The word "case" as used in the phrase "material to the case" should be construed ordinarily in its broader, more comprehensive sense, as embracing the relevant facts arising out of or connected with the transactions forming the subject of action declared upon in the complaint. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

"Anything May Be Amended at Any Time."—

In accord with original. See *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602.

Relation Back Doctrine.—

In the absence of showing that the rights of innocent third persons would be injuriously affected, an amendment relates back to the commencement of the action. *McDaniel v. Leggett*, 224 N. C. 806, 810, 32 S. E. (2d) 602.

Correcting Misnomer or Mistake in Name of Party.—

Under the broad discretionary powers of the trial court to permit amendment of process and pleading, the court may allow amendment to correct a misnomer or mistake in the name of a party provided the amendment does not amount to a substitution or entire change of parties. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

Amendment of Affidavit upon Which Substituted Service Based.—While an affidavit upon which substituted service is based may be amended, and ordinarily in that respect comes under the provisions of this section, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is necessarily void because of want of jurisdiction. *Rodriguez v. Rodriguez*, 224 N. C. 275, 283, 29 S. E. (2d) 901.

Time of Amendment.—

The trial court has discretionary power to allow a party to amend his pleading after certification of the decision of the Supreme Court on appeal to allege facts relied on as an estoppel, and the exercise of such discretion is not subject to review except for palpable abuse. *Carolina Power, etc., v. Bowman*, 231 N. C. 332, 56 S. E. (2d) 602.

Applied in *Smith v. Smith*, 226 N. C. 506, 39 S. E. (2d) 391; *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

II. DISCRETIONARY POWERS OF THE COURT.**Powers Discretionary.—**

An application for leave to amend a pleading after time for filing has expired is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of discretion. *Hooper v. Glenn*, 230 N. C. 570, 53 S. E. (2d) 843.

Where plaintiff learned the facts for the first time when defendant was examined adversely, and over objection was allowed to file an amendment to the complaint, it was held that this was a matter resting in the sound discretion of the trial court. *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617.

Ruling on Motion Not Reviewable on Appeal.—A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466.

A motion to amend pleading is discretionary with the trial court and is not reviewable on appeal. *Pharr v. Pharr*, 223 N. C. 115, 25 S. E. (2d) 471.

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.**Permissible When It Introduces No New Cause.—**

The court in its discretion may allow an amendment to pleadings setting up new matter, even where the transaction occurred after the action was brought, provided it does not assume the role of a new and entirely different claim. *Nassaney v. Culler*, 224 N. C. 323, 30 S. E. (2d) 226.

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. . . . Especially is this so where the change of front is sought to be made between the trial and appellate courts. *Hylton v. Mount Airy*, 227 N. C. 622, 626, 44 S. E. (2d) 51.

Instances of New Cause Not Introduced.—

In a suit by an administratrix against a business associate of her intestate and others for an accounting as to properties purchased, for the joint account of such intestate and such associate, with moneys furnished by plaintiff's intestate for their joint enterprise, an amendment to the complaint, alleging fraud in concealing property purchased for such joint account and failure to account therefor, is allowable as a cause of action arising out of the same transaction and connected with the same subject of action. *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617.

Plaintiff sued to recover a truck purchased by him which he permitted his brother to drive under a rental agreement. Plaintiff's evidence was to the effect that the truck plus certain rent money and money belonging to plaintiff were used in the swap of the truck for another vehicle. It was held that the trial court had discretionary power to allow plaintiff to amend to assert his right to recover the new vehicle by virtue of a resulting or a constructive trust, since the amendment does not change the nature of the case or add any cause of action. *Baker v. Baker*, 230 N. C. 108, 52 S. E. (2d) 20.

Instance of New Cause of Action.—In an action by a tenant against his landlord for selling the leased premises during the term to the tenant's damage, the court has no power to permit an amendment alleging that the parties were engaged in a joint adventure in the operation of the premises, since the new matter alleges a wholly different cause of action arising from a different and distinct legal relationship, and further such cause based upon obligations arising from the relation of joint adventures is inconsistent with and contradictory to the original cause based upon the relationship of landlord and tenant. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

V. AMENDMENTS OF PROCESS.**Absence of Clerk's Signature.—**

Where a clerk of the Superior Court received and docketed summons and complaint in a civil action, affixed the seal of court to the summons and sent the papers with necessary fees to the sheriff of another county for service, and the papers were properly served and returned to the clerk issuing same, who then signed the summons, upon motion of defendant to dismiss upon special appearance, the court

has power, in its discretion, to allow the summons to be amended by affixing thereto the signature of the clerk. *North Carolina Joint Stock Land Bank v. Aycock*, 223 N. C. 837, 28 S. E. (2d) 494.

Summons Issued under Erroneous Name.—In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff files a motion to amend summons and complaint to conform to defendant's true name, there is no error in allowing the motion to correct the mistake. *Propst v. Hughes Trucking Co.*, 223 N. C. 490, 27 S. E. (2d) 152.

Applied in *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

VI. AMENDMENTS AS TO PARTIES.**Generally.—**

As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. *Service Fire Ins. Co. v. Horton Motor Lines*, 225 N. C. 588, 35 S. E. (2d) 879.

VIII. SPECIFIC INSTANCES.

Petition Omitting Portion of Land.—When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent were included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper procedure to have the mistake corrected by amendment nunc pro tunc, and the court may make its decree conform thereto. *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602.

In an action by a tenant against his landlord for selling the leased premises during the term to the tenant's damage, the court may permit an amendment that the landlord covenanted not to sell the premises during the term of the lease and that he breached the covenant by selling during the term to a bona fide purchaser, since the allegations of the amendment are relevant and germane to the subject of the action set out in the complaint. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

§ 1-164. Amendment changing nature of action or relief; effect.

Cited in *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565.

§ 1-165. Unsubstantial defects disregarded.

Quoted in *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559.

§ 1-168. Variance, material and immaterial.

Immaterial Variance.—Even though it may be taken for granted that the evidence offered did not correspond in all respects with the allegations of the complaint, the resultant variance must be adjudged immaterial where it did not actually mislead defendant to his prejudice in maintaining his defense upon the merits. *Spivey v. Newman*, 232 N. C. 281, 59 S. E. (2d) 844.

Where the difference between the allegation and proof is not substantial and could not mislead the other party, as where plaintiff declares on an express contract and seeks to recover on an implied agreement arising out of the same transaction, the variance is not fatal. *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528.

§ 1-169. Total failure of proof.

Cited in *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528.

Subchapter VII. Pre-Trial Hearings; Trial and Its Incidents.**Art. 18A. Pre-Trial Hearings.**

§ 1-169.1. Pre-trial dockets and cases placed thereon; pre-trial orders; time for hearings and matters for consideration.—The clerk of the superior court of every county shall maintain a pre-trial docket. Upon written request of counsel for any party, filed with the clerk and served upon counsel for all other parties after issue has been

joined and not less than ten days prior to the term at which the case is to be tried, a civil case, except a case specified in § 1-169.5, shall be placed on this docket. The judge holding court in the district or the presiding judge, at any time after issue has been joined, may, in his discretion, order that any civil case except a case specified in § 1-169.5, be placed on the pre-trial docket. Except by order of the presiding judge, no case on this docket shall be tried until a pre-trial order has been entered therein in conformity with this article, but this shall not be construed to prohibit the calendaring of any case for trial prior to the pre-trial hearing or the entry of such order.

Pre-trial hearings in the cases on the pre-trial docket shall be held on the first day of every term of superior court for the trial of civil cases only, preference being given to those cases on such docket which are calendared for trial at the same term. The attorneys for the parties shall appear before the presiding judge to consider:

1. Motions to amend or supplement any pleading.
2. The settling of the issues.
3. The advisability or necessity of a reference of the case, either in whole or in part.
4. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof.
5. Facts of which the court is to be asked to take judicial notice.
6. The determination of any other matters which may aid in the disposition of the case.
7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term.

Following the hearing the presiding judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification.

After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same term in which the pre-trial hearing is held or at a subsequent term, as ordered by the judge. (1949, c. 419, s. 1.)

Editor's Note.—Section 6 of the chapter from which this article was codified made it effective as of March 18, 1949, for purposes of pre-trial hearings under § 1-169.3. With respect to pre-trial hearings under § 1-169.1 or § 1-169.4, this article was made effective on October 1, 1949, as to civil cases in which issue is joined.

For comment on this article, see 27 N. C. Law Rev. 430.
For comment on the operation of procedure under this article, see 28 N. C. Law Rev. 375.

§ 1-169.2. Time allotted to hearings; summoning of jurors.—The presiding judge may devote any additional day or days of the term to pre-trial hearings as he may find necessary or desirable. In the event pre-trial hearings, herein provided for, do not consume the whole of the first day of the term, the presiding judge may proceed to the consideration of the motion docket or any other matters not requiring the intervention of a jury. At the time jurors are to be summoned for the first week of the term, the clerk of the superior court shall determine whether it is probable that the pre-trial docket and other matters not requiring the intervention of a jury will consume the

first day of the term and, in accordance with such determination, shall direct the sheriff to summon the jurors for the first or second day of the term. (1949, c. 419, s. 2.)

§ 1-169.3. Hearings out of term and in or out of the county or district.—Upon agreement of counsel for all parties to any civil case, the resident judge or the regular judge holding the courts in the district may hold pre-trial hearings out of term and in or out of the county or district. At any such hearing the authority of the judge shall be the same as at pre-trial hearings conducted at term time. (1949, c. 419, s. 3.)

§ 1-169.4. Disposition of pre-trial docket at mixed terms.—At terms of the superior court devoted to both civil and criminal matters, the pre-trial docket shall be the order of business after the criminal docket has been disposed of, or may be considered earlier in the discretion of the presiding judge. (1949, c. 419, s. 4.)

§ 1-169.5. Application of article.—The provisions of this article shall not apply to uncontested divorce cases or to proceedings after judgment by default, and shall apply to special proceedings only after transfer to the civil issue docket. (1949, c. 419, s. 5.)

§ 1-169.6. Hearings in county and municipal courts, etc.—Effective October 1, 1949, the judge of every court, other than the superior court, having jurisdiction to try civil cases beyond the jurisdiction of a justice of the peace, may in his discretion, upon not less than five days' notice, direct the attorneys in any civil case at issue in his court, including those in which issue was joined prior to October 1, 1949, to appear before him for a pre-trial hearing for consideration of the matters set forth in § 1-169.1. Upon request for pre-trial hearing by the attorney for any party to a civil case at issue in his court, the judge shall, upon not less than five days' notice to the attorneys for the other parties, order such a pre-trial hearing. After each such pre-trial hearing, the judge shall enter an order as contemplated by § 1-169.1. (1949, c. 419, s. 7.)

Art. 19. Trial.

§ 1-171. Joinder of issue and trial.

Cause Transmitted by Operation of Law.—Where defendant failed to file his answer to complaint within the proper time, but did file the answer before the clerk entered a default judgment the cause was, in effect, transmitted by operation of law to the superior court when the answer was filed. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

§ 1-172. How issue tried.

Entitled to Jury Trial.—It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356.

Cited in *Lockhart v. Lockhart*, 223 N. C. 123, 25 S. E. (2d) 465.

§ 1-173. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order: Provided, that uncontested cases in which no answer has been filed may

be tried at any term after the time for filing answers has expired. (Rev., s. 528; Code, s. 400; C. C. P., s. 226; 1923, c. 54; 1925, c. 5; C. S. 557; 1945, c. 989.)

Editor's Note.—

The 1945 amendment added the proviso.

Cited in *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

§ 1-176. Continuance during term.

Continuances are not favored, as a general rule, and ought not to be granted unless the reasons therefor are fully established. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

Continuance Discretionary with Judge.—

Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

Continuance to Prepare Defense.—Where the record fails to show that a requested continuance would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense, the denial of the motion is not prejudicial. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520, discussed in 27 N. C. Law Rev. 544.

An application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance, and this section contemplates that this is to be done. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the state and defendant in a criminal action. (Rev., s. 535; Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452; 1949, c. 107; C. S. 564.)

I. EDITOR'S NOTE.

The 1949 amendment rewrote this section. It did not alter the provision prohibiting the judge from stating an opinion on the facts. But it materially changed the rest of the section. See 27 N. C. Law Rev. 435 containing a discussion of the change made by the amendment. This change should be borne in mind in considering the cases referred to in this note.

II. OPINION OF JUDGE.

A. General Considerations.

Purposes and Effect of Section.—

In accord with 2nd paragraph in original. See *State v. Woolard*, 227 N. C. 645, 647, 44 S. E. (2d) 29.

This section was intended to keep inviolate the line between the functions of court and jury—the one as dispenser of the law, the other as triers of the facts—, and thus to preserve the integrity of trial by jury. But it does more. It provides a co-operative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892.

A Substantial Right of Litigants.—

This section confers a substantial legal right upon litigants, and "calls for instructions as to the law upon all substantial features of the case." *McNeill v. McNeill*, 223 N. C. 178, 182, 25 S. E. (2d) 615.

This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378, 379.

Credibility of Witnesses Is for Jury.—No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should con-

stantly be observed, as the slightest intimation from the bench will always have great weight with the jury. *State v. Austin*, 223 N. C. 203, 25 S. E. (2d) 613. See *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378; *State v. McNeill*, 231 N. C. 666, 58 S. E. (2d) 366.

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774.

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate this section, since this section relates only to the expression of opinion during the trial of the case. *State v. Lippard*, 223 N. C. 167, 25 S. E. (2d) 594.

Directing a Verdict.—

Even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury, and therefore a recapitulation of the evidence may be necessary. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892.

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show you will answer the issue" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892.

Evidence Insufficient to Justify Instructed Verdict.—In an action to quiet title, the evidence was not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892.

Record on Appeal Must Show Error.—

In accord with 2nd paragraph in original. See *State v. Jones*, 227 N. C. 402, 404, 42 S. E. (2d) 465.

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. *State v. Spivey*, 230 N. C. 375, 53 S. E. (2d) 259.

Correctness of Instructions Will Be Presumed.—Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

Exceptions after Verdict.—

Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774.

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Applied in *In re Evans' Will*, 223 N. C. 206, 25 S. E. (2d) 556; *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211; *State v. Ellison*, 226 N. C. 628, 39 S. E. (2d) 824; *State v. Correll*, 228 N. C. 28, 44 S. E. (2d) 334; *State v. McMahan*, 228 N. C. 293, 45 S. E. (2d) 340; *Barringer v. Barringer*, 228 N. C. 790, 46 S. E. (2d) 849; *Wyatt v. Queen City Coach Co.*, 229 N. C. 340, 49 S. E. (2d) 650.

Cited in *State v. DeGraffenreid*, 223 N. C. 461, 27 S. E. (2d) 130; *Daughtry v. Cline*, 224 N. C. 381, 30 S. E. (2d) 322 (con. op.); *State v. Harrill*, 224 N. C. 477, 31 S. E. (2d) 353; *Kearney v. Thomas*, 225 N. C. 156, 33 S. E. (2d) 871; *State v. Bullins*, 226 N. C. 142, 36 S. E. (2d) 915; *Perry v. First Citizens Nat. Bank, etc., Co.*, 226 N. C. 667, 40 S. E. (2d) 116; *Brown v. Loftis*, 226 N. C. 762, 40 S. E. (2d) 421; *Nichols v. Wachovia Bank, etc., Co.*, 231 N. C. 158, 56 S. E. (2d) 429; *Hill v. Atlantic Coast Line R. Co.*, 231 N. C. 499, 57 S. E. (2d) 781; *Combs v. Porter*, 231 N. C. 585, 58 S. E. (2d) 100; *Merchants, etc., Bank v. Sherrill*, 231 N. C. 731, 58 S. E. (2d) 741; *Collingwood v. Winston-Salem Southbound Ry. Co.*, 232 N. C. 192, 59 S. E. (2d) 584; *Fleming v. Carolina Power, etc., Co.*, 232 N. C. 457, 61 S. E. (2d) 364; *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

B. What Constitutes an Opinion.

In General.—

The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which

is likely to prevent a fair and impartial trial. *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29, citing *State v. Ownby*, 146 N. C. 677, 61 S. E. 630.

The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29, citing *State v. Benton*, 226 N. C. 745, 40 S. E. (2d) 617.

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. *State v. Love*, 229 N. C. 99, 47 S. E. (2d) 712.

Evidence Tends to Show.—

The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. *Thompson v. Davis*, 223 N. C. 792, 798, 28 S. E. (2d) 556; *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858.

Remarks Must Be Prejudicial.—

A remark or question by the court during the progress of the trial, even though it amount to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774.

Taking Witness into Custody in Presence of Jury.—In this prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, was held to be prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. *State v. McNeill*, 231 N. C. 666, 58 S. E. (2d) 366.

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

b. Remarks Concerning Witnesses.

Statement That Other Evidence Corroborates Witness.—

A charge that ". . . and the state contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the state "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the state. *State v. McKnight*, 226 N. C. 766, 40 S. E. (2d) 419.

Remark That Witness Has Fully Answered Question.—

Where court was of the opinion that state's witness on cross-examination by defendant's counsel had answered interrogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. *State v. Stone*, 226 N. C. 97, 36 S. E. (2d) 704, citing *State v. Mansell*, 192 N. C. 20, 133 S. E. 190.

d. Miscellaneous Remarks.

In a prosecution for manslaughter the use by the court of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment, is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. *State v. Scoggins*, 225 N. C. 71, 33 S. E. (2d) 473.

Where Court Is Merely Identifying Exhibits.—A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the

scene, it being obvious that the court was merely identifying the exhibits offered by the state. *State v. Hooks*, 228 N. C. 689, 47 S. E. (2d) 234.

Reference to Document as Will of Deceased.—In a caveat proceeding reference in the court's charge to a paper-writing as the will of the deceased was held not reversible error as an expression of opinion in contravention of this section where it appeared that the court was only following the example set by counsel for caveators in the examination of some of the witnesses, and the jury understood that they were trying a caveat filed to the paper-writing which had been probated in common form as the will of the deceased, and because of the caveat it was then being offered for probate in solemn form. In re *Will of McDowell*, 230 N. C. 259, 52 S. E. (2d) 807.

Reference to Effect on Verdict of Notations on Issues Submitted to Jury.—Although a trial judge should not express an opinion before jurors whom he proposes to poll in regard to the influence written notations on the margin of the issues submitted to the jury may have had on the verdict, such remarks do not come within the ban of this section. *Call v. Stroud*, 232 N. C. 478, 61 S. E. (2d) 342.

2. Remarks Held Error.

b. Remarks Concerning Witnesses.

Comments on Witnesses.—

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught," was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29.

In prosecution for having carnal knowledge of female under sixteen years of age the disparagement of the defendant's witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378, 379.

c. Remarks Concerning Weight and Credibility of Testimony.

Contentions of the Parties.—The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section, and where court in stating state's contentions in regard to the disinterestedness of officers who testified and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" was held error as an expression of opinion by court upon weight of the evidence. *State v. Benton*, 226 N. C. 745, 40 S. E. (2d) 617.

Remarks as to Testimony of Officer.—Where an officer purchased liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution, an instruction which left the impression that his credibility was enhanced by the fact that he was an officer in the performance of his duty, and that he was protected from prosecution by § 18-8, was held erroneous as an expression of opinion on the credibility of the testimony. *State v. Love*, 229 N. C. 99, 47 S. E. (2d) 712.

d. Miscellaneous Remarks.

Instruction as to Un corroborated Testimony in Perjury Trial.—While the un corroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with this section. *State v. Hill*, 223 N. C. 711, 28 S. E. (2d) 100.

Instruction as to Title to Land.—Plaintiffs and defendant claimed the locus under respective state grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the locus. The court held that an instruction that by the two grants introduced in evidence title had been shown out of the state, must be held for error as an expression of opinion that the grant under which plaintiffs claim was valid and that it had been located to cover the land in question. *Davis v. Morgan*, 228 N. C. 78, 80, 44 S. E. (2d) 593.

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Considerations of the Charge.

The Object of Instructions.—

In accord with original. See *State v. Friddle*, 223 N. C. 258, 25 S. E. (2d) 751.

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858.

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict, and this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

Exception Must Be Specific.—

An exception to the court's charge, that it failed to state in a plain and correct manner the evidence and law arising thereon as provided in this section, is a broadside exception and presents no question for decision. *Baird v. Baird*, 223 N. C. 729, 28 S. E. (2d) 225.

Objection to a charge for not complying with this section must state specifically how the charge failed to measure up to the requirements of this section. *Steele v. Coxe*, 225 N. C. 726, 727, 36 S. E. (2d) 288.

And Based on Proper Assignment of Error.—An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. *State v. Muse*, 230 N. C. 495, 53 S. E. (2d) 529.

Exception and Assignment of Error.—An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. *State v. Britt*, 225 N. C. 364, 34 S. E. (2d) 408.

Errors Should Be Pointed Out before Verdict.—Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight. *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884.

Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823, 824.

Evidence towards Which Instruction Directed Must Appear.—The law requires the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The function of the appellate court on review is to determine whether this has been adequately done, and it cannot perform that office in the absence of the evidence toward which the instruction was directed. *Shepherd v. Dollar*, 229 N. C. 736, 51 S. E. (2d) 311.

Where Record Shows Charge Was Correct and No Objection Made.—Where it was stipulated in the record that the court correctly charged the jury on all phases of the case in compliance with this section, and the issues submitted were not objected to by defendants, it was held that the verdict of the jury must be upheld. *Ward v. Smith*, 223 N. C. 141, 142, 25 S. E. (2d) 463.

B. Explanation Required.

1. In General.

Rule Stated.—

In accord with 1st paragraph in original. See *State v. Friddle*, 223 N. C. 258, 25 S. E. (2d) 751.

In accord with 4th paragraph in original. See *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352.

In accord with 6th paragraph in original. See *McNeill v. McNeill*, 223 N. C. 178, 25 S. E. (2d) 615.

It is the duty of the court to explain the law and apply it to the testimony in the case. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797.

It is the duty of the court to state the evidence "to the extent necessary" and to declare and explain the law as it

relates to the pertinent aspects of the testimony offered. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212.

The chief object contemplated in this section is for the court to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved. *Stern Fish Co. v. Snowden*, 233 N. C. 269, 63 S. E. (2d) 557.

It is the duty of the judge, under the provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378, 379.

Discretion of the Court.—The manner in which the trial judge shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. (2d) 601.

Contention of Parties.—

It is not required by this section, or other statute, that the contentions of the litigants be stated at all although it is found to be a convenient method of integrating and presenting to the jury the subjects for consideration; and there is no rule making it mandatory. "When, however, the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant." *In re Will of West*, 227 N. C. 204, 209, 41 S. E. (2d) 838.

2. Statement of Evidence.

In General.—

This section sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law, though the decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892.

Under this section the judge is not required to state the evidence given in the case "except to the extent necessary to explain the application of the law thereto." *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101.

The court is required to state the evidence to the extent necessary to explain the law applicable thereto and to give equal stress to the respective contentions of the parties. *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528.

Recapitulation Unnecessary.—

In accord with 1st paragraph in original. See *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823, 824.

Failure of the court to charge the jury as to the degree of circumstantial proof required to convict is not error, charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. *State v. Shoup*, 226 N. C. 69, 36 S. E. (2d) 697.

Where Judge Was under Impression Certain Material Facts Were Introduced in Evidence.—Where the court in its charge called material facts to the attention of the jury, supported by the statement of the court, as well as of counsel, that it was under the impression that they were introduced in evidence, and they were not withdrawn but were to be rejected and not considered only in the event the jury did not so recall, it was held that this was not a statement "in a plain and correct manner" of "the evidence given in the case." *Curler v. Scales*, 223 N. C. 788, 791, 28 S. E. (2d) 576.

Special Request to Present Subordinate Feature of Evidence.—Where, in stating the evidence and explaining the law arising thereon, the court deals with all substantial and essential features of the evidence, an objection thereto on ground that the charge failed to comply with this section cannot be sustained, it being the duty of the objecting party if he desired some subordinate feature to have been presented to the jury to have aptly tendered request for special instructions thereon. *Metcalfe v. Foister*, 232 N. C. 355, 61 S. E. (2d) 77.

3. Explanation of Law.

In General.—

In accord with 1st, 2nd and 3rd paragraphs in original. See *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 102, 44 S. E. (2d) 601.

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. *State v. Herbin*, 232 N. C. 318, 59 S. E. (2d) 635.

Effect of 1949 Amendment.—The duty of the court to de-

clear and explain the law arising on the evidence remains unchanged by the present provisions of this section as rewritten by the General Assembly in 1949. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212.

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484; *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case and the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness, upon the issues made by the evidence. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

Judge Must Explain Law as It Relates to Testimony.—The judge must declare and explain the law as it relates to the various aspects of the testimony offered. By this it is meant that this section requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

Charge Containing Only Declarations of Abstract Principles.—The court is required to charge the law arising on the evidence given in the case, and a charge containing declarations of abstract principles of law without relating them to the evidence, is insufficient. *Collingwood v. Winston-Salem Southbound Ry. Co.*, 232 N. C. 724, 62 S. E. (2d) 87.

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This "calls for instructions as to the law upon all substantial features of the case." *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921, citing *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484; *State v. Fain*, 229 N. C. 644, 50 S. E. (2d) 904.

The court need not read a statute to the jury in order to comply with the requirements of this section, a simple explanation of the law without the involvement of the technical language of a statute being preferable. *Batchelor v. Black*, 232 N. C. 314, 59 S. E. (2d) 817.

And it is not sufficient merely for the court to read a statute bearing on the issues in controversy and leave the jury unaided to apply the law to the facts. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212.

The action of the trial court in reading pertinent statutes regulating the operation of motor vehicles upon the public highways, without applying the law to the evidence in the case fails to comply with this section. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212.

Removal of Doubt Engendered by Conflicting Statements of Counsel.—That counsel are permitted to argue the legal aspects of the case serves to emphasize the necessity of compliance with the provisions of this section. When counsel avail themselves of this right the court should explain and apply the law so as to remove any doubt in respect thereto which may have been engendered by conflicting statements of counsel. The duty to set at rest any question as to the law of the case rests upon the judge and not the jury. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797.

Party Must Request.—

Where the court in its charge substantially complies with this section, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43.

Where no special instructions were prayed and no omission of evidence, nor error in the stating thereof, was called to the attention of the court by defendant, and the court directed the attention of the jury to the principal questions which were under investigation and explained the law applicable thereto, it was held that this was all required of him by this section in the absence of prayers for special instructions. *Ellis v. Wellons*, 224 N. C. 269, 273, 29 S. E. (2d) 884.

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the

evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. *State v. Brooks*, 228 N. C. 68, 44 S. E. (2d) 482.

Effect of Failure to Request Special Instructions.—A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instruction to that effect. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

Where the trial court substantially complies with plaintiff's oral request for instructions in respect to evidence of previous statements made by plaintiff tending to contradict plaintiff's evidence on the stand, the failure to give more particular instructions on this aspect will not be held for error. *Grant v. Bartlett*, 230 N. C. 658, 55 S. E. (2d) 196.

C. Illustrative Cases.

Erroneous Charge on Issue of Damages.—Where the principal denies that he made any contract with plaintiff broker for the sale of lumber and denies he had received any orders through plaintiff, the burden is on plaintiff not only to prove the brokerage contract but to prove each order upon which he asserts his right to commission and it is error for the court to charge on the issue of damages that there was no controversy as to the amount and that if the jury should find the plaintiff's evidence to be true to answer that issue in the sum demanded by plaintiff. *Haines v. Clark*, 230 N. C. 751, 55 S. E. (2d) 693.

Instruction that jury should be guided by the law as argued by counsel if not inconsistent with rules of law laid down by the court, but to follow the instructions given by the court if argument of counsel was inconsistent therewith, must be held for reversible error. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797.

Failure to Give Elaborate Definition of Slander.—In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with this section, and it appeared that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander. *Gillis v. Great Atlantic, etc., Tea Co.*, 223 N. C. 470, 27 S. E. (2d) 283.

Instruction as to Fornication and Adultery.—

Upon trial in the superior court, after appeal by the male defendant only from a conviction of fornication and adultery in the recorder's court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that this defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to do so, they should bring in a verdict of not guilty, substantially complies with this section in the absence of request for further instructions. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136.

Age and Chastity of Prosecutrix in Prosecution for Carnal Knowledge.—Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of this section, and an exception thereto will be sustained. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Force Used in Defense of Home—Eviction of Trespassers.—When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to do so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. *State v. Spruill*, 225 N. C. 356, 34 S. E. (2d) 142.

Right of Self-Defense.—Where state's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the fail-

ure of court to instruct the jury upon the right of self-defense was not error. *State v. Deaton*, 226 N. C. 348, 38 S. E. (2d) 81.

Violent Character of Deceased.—Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. *State v. Riddle*, 228 N. C. 251, 45 S. E. (2d) 366.

Specific Intent in Robbery.—In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410.

Recommendation of Life Imprisonment.—In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

Law of Circumstantial Evidence.—The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the state relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. *State v. Hicks*, 229 N. C. 345, 49 S. E. (2d) 639.

Legal Effect of Alibi.—Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Failure to Submit Question of Guilt of Less Degrees of Crime.—Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by this section. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53.

Instruction to Disregard Previous Inconsistent Instructions.—The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858.

Necessity for Defining Legal Status of Party.—The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that §§ 20-146 and 20-149 applied. Defendant contended that intestate was a pedestrian and was required by § 20-174(d), to push the handcart along the extreme left-hand side of the highway. It was held that an instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Inadvertently Omitting Issue as to Title in Charge in Replevin Action.—In action in replevin to recover possession of an automobile judge charged jury that if they were satisfied by the greater weight of the evidence of the truth of it, they should find in favor of the plaintiff or answer the first issue as to ownership "yes." It was held that charge inadvertently ignored the fact that title to the ownership of car was still at issue, and may be taken as assuming the fact that it was sufficiently proved or as expressing an opinion on the weight and sufficiency of the evidence. *James v. James*, 226 N. C. 399, 38 S. E. (2d) 168, 170.

Contradictory Evidence.—In civil action for damages resulting from collision between vehicles of plaintiff and defendant at street intersection, where the city maintained traffic signals, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering intersection on a red light, it was held that court erred, in its charge to jury, by failing to state

in a plain and concise manner the evidence offered as to right of way between the parties and to declare and explain the law applicable thereto. *Stewart v. Yellow Cab Co.*, 225 N. C. 654, 36 S. E. (2d) 256.

Burden of Proof.—Where defendant was seeking a monetary recovery of plaintiffs the burden of proving the right to such recovery was upon defendant, and failure to instruct jury as to this issue was error. *Crain v. Hutchins*, 226 N. C. 642, 39 S. E. (2d) 831, 832.

Negligence.—An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence" instead of "would constitute negligence," was held not an expression of opinion in violation of this section, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 413, 42 S. E. (2d) 593.

Reckless Driving.—An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient in a prosecution under § 20-140, to meet the requirements of this section since it fails to explain the law or apply the law to the facts as the jury should find them to be. *State v. Flinchem*, 228 N. C. 149, 44 S. E. (2d) 724.

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of this section. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Mere Reading of Speed Regulations Is Insufficient. The mere reading of the statutory speed regulations, laid down in § 20-141, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions to the evidence adduced, is insufficient to meet the requirements of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Respondent Superior.—In *Webb v. Statesville Theatre Corp.*, 226 N. C. 342, 38 S. E. (2d) 84, it was held that the failure of court to charge jury upon the principle of respondent superior was not error as failing to declare and explain the law arising on the evidence where defendant admitted the relationship of master and servant and the case was tried throughout on that theory.

Requirement of Section Complied with.—The charge of the court in *State v. Thompson*, 227 N. C. 19, 40 S. E. (2d) 620, was held to have complied with the requirement of this section. See also, *Glosson v. Trollinger*, 227 N. C. 84, 40 S. E. (2d) 606.

Applied in *State v. Fain*, 229 N. C. 644, 50 S. E. (2d) 904.

§ 1-181. Requests for special instructions.—(a) Requests for special instructions to the jury must be—

- (1) In writing,
- (2) Entitled in the cause, and
- (3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the cause. (Rev., s. 538; Code, s. 415; C. C. P., s. 239; 1951, c. 837, s. 6; C. S. 565.)

Editor's Note.—

The 1951 amendment rewrote this section and inserted the provisions of subsection (b).

Time Limit for Request for Instructions.—

Requests for special instructions must be in before the beginning of the argument. *State v. Morgan*, 225 N. C. 549, 35 S. E. (2d) 621.

Defendant's request for special instruction to jury while the solicitor was arguing the case and after counsel for defendant had completed his argument was too late to form a basis for a successful exceptive assignment of error. *Id.*

Section Mandatory.—It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by this section. *State v. Spencer*, 225 N. C. 608, 35 S. E. (2d) 887.

A Party Must Aply Tender Written Request for Special Instructions.—

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. *Woods v. Roadway Express*, 223 N. C. 269, 25 S. E. (2d) 856.

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. *State v. Hicks*, 229 N. C. 345, 49 S. E. (2d) 639.

The supreme court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. *Kearney v. Thomas*, 225 N. C. 156, 33 S. E. (2d) 871.

§ 1-183. Motion for nonsuit.—When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may appeal to the Supreme Court and it shall not be necessary for him to take exception to the ruling of the court allowing the motion. If the motion is refused and the defendant does not choose to introduce evidence the jury shall pass upon the issues in the action and the defendant may on appeal to the Supreme Court urge as ground for reversal the trial court's denial of his motion without the necessity of the defendant having taken exception to such denial. If the defendant introduces evidence he thereby waives any motion for dismissal or judgment as of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. Defendant, however, may make such motion at the conclusion of the evidence of both parties irrespective of whether or not he made a motion for dismissal or judgment as of nonsuit theretofore. If the motion is allowed the plaintiff may appeal to the Supreme Court and it shall not be necessary for him to take exception to the ruling of the court allowing the motion. If the motion is refused and after the jury has rendered its verdict the defendant may on appeal urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence without the necessity of the defendant having taken exception to such denial. (Rev., s. 539; 1897, c. 109; 1899, c. 131; 1901, c. 594; 1951, c. 1081, s. 1; C. S. 567.)

Editor's Note.—

The 1951 amendment rewrote this section. Section 3 of the amendatory act, ratified April 14, 1951, provided: "This act shall be in full force and effect from and after its ratification and shall apply to all civil actions or special proceedings instituted after the ratification of this act and to all pending civil actions and special proceedings in which the plaintiff shall not have rested his case at the time of the ratification of this act."

As to note on evidence to be considered on motion to nonsuit, see 23 N. C. Law Rev. 243.

This section is procedural and does not affect the principles of demurrer to the evidence as it existed at common law. *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 128, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.).

Section Strictly Followed.—Since the allowance of a motion for judgment as of nonsuit is based upon purely statutory grounds, the requirement of this section must be strictly followed. *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123.

Effect of Motion.—By its motion for a compulsory nonsuit under this section, and its prayers for a directed verdict, the defendant challenges the sufficiency of the evidence to support the cause of action alleged. *Potter v. National Supply Co.*, 230 N. C. 1, 51 S. E. (2d) 908.

Time to Make Motion to Nonsuit.—

In accord with 2nd paragraph in original. See *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123.

Failure to Renew Motion at Close of All the Evidence.—Defendant, by offering evidence and failing to renew his motion for judgment as in case of nonsuit at the close of all the evidence, as provided in this section, waives his exception to the denial of such motion entered when plaintiff first rested his case. *Hawkins v. Dallas*, 229 N. C. 561, 50 S. E. (2d) 561.

Motion to Nonsuit Is a Question of Law.—A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided by the court. *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463; *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316; *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757.

Court Does Not Pass on Credibility or Weight of Evidence.—In ruling on a motion for nonsuit, the court does not pass on the credibility of the witnesses or the weight of the testimony. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

Contradictions in plaintiff's evidence do not justify nonsuit. *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791.

Admissions and Inferences.—

When the defendant moves for a compulsory nonsuit, he admits, for the purpose of the motion, the truth of all facts in evidence tending to sustain the plaintiff's claim; and the plaintiff is entitled to have the court, in ruling on the motion, give him the benefit of every favorable inference which the testimony fairly supports. *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757.

Plaintiff's Evidence Is Taken as True.—In passing upon a motion for a compulsory nonsuit under this section, the court must assume the evidence in behalf of the plaintiff to be true and must extend to the plaintiff the benefit of every fair inference which can be reasonably drawn therefrom by the jury in favor of the plaintiff. *Hughes v. Thayer*, 229 N. C. 773, 51 S. E. (2d) 488; *Higdon v. Jaffa*, 231 N. C. 242, 56 S. E. (2d) 661.

The evidence favorable to plaintiffs is taken as true. *Stokes v. Edwards*, 230 N. C. 306, 52 S. E. (2d) 797.

And All Conflicts Resolved in His Favor.—In determining whether or not the trial court erred in denying the defendant's motion for an involuntary nonsuit or in refusing to direct a verdict for the defendant in conformity to its requests for instructions, the supreme court must take it for granted that the evidence tending to support the plaintiff's claim is true and must resolve all conflicts of testimony in his favor. *Potter v. National Supply Co.*, 230 N. C. 1, 51 S. E. (2d) 908. See *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

Plaintiff Entitled to Benefit of Inferences.—

In accord with 1st paragraph in original. See *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160; *Ross v. Atlantic Greyhound Corp.*, 223 N. C. 239, 25 S. E. (2d) 852; *Lindsey v. Speight*, 224 N. C. 453, 31 S. E. (2d) 371; *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209; *Buckner v. Wheelton*, 225 N. C. 62, 33 S. E. (2d) 480; *Grier v. Phillips*, 230 N. C. 672, 55 S. E. (2d) 485; *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791.

Evidence Erroneously Admitted.—A motion for a compulsory nonsuit under this section does not present for review errors committed by the court in admitting testimony. Upon such motion all relevant evidence admitted by the court must be accorded its full probative force, irrespective of whether it has been erroneously received. *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316.

When Demurrer Entered at Close of All the Evidence.—

—When considering defendant's demurrer to the evidence entered at the close of all the evidence, that is, motion for judgment as in case of nonsuit entered at that stage of the trial, pursuant to provisions of this section, the evidence is to be taken in the light most favorable to plaintiff, and he is to be given the benefit of every fact or inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence. *Garrett v. Garrett*, 229 N. C. 290, 49 S. E. (2d) 643.

Consideration of Defendant's Evidence.—

In accord with 1st paragraph in original. See *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283; *Pappas v. Crist*, 223 N. C. 265, 25 S. E. (2d) 850; *Buckner v. Wheelton*, 225 N. C. 62, 33 S. E. (2d) 480.

Upon a motion as of nonsuit so much of defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by plaintiff may be considered, but that which tends to establish another and a different state of facts or which tends to

contradict or impeach the evidence offered by plaintiff is to be disregarded. *Atkins v. White Transp. Co.*, 224 N. C. 688, 690, 32 S. E. (2d) 209; *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

The court will consider only the evidence which tends to support plaintiff's claim upon a motion for judgment as of nonsuit at the close of all evidence. *Stell v. First Citizens Bank, etc., Co.*, 223 N. C. 550, 27 S. E. (2d) 524.

Nonsuit in Favor of Party Having Burden of Proof.—A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him. *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742.

There is but one exception to this rule: When the plaintiff offers sufficient evidence to constitute a prima facie case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered. *Id.*

In the absence of such evidence or admissions on the part of the plaintiff it does not matter how clearly the matter appears in the evidence of the defendant, decision is not thereby shifted to the court as a matter of law, since the question of credibility still remains. *Id.*

When Motion Should Be Disallowed.—

If upon the whole evidence there are inferences tending to support plaintiff's case, nonsuit is properly refused. *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791.

The court cannot properly enter a compulsory nonsuit and thereby withdraw the case from the jury if the facts are in dispute, or if the testimony in relation to the facts is such that different conclusions may reasonably be reached thereon. *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757.

Upon a motion for judgment as of nonsuit, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning*, 224 N. C. 75, 29 S. E. (2d) 21.

Where defendants failed to lodge their motion for dismissal of the action and for a judgment as in case of nonsuit when plaintiff had introduced his evidence and rested his case, the granting of such a motion after all the evidence on both sides was in was unauthorized and error. *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123.

Where Only Some of Defendants Move for Nonsuit.—When the only defendants who have any interest adverse to plaintiff move for judgment of nonsuit, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable. *Daughtry v. Daughtry*, 223 N. C. 528, 27 S. E. (2d) 446.

Exception Considered on Appeal.—

In accord with 2nd paragraph in original. See *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209.

Evidence Sufficient for Jury—Illustrative Cases.—

In an action for damages for personal injuries to plaintiff by negligence of defendant, where plaintiff's evidence tended to show that she was driving her car, at 20 to 25 miles per hour, south on a city street towards its intersection with another street running east and west, and that defendant's truck was approaching the intersection from the west and was 125 feet distant from the intersection when plaintiff entered same, and said truck, running at 45 miles per hour, struck plaintiff's car, which was within 4 feet of the curb on the south side of the intersection, knocking it 70 feet into a stone wall across the street, motion of nonsuit was properly denied. *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642.

In an action to recover damages for fraud where plaintiff, a woman 65 years of age and of no business experience and of limited education, sued defendant, a banker of large financial interests, and plaintiff's evidence tended to show that she consulted defendant, an old and intimate friend, about investing money and he invested her money in 1929 in a note secured by real estate mortgage, over four years past maturity, defendant assuring plaintiff that the note was "as good as gold," that he would look out for its collection and payment of taxes on the property and that the principal could be collected at any time, whereas the property was not worth the debt and defendant did not collect the interest regularly and allowed the realty securing the note to be sold for taxes in 1942, without notice to plaintiff, and plaintiff suffered a heavy loss from the investment, the allowance of motion for nonsuit was error. *Small v. Dorsett*, 223 N. C. 754, 28 S. E. (2d) 514.

In an action to recover damages for malpractice against a physician, where all the evidence tended to show that plaintiff, a patient in defendant's hospital and admittedly in an insane condition, got under her bed and could not be removed by the nurses, whereupon defendant took hold of her arm and pulled so hard that he heard the bone break, and failed to reduce or immobilize the fracture in a reasonable time, but sent for her father and delivered her to him, declining to treat her further, there was error in sustaining a motion for judgment as of nonsuit. *Groce v. Myers*, 224 N. C. 165, 29 S. E. (2d) 553.

Where plaintiff, a passenger in defendant's motor vehicle, brought an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather, about seven-thirty a. m., suddenly left the road, ran down an embankment and turned over, causing the plaintiff's injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, was held properly refused. *Boone v. Matheny*, 224 N. C. 250, 29 S. E. (2d) 687.

In an action for damages, based on abuse of process, where plaintiff's evidence tended to show that defendant procured the issuance of a warrant against plaintiff for disposing of mortgaged property and offered not to have it served if plaintiff would pay the amount claimed by defendant, and that, after plaintiff's arrest under the warrant and imprisonment, defendant offered to procure his release if plaintiff would pay or work out the amount claimed, there is sufficient evidence of motive and intent to carry the case to the jury and motion for judgment as of nonsuit was properly denied. *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884.

In an action to recover damages for the wrongful death of plaintiff's intestate caused by a collision between the automobile of plaintiff's intestate and a truck of defendant, where plaintiff's evidence tended to show, though no eyewitness testified, that defendant's truck was being operated on its left-hand side of the highway and the coupe of plaintiff's intestate was being operated on its right-hand side of the highway, at the time of the collision between the two vehicles going in opposite directions, there was error in the allowance of a motion for judgment as of nonsuit at the close of plaintiff's evidence. *Wyrick v. Ballard, etc., Co.*, 224 N. C. 301, 29 S. E. (2d) 900.

In divorce action, where evidence for plaintiff tends to show a living separate and apart for the statutory period and that plaintiff has resided in the state for six months, and defendant offered evidence of wrongful abandonment and recrimination, there is error in allowing a motion for judgment as of nonsuit. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492.

Upon a charge of fornication and adultery, it was held that there was sufficient evidence to support a conviction and motion for nonsuit was properly denied. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136.

Upon a warrant charging defendant with violating § 60-136, which regulates the occupancy of seats by white and colored passengers in street cars or other passenger vehicles or motor buses, it was held that there was sufficient evidence for jury and motion for nonsuit was properly denied. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121.

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, motion by defendants for judgment as of nonsuit held properly denied. *Hobbs v. Queen City Coach Co.*, 225 N. C. 323, 34 S. E. (2d) 211.

When Nonsuit Proper—Illustrative Cases.—

Where defendant was confronted with an emergency, and the evidence did not disclose a failure on his part to exercise ordinary care in the operation of his automobile under the circumstances, defendant's motion for judgment as of nonsuit was held properly granted. *O'Kelly v. Barbee*, 223 N. C. 282, 284, 25 S. E. (2d) 750.

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff alleged negligence by defendant, it was held that defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help, and since plaintiff on his own evidence, was guilty of contributory negligence, judgment of nonsuit was proper. *Morrison v. Cannon Mills Co.*, 223 N. C. 387, 26 S. E. (2d) 857.

Where there was not sufficient evidence to be submitted to the jury of plaintiff being down or in an apparently helpless condition on the track, so that the engineer or

fireman saw, or, by the exercise of ordinary care in keeping a proper lookout, could have seen such helpless condition of plaintiff in time to have stopped the train before striking him, there was no error in the ruling of the court, and the judgment as in case of nonsuit was properly entered. *Battle v. Southern Ry. Co.*, 223 N. C. 395, 26 S. E. (2d) 859.

In an action for the negligent injury by defendant of plaintiff, who drove a tractor, to which were attached plows, on the railroad track of defendant, where it stalled and plaintiff remained on the track in an attempt to get the tractor and plows across, after he had seen defendant's train approaching, until injured, judgment of nonsuit was proper. *Wilson v. Southern Ry. Co.*, 223 N. C. 407, 26 S. E. (2d) 900.

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, it was held that there was no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* did not apply, and judgment as of nonsuit was proper. *Smith v. Whitley*, 223 N. C. 534, 27 S. E. (2d) 442.

Where in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, and there was no evidence of fraud or undue influence, motion for judgment as of nonsuit was properly allowed. *Gerringer v. Gerringer*, 223 N. C. 818, 28 S. E. (2d) 501.

Where the evidence tended to show that defendant's servant, contrary to orders and without his master's knowledge, took deceased and other boys, also employees of defendant, at their request, on a pleasure ride in the master's truck, and, while so engaged on the public highway, the truck struck a hole and plaintiff's intestate was thrown out and killed, defendant's demurrer to the evidence should have been sustained. *Rogers v. Black Mountain*, 224 N. C. 119, 29 S. E. (2d) 203.

In action by owner of automobile against operator of a parking lot to recover for theft of the car upon the theory of bailment, where evidence tended to show that contract signed by plaintiff obligated defendant to permit the vehicle to occupy parking space in the lot, that ordinarily driver parked and removed car herself, taking the keys with her, but that on the occasion in question the driver left vehicle at the gas pumps on the lot with the keys in the car, and that car was taken by a person unknown, it was held the evidence was insufficient to show a bailment and motion for judgment as of nonsuit was proper. *Freeman v. Myers Automobile Service Co.*, 226 N. C. 736, 40 S. E. (2d) 365.

Motion for judgment as of nonsuit held proper in action for injuries to plaintiff caused by defendant's "magic eye" doors. *Watkins v. Taylor Furnishing Co.*, 224 N. C. 674, 31 S. E. (2d) 917; in action to recover double indemnity on insurance policy. *McLain v. Shenandoah Life Ins. Co.*, 224 N. C. 837, 32 S. E. (2d) 592; in action to set up and foreclose alleged lost mortgage. *Downing v. Dickson*, 224 N. C. 455, 31 S. E. (2d) 378; in action for wrongful death. *Eldridge v. Church Oil Co.*, 224 N. C. 457, 31 S. E. (2d) 381; in action for damages from negligent operation of defendant's automobile. *Ray v. Post*, 224 N. C. 665, 32 S. E. (2d) 168; in divorce action. *Dudley v. Dudley*, 225 N. C. 83, 33 S. E. (2d) 489; *Moody v. Moody*, 225 N. C. 89, 33 S. E. (2d) 491; in broker's action for commission. *Bolich-Hall Realty, etc., Co. v. Disher*, 225 N. C. 345, 34 S. E. (2d) 200.

Contributory Negligence.—

In accord with 3rd paragraph in original. See *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642; *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209.

In accord with 3rd and 7th paragraphs in original. See *Daughtry v. Cline*, 224 N. C. 381, 30 S. E. (2d) 322; *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

"It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them." *Bailey v. North Carolina R. Co.*, 223 N. C. 244, 247, 25 S. E. (2d) 833, quoting *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137.

Contributory negligence is an affirmative defense which the defendant must plead and prove (§ 1-139). Nevertheless, a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under this section when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

The court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury or of the decedent in actions for wrongful death if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307; *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538; *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190.

Evidence to the effect that as plaintiff, an invited guest, was in the act of seating himself and closing the door, defendant suddenly put the car in motion, causing the door to swing violently back and hit plaintiff on the forehead, was held sufficient to be submitted to the jury on the question of the actionable negligence of defendant in failing to ascertain whether the plaintiff was in a position of safety before she put the car in motion and therefore nonsuit on the ground of contributory negligence was properly denied. *Spivey v. Newman*, 232 N. C. 281, 39 S. E. (2d) 844.

Same—Evidence Sufficient to Sustain Nonsuit.—

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and "slammed on his brakes," as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, defendants' motion for judgment as of nonsuit on the ground of contributory negligence should have been sustained. *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209.

Evidence Sufficient to Deny Nonsuit.—

In an action for alleged damages to plaintiff's stock of goods by the willful, wanton, and malicious negligence of defendants, employees of the state highway commission, where the plaintiff's evidence tended to show that defendants, in charge of a sweeper and blower in working the highway near plaintiff's store, without warning, so used the sweeper and blower as to throw such a cloud of dirt and filth through the open windows and doors of the store that the merchandise therein was badly damaged, there is ample evidence for the jury and allowance of motion for judgment as of nonsuit, was erroneous. *Miller v. Jones*, 224 N. C. 783, 32 S. E. (2d) 594.

Plaintiff's evidence was to the effect that intestate had an unobstructed view along the track upon which the train approached for only 600 feet, that intestate looked and listened immediately before traveling onto the crossing, that the crossing was in bad repair and the car stalled on the track, and was hit by the speeding train seven seconds after its approach could have been reasonably apprehended. It was held that defendant railroad company's motion to nonsuit on the ground of contributory negligence should have been denied notwithstanding defendants' testimony that plaintiff drove upon the track in the path of the oncoming train and defendants' photographic evidence showing an entirely different situation at the crossing. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307.

In an action by the owner of a lot in a residential subdivision to enjoin another owner from using his lot for business purposes, nonsuit was improperly entered on plaintiff's evidence tending to show that all of the lots in the subdivision had been sold with restrictions according to a general scheme of developing the property exclusively for residential purposes and that there had not been a single violation of the restrictive covenants anywhere within the subdivision. *Higdon v. Jaffa*, 231 N. C. 242, 56 S. E. (2d) 661.

Setting Aside after Refusal of Motion.—

In accord with original. See *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219.

Refusal of defendant's motion for nonsuit and his failure to offer evidence should not be considered as conclusively establishing the credibility of plaintiff's evidence. *Grady v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760.

Applied, in action for loss of services and consortium of wife as result of taxi accident, in *Watkins v. Grier*, 224 N. C. 339, 30 S. E. (2d) 223; in action for wrongful death of child by drowning in pond created by a stopped drain, in *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. (2d) 503; in action for damages sustained from falling on step down from lobby into defendant's store, in *Benton v. United Bank Bldg. Co.*, 223 N. C. 809, 28 S. E. (2d) 491; in action to set aside deed on ground of incompetency, duress and undue influence, in *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 310. For other cases applying section, see *Bourne v. Southern Ry. Co.*, 225 N. C. 43, 33 S. E. (2d) 239; *Chason v. Marley*, 224 N. C. 844, 32 S. E. (2d) 652; *Stafford v. Yale*, 228 N. C. 220, 44 S. E. (2d) 872; *Sisson v. Royster*, 228 N. C. 298, 45 S. E. (2d)

351; Penland v. Southern R. Co., 228 N. C. 528, 46 S. E. (2d) 303; Bethune v. Bridges, 228 N. C. 623, 46 S. E. (2d) 711; Hahn v. Perkins, 228 N. C. 727, 46 S. E. (2d) 854; Fanelty v. Rogers Jewelers, 230 N. C. 694, 55 S. E. (2d) 493; Venus Lodge v. Acme Benevolent Ass'n, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446.

Cited in Montgomery v. Blades, 223 N. C. 331, 26 S. E. (2d) 567; Nebel v. Nebel, 223, N. C. 676, 28 S. E. (2d) 207; Perry v. Herrin, 225 N. C. 601, 35 S. E. (2d) 883; McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511; Jenkins v. City Coach Co., 231 N. C. 208, 56 S. E. (2d) 571; Foster v. Burton, 231 N. C. 714, 58 S. E. (2d) 742; Hooper v. Maryland Cas. Co., 233 N. C. 154, 63 S. E. (2d) 128.

§ 1-184. Waiver of jury trial.

Reference.—

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. Sparks v. Sparks, 232 N. C. 492, 61 S. E. (2d) 356.

Judge's Findings of Fact Are Conclusive.—Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. Poole v. Gentry, 229 N. C. 266, 49 S. E. (2d) 464; Burnsville v. Boone, 231 N. C. 577, 58 S. E. (2d) 351.

When an action is tried by the court without a jury pursuant to the provisions of this section, the findings of fact of the trial judge are conclusive, and are not subject to review on appeal, in the absence of exceptions that they are not supported by evidence. Cannon v. Blair, 229 N. C. 606, 50 S. E. (2d) 732.

Applied in Griggs v. Stoker Service Co., 229 N. C. 572, 50 S. E. (2d) 914. Mitchell v. Barfield, 232 N. C. 325, 59 S. E. (2d) 810.

§ 1-185. Findings of fact and conclusions of law by judge.

Findings of Judge Conclusive.—

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. Fish v. Hanson, 223 N. C. 143, 25 S. E. (2d) 461.

Art. 20. Reference.

§ 1-189. Compulsory.

II. GENERAL CONSIDERATION.

The court has discretionary power to grant or refuse a reference in those cases coming within the purview of this section and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. Veazey v. Durham, 231 N. C. 354, 57 S. E. (2d) 375.

This section stipulates that "the court may . . . direct a reference" in certain classes or types of cases. It is manifest that the verb "may" is used in this connection in its ordinary sense as implying permissive, and not mandatory, action or conduct. Veazey v. Durham, 231 N. C. 354, 57 S. E. (2d) 375.

How Right of Trial by Jury Preserved.—In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Right Waived by Failure to Follow Appropriate Procedure.—The right to trial by jury in civil cases may be waived, and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904.

While a compulsory reference, under this section, does not deprive either party of his constitutional right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Party Should Tender Issues of Fact Arising on Pleadings.—A party should not tender issues as to questions of fact presented by his exceptions to the findings of the referee, but should tender issues of fact arising on the pleadings and relate his issues of fact to his exceptions and to the

findings of fact by number, and demand a jury trial as to each of such issues. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79, wherein compulsory reference was ordered in special proceeding to establish boundary line.

Jury Trial on Issues.—

In reference cases the trial by jury is restricted by this section to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904.

When Findings of Referee Are Conclusive.—On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. Williamson v. Spivey, 224 N. C. 311, 30 S. E. (2d) 46.

Pleas of Estoppel, Laches and Adverse Possession.—Where in an action to redeem land sold under foreclosure under order of court and for an accounting, defendants plead estoppel, laches and title by adverse possession for seven years under color (§ 1-38), it is error for the court to resolve the pleas in bar against defendant and order a compulsory reference, since defendants are entitled to an adequate hearing on their pleas in bar before reference can properly be ordered. Grady v. Parker, 230 N. C. 166, 52 S. E. (2d) 273.

The referee's findings of fact and conclusions of law are not competent as evidence in the trial of the issue raised by exceptions to the report. Cherry v. Andrews, 231 N. C. 261, 56 S. E. (2d) 703.

III. ILLUSTRATIVE CASES.

Where Examination of Long Account Required.—Where the verdict of the jury establishes that plaintiff is entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, the ascertainment of the amount requires an examination of a long account, and the court is empowered to order a compulsory reference to determine such amount. Parker v. Helms, 231 N. C. 334, 56 S. E. (2d) 659.

An action in ejectment in which defendants plead the statutes of limitation of twenty and seven years (§§ 1-38 to 1-40) is not subject to compulsory reference under this section. Williams v. Robertson, 233 N. C. 309, 63 S. E. (2d) 632.

Cited in Leach v. Quinn, 223 N. C. 27, 25 S. E. (2d) 170.

§ 1-193. Testimony reduced to writing.

Cited in Bakami Constr., etc., Co. v. Thomas, 230 N. C. 516, 53 S. E. (2d) 519.

§ 1-194. Report; review and judgment.

When Decisions Reviewable.—

In accord with 2nd paragraph in original. See Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528.

Upon appeal in a consent reference the superior court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or in part and substitute other findings supported by the evidence. Ramsey v. Nebel, 226 N. C. 590, 39 S. E. (2d) 616.

§ 1-195. Report, contents and effect.

Cited in Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528.

Art. 21. Issues.

§ 1-196. Defined.

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. Cherry v. Andrews, 231 N. C. 261, 56 S. E. (2d) 703.

§ 1-198. Of fact.

Error to Submit Issue Not Raised by Pleadings.—

It is error for the court to submit to the jury issues not arising on the pleadings. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 1-200. Form and preparation.

Editor's Note.—

In accord with 2nd paragraph in original. See Griffin v. United Services Life Ins. Co., 225 N. C. 684, 686, 36 S. E. (2d) 225.

Ordinarily the form and number of issues in a civil ac-

tion are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to jury in the form tendered. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 686, 36 S. E. (2d) 225.

When Sufficient.—

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 686, 36 S. E. (2d) 225, citing *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45.

Case Remanded for Insufficient Issues.—In an action to recover on policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to valid delivery and payment of first premium, and court declined to submit such issues or to submit others of similar import, which would be determinative of questions presented, supreme court will remand for new trial. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 36 S. E. (2d) 225.

Art. 22. Verdict and Exceptions.

§ 1-201. General and special.

Applied in *State v. Lovelace*, 228 N. C. 186, 45 S. E. (2d) 48.

§ 1-206. Exceptions.

3. In any trial or hearing no exception need be taken to any ruling upon an objection to the admission of evidence. Such objection shall be deemed to imply an exception by the party against whom the ruling was made. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; 1949, c. 150; C. S. 590.)

Editor's Note.—The 1949 amendment added subsection 3. As subsections 1 and 2 were not changed they are not set out. For brief comment on amendment, see 27 N. C. Law Rev. 435.

Time for Exceptions to Instructions.—In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial but may set out exceptions for the first time in his case on appeal. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

Misstatements of the evidence or the contentions of the parties arising on the evidence must be called to the trial court's attention in time to afford opportunity for correction, and in event the request for correction is refused, appellant must note an immediate exception to such ruling in order to present the matter for review on appeal. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

An exception to a charge by the court must point out some specific part thereof as erroneous, and an exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

§ 1-207. Motion to set aside.

Discretion of the Judge.—

In accord with 1st paragraph in original. See *Ziglar v. Ziglar*, 226 N. C. 102, 36 S. E. (2d) 657; *King v. Byrd*, 229 N. C. 177, 47 S. E. (2d) 856; *Carolina Coach Co. v. Central Motor Lines*, 229 N. C. 650, 50 S. E. (2d) 909.

In accord with 6th paragraph in original. See *Allgood v. Shelton*, 224 N. C. 754, 32 S. E. (2d) 350.

Where motion to set aside a verdict involves no question of law or legal inference, the motion is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review in the absence of abuse of discretion. *Pruitt v. Ray*, 230 N. C. 322, 53 S. E. (2d) 876.

Stated in *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219.

Cited in *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.).

Art. 23. Judgment.

§ 1-208. Defined.

Definition of Final Judgment.—

In accord with original. See *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Definition of Interlocutory Order.—

In accord with 1st paragraph in original. See *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is "subject to change by the court during the pendency of the action to meet the exigencies of the case." *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

Cited in *Moore v. Moore*, 224 N. C. 552, 31 S. E. (2d) 690; *Seawell v. Purvis*, 232 N. C. 194, 59 S. E. (2d) 572.

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

Judgment by default may be entered only when defendant has not answered, and therefore when answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Judgment of Voluntary Nonsuit.—

Under this section, conferring on the clerks of the superior court authority to enter judgments of nonsuit, the authority is limited to judgments of voluntary nonsuit. *Moore v. Moore*, 224 N. C. 552, 555, 31 S. E. (2d) 690.

In wife's action against husband for separate maintenance and counsel fees, judgment entered by clerk, upon findings of fact that parties had resumed marital relations, dismissing the action as of voluntary nonsuit, was a nullity and void upon its face, as it was manifestly not voluntary. *Id.*

Jurisdiction of clerk of superior court to order foreclosure of mortgages is given by this section, in connection with § 1-211, and is an incidental jurisdiction conditioned upon the rendition by the clerk of a judgment by default for the debt secured by the mortgage in favor of the mortgage creditor and against the mortgage debtor. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31, 38.

Cited in *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-211. By default final.

I. IN GENERAL.

A. Failure to File Answer.

Effect of Failure Promptly to Take Judgment by Default.—

In action on note and to foreclose trust deed failure of plaintiffs to move promptly for judgment after they are entitled by lapse of prescribed time or the expiration of the time allowed by consent order does not work a discontinuance. *King v. Rudd*, 226 N. C. 156, 37 S. E. (2d) 116.

Where the plaintiff is entitled to judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil issue docket for trial. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Applied in *Hodges v. Hodges*, 227 N. C. 334, 42 S. E. (2d) 82.

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266; *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219; *Lindsey-Robinson & Co. v. Jones*, 230 N. C. 756, 55 S. E. (2d) 80.

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Sum Certain or Computable.—

Under this section, default judgment can be made only upon a failure to answer a verified pleading where the sum due is "capable of being ascertained by computation," and where it is necessary to hear evidence to ascertain title to mortgage debt and the amount of the debt, clerk is without jurisdiction to order foreclosure. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31, 38.

IV. REAL PROPERTY.

Suit Pending for Further Relief.—Where the clerk enters a default judgment declaring plaintiff to be the owner of an undivided interest in lands in accordance with the facts alleged in the complaint, but does not appoint a receiver or make provision for an accounting as prayed for, the judgment is conclusive as to title, but the suit remains pending in the superior court for such further relief to which plain-

tiff may be entitled consequent upon the adjudication of title. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 252, 59 S. E. (2d) 829.

VI. SETTING ASIDE.

Sections 1-272, 1-273 and 1-274 Are Inapplicable.—Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-212, since the jurisdiction of the judge under this and the following section is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

For Jurisdiction of Judge to Set Aside Default Judgment Is Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

Judgment Is Valid Lien When No Attack Made.—Where a judgment by default final instead of by default and inquiry has been rendered for goods sold and delivered on open account, the judgment is not void but is merely irregular, and when no attack is made upon it at the hearing, it constitutes a valid lien upon the lands of the judgment debtor. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-212. By default and inquiry.

The effect of the failure of the defendants to appear in response to the summons and complaint personally served upon them was to establish pro confesso in the plaintiff a right of action of the kind properly pleaded in the complaint and thereupon the plaintiff became entitled as a matter of law to recover on the cause of action set out in his complaint. *Presnell v. Beshears*, 227 N. C. 279, 280, 41 S. E. (2d) 835.

Appeals from Judgments Entered by Clerk.—Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-211, since the jurisdiction of the judge under this and the preceding section is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

Jurisdiction of Judge Is Concurrent and Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

Cited in *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67; *Russell v. Edney*, 227 N. C. 203, 41 S. E. (2d) 585; *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219; *Lindsey-Robinson & Co. v. Jones*, 230 N. C. 756, 55 S. E. (2d) 80.

§ 1-214. Judgment by default where no answer filed; record; force; docket.

When answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Cited in *Presnell v. Beshears*, 227 N. C. 279, 41 S. E. (2d) 835.

§ 1-215. Time for rendering judgments and orders.

Under the former statute, providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, a judgment rendered by the clerk on any other day was void. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521.

§ 1-215.1. Judgments or orders not rendered on Mondays validated.

Legislature Cannot Validate Void Judgment.—This section was directly intended to validate judgments not rendered on Monday as required by the former statute. However, it is well understood that the legislature has no power to validate a void judgment. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521.

§ 1-215.2. Time within which judgments or orders signed on days other than Mondays may be

attacked.—From and after the 30th day of September, 1951, no action shall be brought or no motion in the cause shall be made to attack any judgment or order of any clerk of the superior court by reason of such judgment or order having been signed by such clerk of the superior court on any day other than Monday. (1951, c. 895, s. 1.)

§ 1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.—From and after the 30th day of September, 1951, any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the order of confirmation of sale was made on a day other than Monday is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1951, c. 895, s. 2.)

§ 1-218. Rendered in vacation.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. (Rev., s. 559; Code, s. 230; 1871-2, c. 3; 1937, c. 361; 1949, c. 719, s. 2; C. S. 598.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out the former second paragraph relating to confirmation of judicial sales.

Cited in *Grady v. Parker*, 228 N. C. 54, 44 S. E. (2d) 449.

§ 1-220. Mistake, surprise, excusable neglect.

I. IN GENERAL.

Editor's Note.—See notes to §§ 1-211, 1-212.

As to opening default judgment for negligence of attorney, see 26 N. C. Law Rev. 84.

This section applies only when the judgment is rendered according to the course and practice of the court. And a motion in a cause to set aside a default judgment on the ground that the time it was rendered by the clerk a duly filed answer appeared of record was held not a motion to set aside for surprise and excusable neglect. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Applies Only to Matters of Fact.—

The relief given under this section, on the ground of "mistake, inadvertence, surprise or excusable neglect" refers to mistake of fact and not of law. *Rierson v. York*, 227 N. C. 575, 578, 42 S. E. (2d) 902.

However, the larger part of the court's jurisdiction under this section is invoked under "excusable neglect" where there is neither mistake of law nor fact. Id.

So a judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact or law. Id.

The surprise contemplated by this section is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Excusable Neglect and Meritorious Defense.—

Court held without discretion to vacate default judgment except upon a finding of fatal irregularity or excusable neglect and meritorious defense. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140.

Where the answer and record disclose a meritorious defense the denial of the trial court of a motion to set aside the judgment under this section because defendant had offered no evidence of a meritorious defense, is erroneous. *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133.

Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station in compliance with § 1-97(1) but the ticket saleswoman failed to notify defendant, and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside

the judgment upon a showing of meritorious defense. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39.

Excusable Neglect Alone Is Insufficient.—A party, moving in apt time under the provisions of this section, to set aside a judgment taken against him, on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. *Hanford v. McSwain*, 230 N. C. 229, 53 S. E. (2d) 84. See *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133.

Existence of a meritorious cause of action is a prerequisite to relief on motion to vacate former judgment. *Craver v. Spough*, 226 N. C. 450, 38 S. E. (2d) 525, 527.

Meritorious Defense Must Be Shown.—

Where defendant was indicted for breaking and entering, and upon his failure to appear judgment nisi was entered against him and his surety, and sci. fa. issued and served upon defendant surety, and upon return of the sci. fa. judgment absolute was entered against defendant and his surety, and subsequently, defendants made a motion to set the judgment aside because of surprise and excusable neglect alleging that they had been misled because the motion for judgment absolute did not appear for hearing on the printed calendar of cases to be heard at that term, it was held that the motion was properly denied since defendants made no allegation that they had any meritorious defense, and none was presented on the hearing of their motion. *State v. O'Connor*, 223 N. C. 469, 27 S. E. (2d) 88.

The question of meritorious defense becomes immaterial in the absence of sufficient showing of excusable neglect. *Johnson v. Sidbury*, 225 N. C. 208, 210, 34 S. E. (2d) 67; *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266, 267.

Surprise at the action of the court did not constitute ground for setting aside judgment under this section. This section does not afford relief from a judgment on the ground of mistake of law. *Crissman v. Palmer*, 225 N. C. 472, 35 S. E. (2d) 422.

Where deed with the notary's certificate showed his commission expired before date of deed and grantee had been in possession thereof approximately twenty years, and the plaintiff in his reply, on file some time before the trial, had denied that there had been a valid registration of the deed under which defendant claimed mineral interests, and the record of the commissioning of notaries was at all times available to grantee, he could not claim surprise or inadvertence because record showed notary's commission had not expired. *Id.*

Applied in *Craver v. Spough*, 226 N. C. 450, 38 S. E. (2d) 525; *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227.

Quoted in *Southern Butane Gas Corp. v. Bullard*, 232 N. C. 730, 62 S. E. (2d) 335.

Cited in *Tomlins v. Cranford*, 227 N. C. 323, 42 S. E. (2d) 100.

II. THE RELIEF.

Discretionary with the Judge.

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise or excusable neglect is a legal discretion and reviewable. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902.

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

Where Summons Regularly Served.

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there is no evidence in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute. *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67.

Failure to File Proper Answer.—Where there are no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect, it is error for court to allow defendant's motion to set aside judgment. *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266, 267.

Sickness of Attorney.—Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, is sufficient to support the court's order setting aside a default judgment under this section. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902.

B. Neglect of Counsel.

Where Attorney Withdraws.

The withdrawal of defendant's attorney from the case by leave of court when the case is called for trial constitutes "surprise" within the meaning of this section. *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133.

Failure of Defendant's Attorney to File Answer.

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. *Gunter v. Dowdy*, 224 N. C. 522, 31 S. E. (2d) 524.

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect under this section. *Id.*

IV. PLEADING AND PRACTICE.

Appeal from Order of Clerk.

The clerk of the superior court has authority to relieve a party from an irregular judgment or one taken against him by mistake, inadvertence, surprise, or excusable neglect; and, on appeal in such cases from the clerk, the judge shall hear and pass upon the matter de novo, finding the facts and entering his judgment accordingly. *Gunter v. Dowdy*, 224 N. C. 522, 31 S. E. (2d) 524.

Discretion of Judge Not Reviewable on Appeal.

Where, on a motion to set aside a default judgment under this section the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the supreme court being bound by the findings when supported by evidence. *Rierson v. York*, 227 N. C. 575, 576, 42 S. E. (2d) 902.

Findings of Court Conclusive.—Upon motion to set aside a judgment under this section, the findings of the court as to excusable neglect and meritorious defense are conclusive on appeal when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. *Hanford v. McSwain*, 230 N. C. 229, 53 S. E. (2d) 84. See *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133.

§ 1-222. For and against whom given; failure to prosecute.

The rule that a new and independent action may not be set up by cross-action does not preclude the owner of property sued for damage to adjacent property caused by excavation for the erection of a building, from joining and setting up the primary liability of his contractor on the theory that the contractor was guilty of positive and active negligence producing the damage, since such cross-action is relevant and germane to the main action, and is also sanctioned by this section. *Wright's Clothing Store v. Ellis Stone & Co.*, 233 N. C. 126, 63 S. E. (2d) 118.

Cross-Action Relating to Plaintiff's Claim.—Where a retailer of an article, sold in the original package, is sued for breach of implied warranty that the product is wholesome and fit for human consumption, he may have his distributor joined as a codefendant and file cross-action against the distributor on the ground that the distributor had impliedly warranted to it that the article was fit for human consumption and that the distributor is primarily liable for injury resulting from breach of this warranty, since the cross-action relates to plaintiff's claim and is based upon an adjustment of that claim, and the defendants are entitled to have their ultimate rights as between themselves determined in the one action. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822.

§ 1-226. When limited by demand in complaint.

Relief Limited to That Demanded Where No Answer Filed.—

Superior court had power, by a default judgment, to declare debtor's deed conveying realty to wife fraudulent and void as to suing creditors, but court acted in excess of its jurisdiction when it ordered wife to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title, where there was nothing in the cause of action stated by the creditors which ren-

dered such action either necessary, or upon which it could be properly based. Lane v. Becton, 225 N. C. 457, 35 S. E. (2d) 334, 336.

as provided in this section. First-Citizens Bank, etc., Co. v. Parker, 232 N. C. 512, 61 S. E. (2d) 441.

Effect of § 45-28.—An execution sale held less than ten days before the expiration of ten years after the rendition of the judgment was held ineffective, since under former § 45-28, the sale under execution could “not be deemed to be closed under ten days,” in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the ten year period. The contentions that the sheriff’s deed related back to the day of the sale, and that delay on the part of the sheriff in executing the deed or making formal return could not adversely affect the rights of the purchaser, were inapposite. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 1-228. Regarded as a deed and registered.

Section Is Partially Superseded by § 47-27.—The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded, as to judgments in eminent domain proceedings, by the later enactment of chap. 148, Public Laws of 1917 (§ 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531. See also note to § 49-19.

§ 1-232. Judgment roll.

Cited in Williams v. Trammell, 230 N. C. 575, 55 S. E. (2d) 81.

§ 1-234. Where and how docketed; lien.

I. IN GENERAL.

Order of Resale of Realty Does Not Prolong Life of Lien.—Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, is raised and resales are ordered successively under the provision of § 45-28 by which the final sale so ordered takes place on a date after the expiration of said period of ten years, such orders do not have the effect of prolonging the statutory life of lien of the judgment within the provisions and meaning of this section. Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627. For comment on this decision, see 22 N. C. Law Rev. 146.

Applied in McCollum v. Smith, 233 N. C. 10, 62 S. E. (2d) 483.

§ 1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.—In all cases where the governing authority of any county has caused the instruments or documents filed for record in the office of the clerk of the superior court of such county to be recorded by any system involving the use of microfilm or by the use of any microphotographic system or by any system of photographic recording, it shall be lawful for the clerk of the superior court to keep a record or docket book for the purpose of entering on same payment or payments, credit or satisfaction, assignments or releases in whole or in part of any judgment which has heretofore been recorded by any photographic process above mentioned. For this purpose, the form of such docket or record book shall be substantially as follows:

“.....Superior Court Cancellation, Assignment, Transfer or Release of Judgments, etc. I (We)do hereby certify that that certain judgment docketed in Judgment Docket, at page, filed day of, 19...., Case No., wherein is (are) Plaintiff(s) and is (are) Defendant(s) has been fully satisfied, released and discharged together with all costs, and interest, Signed in the presence of Assistant-Deputy Clerk of the Superior Court of County

Any entries of payment, credits or satisfaction made on such record or docket book, in substantially the form above mentioned, shall be good and valid payments, credits or satisfactions in all respects as if the same had been duly entered on the original judgment docket before the recording of same by the photographic process or system above mentioned. The clerk of the superior court shall have the authority to forward certificates to the clerk of the superior court of each county to whom a transcript of said judgment has been sent to the same extent and for all the purposes provided in G. S. 1-239, and all payments, credits or satisfactions entered in said docket book or record shall be valid to the same extent as if the same had been entered in the regular judgment docket in accordance with the provisions of G. S. 1-239. (1951, c. 774.)

§ 1-240. Payment by one of several; transfer to trustee for payor.

Editor’s Note.— For a discussion of this section in connection with Federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

A docketed judgment fixes the lien and the debtor cannot escape it. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

B. Priorities.

Between Judgment and Subsequent Mortgage.—

A docketed judgment has priority over a subsequently recorded mortgage. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed. In General.—

The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

V. LOSS OF THE LIEN.

In General.—

The lien of a judgment, created upon real estate by the provisions of this section, is for a period of ten years from the date of the rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627.

Lien Is Lost if Sale Not Made in Ten Years.—This section and § 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. North Carolina Joint Stock Land Bank v. Bláná, 231 N. C. 26, 56 S. E. (2d) 30.

Deduction from Ten-Year Period.—The period during which a judgment debtor is in the bankrupt court and his property in custodia legis should be deducted from the ten-year period

This Section Creates a New Right.—

At common law no right of action for contribution existed between or among joint tort-feasors who were in pari delicto, thus the right is statutory, and its use necessarily depends upon the terms of this section. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 649, 27 S. E. (2d) 736.

Its Purpose.—

The intent and purpose of this section is to permit a defendant, who has been sued in a tort action, to bring into the action for purpose of enforcing contribution, any joint tort-feasor, against whom the plaintiff could have originally brought suit in the same action. *Wilson v. Massagee*, 224 N. C. 705, 713, 32 S. E. (2d) 335.

The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they have accrued, so that all matters in controversy growing out of the same subject of action may be settled in one action, though the plaintiff in the action may be thus delayed in securing his remedy. *Evans v. Johnson*, 225 N. C. 238, 34 S. E. (2d) 73.

But it was not the purpose and it is not the effect of this section to create a cause of action in contribution between joint tort-feasors when the *lex loci delicti* gives none. *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

Right Must Be Enforced According to Form of Section.—

The right to contribution comes from this section, and it is to be enforced according to the form of this section. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269.

What Must Be Alleged and Proved to Enforce Contribution.—

Where a judgment has been obtained, arising out of a joint tort, and only one of the joint tort-feasors was a party and judgment against him alone, to enable such judgment debtor to recover, under this section, against the other joint tort-feasor, he must allege and prove, in an action *de novo*, the negligence of his alleged joint tort-feasor, the defendant, and his duty of contribution. *Charlotte v. Cole*, 223 N. C. 106, 25 S. E. (2d) 407.

Right Is Not One of Subrogation.—This section gives to one joint tort-feasor, who is sued, the right to bring in others jointly liable with him and to require them to contribute proportionately to the payment of any judgment which the plaintiff may recover, but this would not include the right to step into the plaintiff's shoes and prosecute any claim which he might have against them. The right sought to be enforced is one of contribution, and not one of subrogation. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269.

It Is Not Dependent on Plaintiff's Continued Right to Sue.—The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736, 149 A. L. R. 1183. It is the joint tort and common liability to suit which gives rise to the right to "enforce contribution" under this section. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269.

Enforcement of Right of Contribution after Payment of Judgment.—The right of contribution may be enforced after the liability to the injured party has been extinguished by payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736.

Assignment to Third Party Necessary to Claim Subrogation.—See *Stewart v. Parker*, 225 N. C. 551, 35 S. E. (2d) 615.

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors.

—In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of this section to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

Original Defendant Cannot Bring in Injured Third Persons.—This section neither directly nor by implication authorizes the bringing in of persons who are apprehended to have been damaged or injured, at the convenience of the tort-feasor in determining the right to contribution in one trial. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

On Allegation That Plaintiff Was Joint Tort-Feasor.—

This section provides that a tort-feasor sued by the injured person may bring in joint tort-feasors as parties defendant, but it does not authorize a party sued for negligent injury to join injured third persons upon its allegation that plaintiff was a joint tort-feasor in causing the calamity resulting in injury to himself and such third parties, and thus force such injured third parties to prosecute their claims in plaintiff's action. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45.

Presumption as to Authority of Attorney to Transfer Judgment.—Upon the transfer on the judgment docket of a judgment by an attorney of record, acting under authority expressly granted by this section, nothing appearing to indicate that the attorney received less than full value, there is a presumption that such attorney acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside to prove that no such authority existed. *Harrington v. Buchanan*, 224 N. C. 123, 29 S. E. (2d) 344.

Defendants May File Cross Action to Join Others as Joint Tort-Feasors.—

This section means that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons or corporations, who are jointly and severally liable, and not all who are so jointly and severally liable as joint tort-feasors have been made parties defendant, those who are sued may at any time before judgment, upon motion, have the other such joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. *Wilson v. Massagee*, 224 N. C. 705, 710, 32 S. E. (2d) 335.

Apart from the Statute.—This section authorizes the joinder of a third party as a joint tort-feasor for the purpose of enforcing contribution, but before this provision was inserted in the statute in 1929 it was settled law that a third party could be brought in on allegation of primary liability. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822.

Upon equitable principles, apart from the provisions of this section, a person who is sued alone, and whose negligence is passive, is entitled to join and to set up by cross-action the liability of the person whose positive and active negligence produced the injury, in order that the primary and secondary liability as between the joint tort-feasors may be adjudged in the one action, notwithstanding that both are equally liable to the injured person. *Wright's Clothing Store v. Ellis Stone & Co.*, 233 N. C. 126, 63 S. E. (2d) 118.

Where Plaintiff's Complaint Demurrable.—Plaintiff sued the receivers of a corporation and an individual as joint tort-feasors. The demurrer of the receivers on the ground that the complaint did not allege a cause of action against them was sustained, and plaintiff did not amend or appeal. Thereafter, the individual defendant filed a cross-action for contribution against the receivers, alleging facts sufficient for their joinder under this section. It was held that the judgment sustaining the demurrer adjudicated only that the complaint was insufficient to state a cause of action against the receivers as joint tort-feasors, and does not estop the individual defendant from setting up the cross-action against them as joint tort-feasors, since the individual defendant was not the "party aggrieved" by the determination of that issue of law between the plaintiff and the receivers, and had no right to appeal therefrom, and no power to force plaintiff to amend or appeal. *Canestrino v. Powell*, 231 N. C. 190, 56 S. E. (2d) 566.

Burden Is on Original Defendant to Prove Cross Action.—Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 534.

Joinder before Loss Suffered.—A retailer, sued by a customer for breach of implied warranty that a product, sold in the original package, is wholesome and fit for human consumption, is not required to wait until he has suffered loss before joining the wholesaler or distributor upon the theory that the wholesaler or distributor is primarily liable upon the warranty. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822.

Improper Joinder.—Where the driver of a car is under the control and direction of a passenger who is the employee driver's superior, any negligence of the driver is imputable to the passenger and bars any action by the passenger against him, and therefore in an action by the passenger against the owner of the other vehicle involved in the collision, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose

of contribution as a joint tort-feasor. *Bass v. Ingold*, 232 N. C. 295, 60 S. E. (2d) 114.

Propriety of Joinder Determined by Pleadings of Original Defendant.—Where an additional defendant is brought in by the original defendant for the purpose of contribution under this section, the propriety of such joinder will be determined by the pleadings of the original defendant, unaffected by any pleadings filed by plaintiff. *Bass v. Ingold*, 232 N. C. 295, 60 S. E. (2d) 114.

Joint and Several Judgment in Favor of Plaintiff Held Error.—Where plaintiffs seeks no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 834.

Res Judicata.—The owner and driver of a car recovered judgment against the driver and owner of a truck for damages sustained in a collision upon verdict of the jury establishing, inter alia, that the plaintiff therein was not guilty of contributory negligence. Thereafter the passengers in the car sued the owner and driver of the truck for injuries sustained in the same collision. It was held that as between the parties thereto the prior judgment was res judicata on the question of whether the driver of the car was guilty of negligence contributing to the collision, and bars the right of the owner and driver of the truck from joining the driver of the car as a joint tort-feasor in the second action, § 1-240, notwithstanding that the plaintiffs in the second action were not parties thereto or bound by the judgment, and could have joined the driver of the car as a party defendant had they so elected. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269.

Where plaintiffs seek no relief from party joined by original defendants for purpose of contribution under this section, the liability of such defendant to plaintiffs is not at issue on the trial, and judgment for the original defendants does not preclude plaintiffs from later suing the party so joined. *Powell v. Ingram*, 231 N. C. 427, 57 S. E. (2d) 315.

Interstate Commerce.—Where plaintiff sues a defendant under § 28-173, alleging that her intestate was killed by the negligence of the defendant, the defendant cannot join as a joint tort-feasor under this section, a railway company by which the plaintiff's intestate was employed in interstate commerce. *Wilson v. Massagee*, 224 N. C. 705, 709, 32 S. E. (2d) 335.

Cited in *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27; *McIntyre v. Monarch Elevator, etc., Co.*, 230 N. C. 539, 54 S. E. (2d) 45; *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N. C. 270, 56 S. E. (2d) 689; *Essick v. Lexington*, 232 N. C. 200, 60 S. E. (2d) 106.

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.—No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Editor's Note.—

The 1945 amendment added the proviso.

Art. 24. Confession of Judgment.

§ 1-247. When and for what.—A judgment by

confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.

A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgments in proceedings for such alimony or support. (Rev., s. 580; Code, s. 570; C. C. P., s. 325; 1947, c. 95; C. S. 623.)

Editor's Note.—The 1947 amendment added the second paragraph. The apparent purpose of the amendment is expressly to authorize a simplified method for converting an agreement between the parties into a judgment enforceable by contempt. Under prior case law, such an agreement, if made a part of a consent judgment in the sense that the judgment itself orders the payments to be made, can give rise to contempt proceedings; but if the consent judgment merely approves the agreement, without expressly ordering the payments to be made, it is enforceable only as a contract. 25 N. C. Law Rev. 389.

Art. 25. Submission of Controversy without Action.

§ 1-250. Submission, affidavit, and judgment.

Applied in *Blades v. Norfolk Southern Ry. Co.*, 224 N. C. 32, 29 S. E. (2d) 148, with reference to sufficiency of deed to convey title; *Prince v. Barnes*, 224 N. C. 702, 32 S. E. (2d) 224; *Schaeffer v. Haseltine*, 228 N. C. 484, 46 S. E. (2d) 463; *Neill v. Bach*, 231 N. C. 391, 57 S. E. (2d) 385; *Weathers v. Bell*, 232 N. C. 561, 61 S. E. (2d) 600; *Sedberry v. Parsons*, 232 N. C. 707, 62 S. E. (2d) 88.

Cited in *State Distributing Corp. v. Travelers Indemnity Co.*, 224 N. C. 370, 30 S. E. (2d) 377 (dis. op.); *Howland v. Stitzer*, 231 N. C. 528, 58 S. E. (2d) 104; *Pack v. Newman*, 232 N. C. 397, 61 S. E. (2d) 90.

Art. 26. Declaratory Judgments.

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

In General.—

While proceedings under this article have been given a wide latitude, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. *Brandis v. Trustees of Davidson College*, 227 N. C. 329, 331, 41 S. E. (2d) 833.

Necessity for a Controversy.—

This article does not authorize courts to give advisory opinions or academic legal guidance, but actions for declaratory judgments will lie for an adjudication of rights, status or other legal relations only when there is an actual or existing controversy between the parties. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404.

The court acquires jurisdiction to render a declaratory judgment as to those matters concerning which it can be inferred from a liberal interpretation of the pleading that there is an actual or existing controversy between the parties. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404.

Same—Failure of Adverse Party to Demur.—A litigant seeking a declaratory judgment must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties, but the adverse party cannot confer jurisdiction on the court by failing to demur to an insufficient pleading. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404.

Sales of Interests of Infants in Land.—The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale

would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, *quære?* *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404.

Marketability of Land.—The declaratory judgment act does not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404.

Question of Insurer's Liability.—Insurer who issued liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of Uniform Declaratory Judgment Act to determine whether the truck was being used at time of accident within exception clause of policy. *Lumber Mut. Cas. Ins. Co. v. Wells*, 225 N. C. 547, 35 S. E. (2d) 631.

Action to Determine Right to Easement.—An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. *Carver v. Leatherwood*, 230 N. C. 96, 52 S. E. (2d) 1.

Applied in Oxford Orphanage v. Kittrell, 223 N. C. 427, 27 S. E. (2d) 133; **Williams v. Rand**, 223 N. C. 734, 28 S. E. (2d) 247; **In re Battle**, 227 N. C. 672, 44 S. E. (2d) 212; **Buffaloe v. Barnes**, 226 N. C. 313, 38 S. E. (2d) 222; **Paterson v. Brandon**, 226 N. C. 89, 36 S. E. (2d) 717, 163 A. L. R. 1150; **First Security Trust Co. v. Henderson**, 236 N. C. 649, 39 S. E. (2d) 804; **Williams v. Johnson**, 228 N. C. 732, 47 S. E. (2d) 24; **Ward v. Black**, 229 N. C. 221, 49 S. E. (2d) 413; **First Nat. Bank v. Brawley**, 231 N. C. 687, 58 S. E. (2d) 706; **Elmore v. Austin**, 232 N. C. 13, 59 S. E. (2d) 205; **Williamson v. Williamson**, 232 N. C. 54, 59 S. E. (2d) 214.

§ 1-254. Courts given power of construction of all instruments.

In action by executor under Declaratory Judgment Act for construction of will and to determine validity of assignment of interest in legacy, motion to dismiss for want of jurisdiction denied where the controversy over the validity of assignment was originally brought into court by executor, as it is entitled to have matter determined in present proceeding. *First Security Trust Co. v. Henderson*, 226 N. C. 649, 39 S. E. (2d) 804.

An action to modify or reform the provisions of a judgment may not be maintained under the Declaratory Judgment Act. *Howland v. Stitzer*, 231 N. C. 528, 58 S. E. (2d) 104.

Cited in First Security Trust Co. v. Henderson, 225 N. C. 567, 35 S. E. (2d) 694.

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

A proceeding may not be maintained under this and other sections of this article by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity. *Brandis v. Trustees of Davidson College*, 227 N. C. 329, 41 S. E. (2d) 833. For comment upon the decision in this case, see 26 N. C. Law Rev. 69.

Applied in Citizens Nat. Bank v. Corl, 225 N. C. 96, 33 S. E. (2d) 613.

§ 1-256. Enumeration of declarations not exclusive.

The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. *Brandis v. Trustees of Davidson College*, 227 N. C. 329, 331, 41 S. E. (2d) 833.

§ 1-261. Jury trial.

Question of Insurer's Liability.—Where insurer alleged exclusion from liability on policy and insured alleged coverage, and coverage was conceded unless use of vehicle was within exception clause in policy, the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. *Lumber Mut. Cas. Ins. Co. v. Wells*, 225 N. C. 547, 35 S. E. (2d) 631.

Art. 27. Appeal.

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

II. CERTIORARI.

B. General Consideration.

Substitute for Appeal.

Certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589.

"As no appeal lay, a certiorari as a substitute therefor cannot be granted." *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313, quoting *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861.

C. Illustrative Cases.

The action of a county board of education in removing a school committeeman from his office may be reviewed in the superior court by certiorari. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589.

When judgment has been entered in the recorder's court upon defendant's plea of guilty certiorari will not lie from the superior court to the recorder's court. *State v. Barber*, 232 N. C. 577, 61 S. E. (2d) 714.

D. Requirements of Application.

Mere Allegation of Fraud Is Insufficient.—In *Hunsucker v. Winborne*, 223 N. C. 650, 657, 27 S. E. (2d) 817, it was held that conceding the complaint to be a petition for writ of certiorari to review the ruling of the Municipal Board of Control in respect to the sufficiency of the signatures to a petition to change the name of a town, it fails to make proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient.

Failure to Pray That Writ of Certiorari Be Issued.—Where a verified petition of a district school committeeman alleges that the county board of education made an order purporting to remove petitioner from his office without notice and an opportunity to be heard, and contains a general prayer for relief in addition to specific prayers, it will not be held inadequate as a petition for certiorari because of its failure to specifically pray that the writ be issued. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589.

§ 1-271. Who may appeal.

Only the party aggrieved may appeal from the Superior Court to the Supreme Court. *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219.

Where no error is found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void will be dismissed, since only the party aggrieved may appeal. *In re Westover Canal*, 230 N. C. 91, 52 S. E. (2d) 225.

Appeals for Purposes of Delay.—One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of this section. *Stephenson v. Watson*, 226 N. C. 742, 40 S. E. (2d) 351.

Appeal by Garnishee and Delinquent Taxpayer.—Where a proceeding to garnish funds in a bank account belonging to a delinquent taxpayer, under § 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," within the meaning of this section and neither may prosecute an appeal. *Gill v. McLean*, 227 N. C. 201, 41 S. E. (2d) 514.

Where defendant was granted new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defendant was not the "party aggrieved" within the meaning of this section. *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211, 213.

Applied in Canestrino v. Powell, 231 N. C. 190, 56 S. E. (2d) 566.

Stated in Veazey v. Durham, 231 N. C. 357, 57 S. E. (2d) 377.

§ 1-272. Appeal from clerk to judge.

Section Does Not Apply Where Judge and Clerk Have Concurrent Jurisdiction.—This section and §§ 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, have no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233.

Review of Ruling Where Clerk Had Original Jurisdiction.—In order to entitle the judge of the Superior Court to re-

view a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by this section must be followed. *Muse v. Edwards*, 223 N. C. 153, 25 S. E. (2d) 460.

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In re *Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302.

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

Cross Reference.—As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

§ 1-274. Duty of clerk on appeal.

Cross Reference.—As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

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

Judge May Determine Entire Controversy.—

Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if originally before him. *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602.

The superior court acquires jurisdiction of any special proceeding sent to it on any ground whatever from the clerk, with discretionary power in the superior court to remand, and a motion in the superior court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket, is untenable. *Plemmons v. Cutshall*, 230 N. C. 595, 55 S. E. (2d) 74.

Appeal from Action of Clerk in Probate Proceedings.—Upon appeal to the superior court from action of the clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and this section does not apply. In re *Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526.

Thus where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order of the clerk. *Id.*

The jurisdiction of the superior court on appeal from an order of the clerk in removing an administrator and appointing a successor is solely derivative. In re *Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223.

Appeal from Order Requiring Surviving Partners to File Bond and Inventory.—Upon the failure or refusal of surviving partners to file the bond required by § 59-74 or the inventory required by § 59-76 the clerk of the superior court may not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquires jurisdiction of the entire proceeding and the appeal is erroneously dismissed in the superior court on the ground of want of jurisdiction. In re *Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223.

Appointment of Receiver for Partnership.—While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under § 59-77 when the surviving partners have failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding does acquire jurisdiction to appoint such receiver. In re *Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223.

Answer Filed Too Late Permitted to Remain of Record.—Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquires jurisdiction of the entire cause and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919.

Applied in *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845.

§ 1-277. Appeal from superior court judge.

II. APPEAL IN GENERAL.

A. General Consideration.

Stated in *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375.

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

Final Judgment.—

In accord with 2nd paragraph in original. See *Privette*

v. Privette, 230 N. C. 52, 51 S. E. (2d) 925.

An appeal lies to the Supreme Court from a final judgment of the superior court. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Interlocutory Orders.—

In accord with 2nd paragraph in original. See *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925.

In accord with 8th paragraph in original. See *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925.

An appeal does not lie to the Supreme Court from an interlocutory order of the superior court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Matters in Discretion of the Trial Court.—

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subject to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Motions to Strike Allegations from Pleadings and Motions.—While the supreme court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925.

Exceptions to and Motion to Strike Referee's Report.—An appeal from the overruling of exceptions to the report of the referee and to the overruling of the motion that the entire evidence reported by the referee be stricken because not signed by the witnesses, § 1-193, will be dismissed as premature. *Bakami Constr., etc., Co. v. Thomas*, 230 N. C. 516, 53 S. E. (2d) 519.

C. What Supreme Court Will Consider.

Moot Question.—

Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only at the event of a favorable decision. In re *Morris' Custody*, 225 N. C. 48, 50, 33 S. E. (2d) 243.

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

§ 1-279. When appeal taken.

Applied in *Mason v. Moore County Board of Com'rs*, 229 N. C. 626, 51 S. E. (2d) 6.

Stated in *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Cited in *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

§ 1-280. Entry and notice of appeal.

Record Must Show Appeal by Party Seeking Review.—Appeal by the party seeking review is necessary to give the supreme court jurisdiction, and this fact must appear by appeal entry of record, and in the absence of appeal entry of record the purported appeal must be dismissed. The supreme court is without power to correct the record, since it can have no jurisdiction of the cause, nor may counsel correct the record proper by stipulation. *Mason v. Moore County Board of Com'rs*, 229 N. C. 626, 51 S. E. (2d) 6.

Cited in *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

§ 1-282. Case on appeal; statement, service and return.

II. GENERAL CONSIDERATIONS—COUNTERCASE.

Exceptions to Instructions.—See note under § 1-206.

Where Record Constitutes Case on Appeal.—Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364.

When Case on Appeal Essential.—In *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22, it is said: "Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be

presented only through a 'case on appeal' or 'case agreed' * * * This is the sole statutory means of vesting this court with jurisdiction to hear the appeal." *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467.

Applied in *State v. Cannon*, 227 N. C. 336, 42 S. E. (2d) 343; *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407.

Cited in *State v. Dover*, 231 N. C. 735, 61 S. E. (2d) 63.

V. SERVICE OF CASE AND COUNTERCASE.

A. Necessity and Mode of Service.

Leaving Copy in Office of Solicitor.—Service of statement of case on appeal may be made by a proper officer by leaving a copy thereof in the office of the solicitor. *State v. Daniels*, 231 N. C. 17, 56 S. E. (2d) 2.

B. Time of Service.

1. In General.

Strict Compliance Required.

Citation under this catchline in bound volume should read "182 N. C. 764, 108 S. E. 393."

VI. RELIEF GRANTED.

Exceptions Relating to Oral Testimony Treated as Nullity.—Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admitted the court correctly applied the law. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22.

Court Can Reverse Only for Error on Face of Record.—Where there is no proper statement of case on appeal the supreme court can determine only whether there is error on the face of the record proper. *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467.

§ 1-283. Settlement of case on appeal.

Appellant's Duty When Case Settled.

Where the trial court adopts appellant's statement of case with modifications, appellant is under duty to have the statement of case as modified redrafted and submitted to the judge for signature, and upon failure to do so there is no "case on appeal." *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467.

Duty of Judge.

The trial judge alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and counter case, or motion to strike out purported case on appeal. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407.

He Cannot Settle Case by Anticipatory Order.—When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22; *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467.

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such anticipatory order cannot settle or determine what evidence was adduced at the hearing. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22.

Judge May Act Only Where Counsel Disagree.—The trial court is without authority to settle a case on appeal until and unless there is a disagreement of counsel. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22.

Insertion of Testimony Presented at Hearing.—Where, upon the disagreement of the parties, the trial judge settles the case on appeal from order revoking suspension of judgment, defendant may not complain of the insertion therein of testimony presented at the hearing. *State v. Johnson*, 230 N. C. 743, 55 S. E. (2d) 690.

Failure of Judge to Settle Case.—Under this section, the judge is given power to settle the case on appeal, and ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528, 530.

Effect of Absence of Judge from District.

In accord with 1st paragraph in original. See *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407.

Retirement of Judge.

In accord with 1st paragraph in original. See *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407.

Errors and omissions in the case on appeal are corrected upon certiorari and cannot be brought upon exception taken at the time the case is settled. *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528, 530.

Applied in *State v. Cannon*, 227 N. C. 336, 42 S. E. (2d) 343.

§ 1-284. Clerk to prepare transcript.

Motion to Dismiss Allowed.—On appeal to supreme court from order dismissing motion to have respondent subjected to contempt order for refusal to pay amounts due under prior judgment, where pleadings in action in which judgment was entered were not brought up as a part of the record and such pleadings were a necessary part of the record as determining the character of the action and jurisdiction and power of the court, motion to dismiss appeal was allowed. *Campbell v. Campbell*, 226 N. C. 653, 39 S. E. (2d) 812.

Cited in *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528.

§ 1-288. Appeals in forma pauperis; clerk's fees.

—When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the supreme court, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the supreme court as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the term at which the judgment was rendered or within ten days from the expiration by law of the term, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The request for appeal shall be passed upon and granted or denied by the clerk within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the supreme court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the supreme court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (Rev., s. 597; Code, s. 553; 1889, c. 161; 1873-4, c. 60; 1907, c. 878; 1937, c. 89; 1951, c. 837, s. 7; C. S. 649.)

Editor's Note.

The 1951 amendment rewrote the second and fourth sentences.

The 1937 amendment to this section does not permit the filing of an affidavit of the party appealing or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. *Clark v. Clark*, 225 N. C. 687, 689, 36 S. E. (2d) 261.

Purpose of Section.—The statutory provision for appeals in forma pauperis is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a rea-

sonable deposit or give security for the payment of costs incurred on appeal to the supreme court. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. *Perry v. Perry*, 230 N. C. 515, 53 S. E. (2d) 457.

Section Mandatory.—

Requirements of this section, relating to appeals to supreme court from the superior court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless this section is complied with, the supreme court will take no cognizance of the case, except to dismiss it. *Clark v. Clark*, 225 N. C. 687, 36 S. E. (2d) 261.

The requirements of this section, allowing appeals in forma pauperis, are mandatory, not directory, and a failure to comply with the requirements deprives the supreme court of any appellate jurisdiction. *Williams v. Tillman*, 229 N. C. 434, 50 S. E. (2d) 33.

Affidavit Is Essential.—Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and the supreme court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. *Williams v. Tillman*, 229 N. C. 434, 50 S. E. (2d) 33.

Right of Party to Appeal In Forma Pauperis.—On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant was earning \$300.00 per month, and permitted defendant to appeal from the order in forma pauperis. The cause was remanded to the end that the court may determine whether defendant was in fact entitled to appeal in forma pauperis. *Perry v. Perry*, 230 N. C. 515, 53 S. E. (2d) 457.

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

Authority of Lower Court Terminated.—

In accord with 2nd paragraph in original. See *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

An appeal from a judgment rendered in the superior court suspends all further proceedings in the cause in that court, pending the appeal. *Harris v. Fairly*, 232 N. C. 555, 61 S. E. (2d) 619.

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577.

Appeal from Nonappealable Interlocutory Order.—When an appeal is taken to the Supreme Court from an interlocutory order of the superior court which is not subject to appeal, the superior court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375.

A litigant cannot deprive the superior court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the superior court. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375.

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.

II. GENERAL CONSIDERATIONS.

Trial De Novo.—

When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be reheard, that is, heard de novo. *Brake v. Brake*, 228 N. C. 609, 46 S. E. (2d) 643.

On appeal to the Superior Court from a judgment of a justice of the peace, defendants are entitled to a trial de novo, even when they are called and fail to appear. *Globe Poster Corp. v. Davidson*, 223 N. C. 212, 25 S. E. (2d) 557.

Cited in *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101.

V. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

When Appeal Not Dismissed.—

The statute relating to the Greensboro municipal-county court prescribed that appeals therefrom should be governed by the rules governing appeals from justices of the

peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the superior court. If it had been filed within the ten-day period, it would not have been on the superior court docket for ten days prior to the beginning of the term. It was held that appellee is not entitled to dismissal of the appeal at such term of the superior court notwithstanding appellant's failure to apply for recordari. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848.

§ 1-300. Appeal from justice docketed for trial de novo.

Cited in *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848.

Art. 28. Execution.

§ 1-302. Judgment enforced by execution.

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. *Cheshire v. Drake*, 223 N. C. 577, 583, 27 S. E. (2d) 627.

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

Payment of Fees, etc.—

In accord with original. See State Board of Education v. Gallop, 227 N. C. 599, 606, 44 S. E. (2d) 44.

§ 1-306. Enforcement as of course.

Sale Must Be Completed within Ten Years.—This section and § 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511.

Expiration of Lien of Judgment.—Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

Execution Sale Held Less than Ten Days before Expiration of Ten Years.—See notes to § 1-234.

Effect of Enjoining Execution.—A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment. *Holden v. Totten*, 228 N. C. 204, 44 S. E. (2d) 874.

§ 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, one thousand nine hundred and forty-five, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (Rev., s. 623; Code,

s. 444; 1871-2, c. 74; 1881, c. 75; 1945, c. 773; C. S. 669.)

Editor's Note.—The 1945 amendment added the second sentence.

§ 1-310. When dated and returnable.

By this statute the legislature has fixed the life of an execution. It begins on the day of the issuance of the execution, and by limitation terminates ninety days from the date of it. It may not be returned in less than forty days but must be returned in ninety days. Hence, under this statute an execution should be made returnable "not less than forty nor more than ninety days" from its date. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. *Gardner v. McDonald*, 223 N. C. 555, 557, 27 S. E. (2d) 522.

Applied in *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. (2d) 44; *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

§ 1-311. Against the person.

Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. (Rev., s. 625; Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260; 1947, c. 781; C. S. 673.)

Editor's Note.—The 1947 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out. The 1947 amendment is apparently simply a recognition of existing case law. 25 N. C. Law Rev. 390.

§ 1-313. Form of execution.

The judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the sheriff is about to make a levy. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

And No One Else Can Object if Sheriff Sells Land First.—The provisions that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor and nobody else can object if the sheriff levies on and sells land without first exhausting the judgment debtor's personalty. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

Presumption that Sheriff Levied on Realty.—Where it is not made to appear that the judgment debtors possessed personalty, attack on the sale on the ground that the sheriff failed to satisfy the judgment out of the personalty is untenable, since it will be presumed that the sheriff levied on realty because he could not find any personalty. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30.

§ 1-321. Entry of returns on judgment docket; penalty.

Applied in *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. (2d) 44.

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950. The repealed section had been amended by chapter 781 of 1947 Session Laws.

Art. 29. Execution and Judicial Sales.

§§ 1-325 to 1-328: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-329: Transferred to § 1-339.72 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-330: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-331: Transferred to § 1-339.73 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-332: Transferred to § 1-339.74 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 1-333, 1-334: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-335: Transferred to § 1-339.75 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-336: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-337: Transferred to § 1-339.49 by Session Laws 1949, c. 719, s. 2.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-338: Transferred to § 1-339.50 by Session Laws 1949, c. 719, s. 2.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-339: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

Art. 29A. Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. **Definitions.**—(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

- (1) A sale made pursuant to a power of sale
 - a. Contained in a mortgage, deed of trust, or conditional sale contract, or
 - b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or

- (2) A resale ordered with respect to any sale described in subsection (a) (1), where such original sale was not held under a court order, or

- (3) An execution sale, or
- (4) A sale ordered in a criminal action, or
- (5) A tax foreclosure sale, or
- (6) A sale made pursuant to article 4 of chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or

- (7) A sale made in the course of liquidation of a bank pursuant to G. S. § 53-20, or

- (8) A sale made in the course of liquidation of an insurance company pursuant to article 17A of chapter 58 of the General Statutes, or

(9) Any other sale the procedure for which is specially provided by any statute other than this article.

(b) As hereafter used in this article, "sale" means a judicial sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article makes it effective as of Jan. 1, 1950. Section 4 of the act provides that it shall not apply to any judicial sale when the original order of sale has been issued prior to such effective date, and § 5 provides that the present law shall remain in effect for the completion of judicial sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.2. Application of Part 1.—The provisions of Part 1 of this article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. Application of article to sale ordered by clerk; by judge; authority to fix procedural details.—(a) The procedure prescribed by this article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this article applies to all sales ordered by a judge of the superior court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G. S. § 1-339.6 restricting the place of sale of real property, and not inconsistently with G. S. § 1-339.27 (a) and G. S. § 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of the superior court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.4. Who may hold sale.—An order of sale may authorize the persons designated below to hold the sale:

- (1) In any proceeding, a commissioner specially appointed therefor; or
- (2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;
- (3) In a proceeding to sell property of a minor, the guardian of such minor's estate;
- (4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;
- (5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;
- (6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;
- (7) In a receivership proceeding, the receiver. (1949, c. 719, s. 1.)

§ 1-339.5. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. Place of public sale.—(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real prop-

erty situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. For the purposes of this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the state designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.—The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G. S. § 1-339.13 (c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.—(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G. S. § 1-339.27.

(b) The report of sale with respect to all sales of separate tracts situated in different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) The sale, and each subsequent resale, or each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of the superior court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of sale to be recorded in the office of the register of deeds of the county where such property is situated. (1949, c. 719, s. 1.)

§ 1-339.9. Sale as a whole or in parts.—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of the superior court having jurisdiction may direct specifically

- (1) That it be sold as a whole, or
- (2) That it be sold in designated parts, or
- (3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1.)

§ 1-339.10. Bond of person holding sale.—(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of the superior court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and

(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bond shall be payable to the state of

North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1.)

§ 1-339.11. Compensation of person holding sale.

—(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of the superior court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1.)

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.—

Whenever any person fails to file any report or account, as provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

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

§ 1-339.13. Public sale; order of sale.—(a) Whenever a public sale is ordered, the order of sale shall

(1) Designate the person authorized to hold the sale;

(2) Direct that the property be sold at public auction to the highest bidder;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;

(4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;

(5) Designate, consistently with G. S. § 1-339.6, the county and the place therein at which the sale is to be held; and

(6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale.

(b) The order of public sale may also, but is not required to

(1) State the method by which the property

shall be sold, pursuant to G. S. § 1-339.9;

(2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G. S. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous.

(c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.—An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G. S. § 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

§ 1-339.15. Public sale; contents of notice of sale.—The notice of public sale shall

- (1) Refer to the order authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;
- (5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and
- (6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1.)

§ 1-339.16. Public sale; time for beginning advertisement.—An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.—(a) The notice of public sale of real property shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,
- (2) And in addition thereto,
 - a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(b) When the notice of public sale is published in a newspaper,

- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and
- (2) The date of the last publication shall not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated.

(d) In addition to the foregoing, the notice of public sale shall be otherwise posted or the sale shall be otherwise advertised as may be required by the judge or clerk pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.18. Public sale; posting notice of sale of personal property.—(a) The notice of public sale of personal property, except in the case of perishable property as provided by G. S. § 1-339.19, shall be posted, at the courthouse door, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of the superior court pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.19. Public sale; exception; perishable property.—If personal property to be sold at public sale is determined by the judge or clerk of the superior court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1.)

§ 1-339.20. Public sale; postponement of sale.—

(a) A person authorized to hold a public sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

(b) Upon postponement of public sale the per-

son authorized to hold the sale shall personally, or through his agent or attorney

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof posted at the courthouse door, as provided by G. S. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of the superior court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.21. Public sale; time of sale.—(a) A public sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No public sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than 5000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

§ 1-339.22. Public sale; continuance of uncompleted sale.—A public sale commenced but not completed within the time allowed by G. S. § 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.—(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of the superior court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sale of articles of

property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G. S. § 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of the superior court having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.—(a) The person holding a public sale shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) The date, hour and place of the sale;

(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and

(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(6) The names of the purchasers;

(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and

(8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G. S. § 1-339.31 or G. S. § 1-339.32, whichever is applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G. S. § 1-339.31 or G. S. § 1-339.32, the final report required by those sections shall be subsequently filed. (1949, c. 719, s. 1.)

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first \$1000 thereof plus five per cent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together

with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require a person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the state of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1.)

Editor's Note.—The second "is" in the third line from the end of subsection (a) appears in the printed act as "if", being in all probability a typographical error.

§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold at public sale in parts, as provided by G. S. § 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.—(a) When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered.

(b) In any case in which a judge has jurisdiction of the original sale, he may provide by order that jurisdiction is retained for resale purposes, and in such case when an upset bid is submitted, the judge having jurisdiction shall make the order of resale. In all cases where the judge does not retain jurisdiction of a sale for resale purposes, and in all cases where a sale is originally ordered by a clerk, the clerk shall make the order of resale and shall have jurisdiction of the proceeding for resale purposes. Whenever the original order of sale is made by the judge, the terms of any resale ordered by the clerk shall be consistent with terms of the original order, and the final order of confirmation shall be made by the judge having jurisdiction of the proceeding.

(c) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal ad-

vertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks, but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(d) When the notice of resale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(e) When the real property to be resold is situated in more than one county, the provisions of subsection (c) of this section shall be complied with in each county in which any part of the property is situated.

(f) The person making a resale shall report the resale in the same manner as required by G. S. § 1-339.24.

(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(h) Resales may be had as often as upset bids are submitted in compliance with this article.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

§ 1-339.28. Public sale; confirmation of sale.—

(a) No public sale of real property may be consummated until confirmed

(1) By the resident judge of the district or the judge regularly holding the courts of the district, in those cases in which the sale was originally ordered by a judge, or

(2) By the clerk of the superior court in those cases in which the sale was originally ordered by the clerk.

(b) No public sale of real property of a minor or incompetent originally ordered by a clerk may be consummated until confirmed both by the clerk and by the resident judge of the district or the judge regularly holding the courts of the district.

(c) No public sale of real property may be confirmed until the time for submitting an upset bid, pursuant to G. S. § 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G. S. § 1-339.23 (a), or when the order of sale provides for such confirmation. (1949, c. 719, s. 1.)

§ 1-339.29. Public sale; real property; deed; order for possession.—(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

- (1) The authority for making the sale,
- (2) The title of the action or proceeding in which the sale was had,
- (3) The name of the person authorized to make the sale,
- (4) The fact that the sale was duly advertised,
- (5) The date of the sale,
- (6) The name of the highest bidder and the price bid,
- (7) That the sale has been confirmed,
- (8) That the terms of the sale have been complied with, and
- (9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.—(a) If an order of public sale requires the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within ten days after notice given by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale of real property is the same in every respect as is provided by this article in the case of an original public sale of real property except that the provisions of G. S. § 1-339.27 (c), (d) and (e) apply with respect to the posting and publishing of the notice of such resale.

(e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

§ 1-339.31. Public sale; report of commissioner or trustee in deed of trust.—(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G. S. § 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

- (1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;
- (2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;
- (3) When the commissioner or trustee is required to collect deferred payments,
 - a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and
 - b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall file an annual report of his receipts and disbursements, and
 - c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.—An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this article unless so directed by the judge or clerk of the superior court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.—Whenever a private sale is ordered, the order of sale shall

- (1) Designate the person authorized to make the sale;
- (2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
- (3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
- (4) Prescribe such terms of sale as the judge or clerk of the superior court ordering the sale deems advisable. (1949, c. 719, s. 1.)

§ 1-339.34. Private sale; exception; certain personal property.—(a) Notwithstanding any provisions of this article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

(1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or'

(2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or

(3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ 1-339.35. Private sale; report of sale.—(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(5) The name or names of the person or persons to whom the property was sold;

(6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and

(7) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.36. Private sale; upset bid; subsequent procedure.—(a) Every private sale of real or personal property, except a sale of personal property as provided by G. S. § 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G. S. § 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid has been submitted, except that the notice of resale of personal property need not be published in a newspaper, but shall be posted as provided by G. S. § 1-339.17. (1949, c. 719, s. 1.)

§ 1-339.37. Private sale; confirmation.—If no upset bid for property sold at private sale is submitted within ten days after the report of sale is

filed, the sale may then be confirmed, and the provisions of G. S. § 1-339.28 (a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confirmation is required or any sale held as provided by G. S. § 1-339.34. (1949, c. 719, s. 1.)

Editor's Note.—The word "or" in the next to last line of the section was no doubt inadvertently used and was intended to read "of".

§ 1-339.38. Private sale; real property; deed; order for possession.—(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale.—Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G. S. § 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.40. Private sale; final report.—(a) A commissioner or a trustee in a deed of trust authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.31.

(b) Any other person authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.32. (1949, c. 719, s. 1.)

Art. 29B. Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.—(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article makes it effective as of Jan. 1, 1950. Section 4 of the act provides that it shall not apply to any execution sale held pursuant to any execution issued prior to such effective date, and § 5 provides that the present law shall remain in effect for the completion of execution sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.42. Clerk's authority to fix procedural details.—The clerk of the superior court who issues an execution has authority to fix and deter-

mine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.44. Place of sale.—(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.45. Presence of personal property at sale required.—A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. Sale as a whole or in parts.—When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. Sale to be made for cash.—Every sale shall be made for cash. (1949, c. 719, s. 1.)

§ 1-339.48. Life of execution.—If an execution is issued on a judgment, within the time provided by G. S. § 1-306, and a sale, by authority of that execution, is commenced within the time provided by G. S. § 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G. S. § 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G. S. § 1-306. For the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G. S. § 1-339.52, or first posted in the case of personal property as required by G. S. § 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the

offense is committed. (Rev., s. 649; Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3; 1949, c. 719, s. 2; C. S. 696.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from § 1-337.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887; 1949, c. 719, s. 2; C. S. 697.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from § 1-338.

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.—The notice of sale shall

- (1) Refer to the execution authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and
- (5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

§ 1-339.52. Posting and publishing notice of sale of real property.—(a) The notice of sale of real property shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,
- (2) And in addition thereto,
 - a. If a newspaper qualified for legal advertising is published in the county; the notice shall be published in such a newspaper once a week for at least four successive weeks; but
 - b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(b) When the notice of sale is published in a newspaper,

- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and
- (2) The date of the last publication shall not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situ-

ated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1.)

§ 1-339.53. Posting notice of sale of personal property.—The notice of sale of personal property, except in the case of perishable property as specified in G. S. § 1-339.56, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the date of sale. (1949, c. 719, s. 1.)

§ 1-339.54. Notice to judgment debtor of sale of real property.—In addition to complying with G. S. § 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

- (1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or
- (2) If the judgment debtor is not found in the county,

- a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
- b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

§ 1-339.55. Notification of governor and attorney general.—When the state is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the governor and the attorney general at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the state. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.—If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other nonperishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.—If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses

incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.—(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale.

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

(b) Upon postponement of a sale, the sheriff shall

- (1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
- (2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G. S. § 1-339.52 in the case of real property or G. S. § 1-339.53 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

- (1) State that the sale is postponed,
- (2) State the hour and date to which the sale is postponed,
- (3) State the reason for the postponement, and
- (4) Be signed by the sheriff.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable, but nothing herein contained shall be deemed to relieve the sheriff of liability for the nonperformance of his official duty. (1949, c. 719, s. 1.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale

or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

§ 1-339.61. Continuance of uncompleted sale.—

A sale commenced but not completed within the time allowed by G. S. § 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.—

A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.—(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the sheriff acted;

(3) The date, hour and place of the sale;

(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(6) The name or names of the person or persons to whom the property was sold;

(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and

(8) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.64. Upset bid on real property; compliance bond.—

(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first \$1000 thereof plus five per cent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the state of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1.)

§ 1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.—

When real property is sold in parts, as provided by G. S. § 1-339.46, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.66. Resale of real property; jurisdiction; procedure.—

(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(c) When the notice of resale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The sheriff shall report the resale in the same manner as required by G. S. § 1-339.63.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

Order for Resale Does Not Prolong Life of Judgment.—Where the bid for real estate offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment, upon which the execution issued, was raised and resales were ordered successively under the provisions of a former statute of similar import, by which the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of lien of the judgment within the provisions and the meaning of § 1-234. *Cheshire v. Drake*, 223 N. C. 577, 27 S. E. (2d) 627.

§ 1-339.67. Confirmation of sale of real property.—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G. S. § 1-339.65, has expired. (1949, c. 719, s. 1.)

§ 1-339.68. Deed for real property sold; property subject to liens.—(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held. (1949, c. 719, s. 1.)

§ 1-339.69. Failure of bidder to comply with bid; resale.—(a) When the highest bidder at a sale of personal property fails to pay the amount of his bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(b) When the highest bidder at a sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the provisions of G. S. § 1-339.66 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(c) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

§ 1-339.70. Disposition of proceeds of sale.—

(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G. S. § 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. Special proceeding to determine ownership of surplus.—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G. S. § 1-339.70, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of \$200.00, or otherwise comply with the provisions of G. S. § 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1.)

Art. 29C. Validating Sections.

§ 1-339.72. Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks, and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from section 1-329.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.—All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior

to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (Rev., s. 643; Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3; C. S. 690.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, after striking out the first two paragraphs of former § 1-331 transferred it to this section.

§ 1-339.74. Sales on other days validated.—All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-332 to this section.

§ 1-339.75. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in no wise be prejudiced hereby. (Rev., s. 646; 1901, c. 742; 1949, c. 719, s. 3; C. S. 693.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-335 to this section.

§ 1-339.76. Validation of sales when payment deferred more than two years.—All sales of land conducted prior to February 10, 1927, under authority of G. S. § 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; 1927, c. 16; 1949, c. 719, s. 3; C. S. 86.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as the former last sentence of § 28-93.

Art. 30. Betterments.

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

Rule Stated.—One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. *Rogers v. Timberlake*, 223 N. C. 59, 25 S. E. (2d) 167.

Plaintiff is not confined to a common law action for improvements, if indeed such right may be enforced by inde-

pendent action. *Rhyne v. Sheppard*, 224 N. C. 734, 736, 32 S. E. (2d) 316.

§ 1-341. Annual value of land and waste charged against defendant.

Where defendants disclaim all right and title to a part of the locus, in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. *Hughes v. Oliver*, 228 N. C. 680, 47 S. E. (2d) 6.

Rents and Rental Values as Related to Betterments.—Under this section, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements. *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860.

Cited in *Anderson v. Moore*, 233 N. C. 299, 63 S. E. (2d) 641.

Art. 31. Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

Nature of Proceedings, etc.—

The proceedings under this section are in the nature of equitable proceedings. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408, 413.

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408, 413.

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation he should be required to produce them. *Id.*

Accounting of Partnership Affairs.—In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408.

§ 1-358. Disposition of property forbidden.

Section Refers to Property of Debtor at Time of Order.—When this section and § 1-360 are read either singly or as a component part of this article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670.

Prospective Earnings Are Not Property.—Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670.

§ 1-360. Debtors of judgment debtor, summoned.

Section Applies Only to Debts Due at Time of Order.—When this section and § 1-358 are read either singly or as a component part of this article it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670.

Prospective Earnings Are neither Property nor Debt.—Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670.

§ 1-362. Debtor's property ordered sold.

Earnings for Sixty Days.—

In the 1st paragraph in the original the last line should read, "debts and not for taxes due."

§ 1-368. Disobedience of orders punished as for contempt.

Paying Salary Accruing after Issuance of Order.—An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental

to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670.

Art. 32. Property Exempt from Execution.

§ 1-369. Property exempted.

I. IN GENERAL.

Editor's Note.—

For article on homestead exemption, see 29 N. C. Law Rev. 143.

Cited in *Sample v. Jackson*, 225 N. C. 380, 382, 35 S. E. (2d) 236.

A. Nature of Homestead.

Homestead Is Not Offspring of Judgment Debt.—The homestead, whether allotted on the voluntary petition of the owner or by the sheriff under execution, is not the offspring of and does not draw its life blood from a judgment debt. It stems from the constitution and "it is not the condition of the homesteader that creates the homestead condition, but the force of the constitution, attaching to and acting upon the land." *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635; *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 670.

II. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Purpose of Homestead Provision.—

The purpose of the homestead provision of the constitution is to surround the family home with certain protection against the demands of urgent creditors. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Homestead Is Vested Right.—

Title to the homestead is vested in the owner by the constitution and no allotment by the sheriff is necessary to create the right or vest the title. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

III. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Statute Is Not Topped in Respect to Debt as Such.—

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Payment of Judgment Does Not Extinguish Homestead.—

Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not start the running of the statute against judgments then of record or thereafter docketed. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-371. Sheriff to summon and swear appraisers.

Purpose of Allotment by Sheriff.—No sale can be had until the homestead is first ascertained and set apart to the judgment debtor. The allotment by the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead which is subject to sale under execution. *Lambert v. Kinner*, 74 N. C. 348; *Gheen v. Summey*, 80 N. C. 187; *Littlejohn v. Egerton*, 77 N. C. 379. The issuance of the execution and the levy thereunder merely set in motion the machinery through which the homestead is valued and set apart to the owner. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Allotment Does Not Create Homestead Right.—When a sheriff is seeking to collect a judgment under execution issued to him, he must, before levying upon the real property of the debtor, proceed to have the debtor's homestead allotted as required by this section. But this does not create the homestead right. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

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

Provided, that the return of the appraisers of their proceedings as described in this section shall

be invalid, void, and of no effect as to the rights of third persons or parties or as to the rights of persons, firms or corporations who are not parties to the judgment or proceeding unless said return is filed with the judgment roll in the action, and the minutes of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. (Rev., ss. 688, 689; Code, ss. 503-4; 1868-9, c. 137, ss. 3-4; 1877, c. 272; 1945, c. 912; C. S. 731.)

Editor's Note.—The 1945 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Same—When Registration Not Necessary.—

The registration of a certified copy of the report of the appraisers is indispensable only when the allotment is made on petition of the homesteader; when the homestead is laid off by the sheriff, failure to register report of the appraisers is an irregularity insufficient to invalidate the allotment. For statutory change on this aspect, see amendment of this section. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-373. Reallotment for increase of value.

Where in bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment the court held that as against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallotment of homestead either by suit in equity or by application to the clerk under this section, but could proceed by levy of execution and allotment of homestead. *Sample v. Jackson*, 226 N. C. 408, 38 S. E. (2d) 155.

§ 1-386. Allotted on petition of owner.

Insolvency or the need for protection against sale is not a prerequisite to a homestead's allotment. While the homestead may have real beneficial value only when the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

Art. 33. Special Proceedings.

§ 1-393. Chapter applicable to special proceedings.

A judgment may be either interlocutory or final in a special proceeding as well as in a civil action. *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

Stated in *Seawell v. Purvis*, 232 N. C. 194, 59 S. E. (2d) 572.

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

Provided, further, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within thirty (30) days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (Rev., ss. 711, 712; Code, ss. 279, 287; 1868-9, c. 93, s. 4; 1927, c. 66, s. 5; 1929, cc. 50, 237, s. 3; 1939, c. 49, s. 2; 1939, c. 143; 1951, c. 783; C. S. 753.)

Editor's Note.—

The 1951 amendment rewrote the last proviso at the end of the section. As the rest of the section was not changed by the amendment it is not set out.

Cited in *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215.

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

Boundary Disputes.—

Where in a special proceeding under chapter 38 of General Statutes, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads the

twenty years' adverse possession under § 1-40, as a defense, the proceeding is assimilated to an action to quiet title (§ 41-10) and the clerk, as directed by this section, should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions originally instituted in that court. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79.

Applied in *Jernigan v. Jernigan*, 226 N. C. 204, 37 S. E. (2d) 493.

§ 1-404. Reports of commissioners and jurors.—

Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within ten days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (Rev. s. 723; 1893, c. 209; 1945, c. 778; C. S. 763.)

Editor's Note.—The 1945 amendment substituted "ten" for "twenty" in line nine.

Art. 34. Arrest and Bail.

§ 1-410. In what cases arrest allowed.

Complaint May Allege Facts Necessary to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661.

Thus a motion to strike allegations that the injury was willful, wanton or malicious is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. *Id.*

§ 1-435. Bail may arrest defendant.

Stated in *Hightower v. Thompson*, 231 N. C. 491, 57 S. E. (2d) 763.

Art. 35. Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.—(a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless

- (1) Personal service within the state is had on
 - a. The defendant, or
 - b. A process agent authorized by him, or
 - c. A process agent authorized expressly or impliedly by law, or unless
- (2) The defendant makes a general appearance.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in § 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full,

subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1.)

Editor's Note.—

The 1947 amendment rewrote this article, which formerly consisted of §§ 1-440 to 1-471 appearing in the original volume, to read as set forth herein. Therefore the named sections have been superseded.

For a brief account of the 1947 amendment, see 25 N. C. Law Rev. 386.

Applied in *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action by a wife for alimony or for maintenance and support, but not in any other action. (1947, c. 693, s. 1.)

§ 1-440.3. Grounds for attachment.—In those actions in which attachment may be had under the provisions of § 1-440.2, an order of attachment may be issued when the defendant is

- (1) A nonresident, or
- (2) A foreign corporation, or
- (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the state after due diligence, or
- (4) A resident of the state who, with intent to defraud his creditors or to avoid service of summons,
 - a. Has departed, or is about to depart, from the state, or
 - b. Keeps himself concealed therein, or
- (5) A person or domestic corporation which, with intent to defraud his or its creditors,
 - a. Has removed, or is about to remove, property from this state, or
 - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Section Is Exclusive.—The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

Grounds Must Appear by Affidavit.—The grounds upon which an ancillary writ of attachment is issued must be made to appear by affidavit. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.4. Property subject to attachment.—All of a defendant's property within this state which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this article. (1947, c. 693, s. 1.)

Cash Deposited as Security in Lieu of Bond.—The right of a nonresident defendant in the cash voluntarily deposited by him as security in lieu of bond for his appearance to answer a criminal charge preferred against him is liable to garnishment; and the purposes for which the cash was deposited having been accomplished by defendant's appearing, and later giving a new recognizance for his appearance, the entire amount of the deposit is subject to the lien of the attachment. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.—(a) An order of attachment may be issued by

- (1) The clerk of the superior court in which the action has been, or is being, commenced, or by
- (2) The resident judge, the judge regularly holding the superior courts of the district, or any judge holding a term of superior court in

the county in which the action has been, or is being, commenced.

(b) An order of attachment issued by a judge may be issued as follows:

(1) The resident judge of the district, or the judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, at term or in vacation, and within or without the district.

(2) Any other judge holding a term of superior court in the county may issue the order in open court.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by § 1-440.10 and the affidavit required by § 1-440.11 to be filed promptly with the clerk of the superior court of the county in which the action is pending. (1947, c. 693, s. 1.)

§ 1-440.6. Time of issuance with reference to summons or service by publication.—(a) The order of attachment may be issued

(1) In those cases where a summons is issued, at the time the summons is issued or at any time thereafter, or

(2) In those cases where service is by publication, at the time the order of publication is made or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1.)

§ 1-440.7. Time within which service of summons or service by publication must be had.—

(a) When an order of attachment is issued before the summons is served,

(1) If personal service within the state is to be had, such personal service must be had within thirty days after the issuance of the order of attachment;

(2) If such personal service within the state is not to be had,

a. Service of the summons outside the state, in the manner provided by § 1-104, must be had within thirty days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by § 1-99, unless the defendant appears in the action or unless personal service is had on him within the state.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of § 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1.)

Applied in *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-440.8. General provisions relative to bonds.—

(a) Any bond given pursuant to the provisions

of this article shall be executed by the party required to furnish the bond and by

(1) A surety company authorized to do business in this state, as provided by § 109-17, or by

(2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the state and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this article that

(1) The court had no jurisdiction to require or accept bond, or

(2) The order of attachment was improperly granted, or

(3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

§ 1-440.9. Authority of court to fix procedural details.—The court of proper jurisdiction, before which any matter is pending under the provisions of this article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.—

(a) Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

(1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars (\$200.00);

(2) The condition of the bond shall be that

- If the order of attachment is dissolved, dismissed or set aside by the court, or
- If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

§ 1-440.11. Affidavit for attachment; amendment.—

(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,

b. The nature of such action, and

c. The ground or grounds for attachment (one or more of those stated in § 1-440.3); and

(2) In those cases described below, the additional facts indicated:

- a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;
- b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

§ 1-440.12. Order of attachment; form and contents.—

(a) If the matters required by § 1-440.11 (a) are shown by affidavit to the satisfaction of the court and if the bond required by § 1-440.10 is furnished, the court shall issue an order of attachment which shall

- (1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;
- (2) Run in the name of the state and be directed to the sheriff of a designated county;
- (3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;
- (4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;
- (5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;
- (6) Show the date of issuance; and
- (7) Be signed by clerk or the judge issuing the order.

(b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.—

(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, at the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the

plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

§ 1-440.14. Notice of issuance of order of attachment when no personal service.—

(a) When the original order of attachment is issued in an action in which an order is thereafter issued for service by publication of a notice as provided by § 1-98, the order of publication shall direct that the published notice include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after the order of publication is made, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within thirty days after the issuance of the order of attachment. Such notice shall show

- (1) The county and the court in which the action is pending,
- (2) The names of the parties,
- (3) The purpose of the action, and
- (4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

- (1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or
- (2) Shall be posted at the courthouse door in the county for thirty days.

(d) When an order of attachment is issued in an action in which service on the defendant is to be, or has been, had in the manner provided by § 1-104 in lieu of personal service on the defendant,

- (1) A notice of the issuance of the order of attachment shall also be served on the defendant in the same manner as is provided for service of notice by § 1-104, which notice shall show the same facts with reference to the attachment as are required by subsection (b) of this section, or
- (2) A notice of the issuance of the order of attachment shall be published in the manner provided by subsections (b) or (c) of this section. (1947, c. 693, s. 1.)

Applied in Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.—

(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

- (1) The levy on real property shall be made as provided by § 1-440.17;
- (2) The levy on stock in a corporation shall be made as provided by § 1-440.19;
- (3) The levy on goods stored in a warehouse shall be made as provided by § 1-440.20;
- (4) The levy on tangible personal property in

the possession of the defendant shall, except as provided in § 1-440.19, be made as provided by § 1-440.18;

(5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant, shall, except as provided by §§ 1-440.19 and 1-440.20, be made as provided by § 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by § 1-440.25. (1947, c. 693, s. 1.)

§ 1-440.16. Sheriff's return.—

(a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by §§ 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within ten days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

§ 1-440.17. Levy on real property.—

(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

(1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and

(2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall dock the levy, as provided by § 1-440.33. (1947, c. 693, s. 1.)

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. *Voehringer v. Pollock*, 224 N. C. 409, 30 S. E. (2d) 374.

§ 1-440.18. Levy on tangible personal property in defendant's possession.—The sheriff shall levy on tangible personal property in the possession of

the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.—

(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

(1) When the certificate is in the possession of the defendant, and

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in § 1-440.26,

(1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

a. Such certificate has been surrendered to the corporation which issued it, or

b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.20. Levy on goods in warehouses.—

(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in § 1-440.26,

(1) If a negotiable warehouse receipt has not been issued with respect thereto, or

(2) If a negotiable warehouse receipt has been issued with respect thereto, and

a. Such receipt is seized, or

b. Such receipt is surrendered to the warehouseman who issued it, or

c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.21. Nature of garnishment.—

(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

(1) Tangible personal property belonging to the defendant but not in his possession, and

(2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by § 1-440.23 is issued. (1947, c. 693, s. 1.)

§ 1-440.22. Issuance of summons to garnishee.—

- (a) A summons to garnishee may be issued
 - (1) At the time of the issuance of the original order of attachment, by the court making such order, or
 - (2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

§ 1-440.23. Form of summons to garnishee.—

The summons to garnishee shall be substantially in the following form:

State of North Carolina

In the Superior Court

..... County

....., Plaintiff,

vs.

....., Defendant,

and

....., Garnishee.

} Summons to Garnishee

To, Garnishee:

You are hereby summoned, as a garnishee of the defendant,, and required, within twenty days after the service of this summons upon you, to file a verified answer in the Office of the Clerk of the Superior Court of the above named county, at, North Carolina, showing—

- (1) Whether, at the time of the service of this summons upon you, or at any time since then until the date of your answer, you were indebted to the defendant or had any property of his in your possession and, if so, the amount and nature thereof; and
- (2) Whether, according to your knowledge, information or belief, any other person is indebted to the defendant or has any property of the defendant in his possession and, if so, the name of each such person.

In case of your failure to file such answer a conditional judgment will be rendered against you for the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as will be sufficient to cover the plaintiff's costs.

This the day of, 19...
.....
(Here designate Clerk Superior Court or Judge.)

(1947, c. 693, s. 1.)

§ 1-440.24. Form of notice of levy in garnishment proceeding.—The notice of levy to be served on the garnishee shall be substantially in the following form:

State of North Carolina

In the Superior Court

..... County

..... Plaintiff,

vs.

....., Defendant,

and

....., Garnishee.

} Notice of Levy

To, Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of county and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the defendant in your possession, and that if you surrender the possession of, or transfer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the day of, 19...
.....
Sheriff of County.

(1947, c. 693, s. 1.)

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.—

The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by § 1-440.26, a copy of each of the following:

- (1) The order of attachment,
- (2) The summons to garnishee, and
- (3) The notice of levy.

(1947, c. 693, s. 1.)

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.—

(a) When the garnishee is a domestic corporation, the copies of the process listed in § 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in § 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the state, except that

- a. If the corporation has property within this state, or
- b. If the cause of action arose in this state, or
- c. If the plaintiff resides in this state,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this state on behalf of a corporation is

deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

§ 1-440.27. Failure of garnishee to appear.—

(a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than ten days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

§ 1-440.28. Admission by garnishee; set-off; lien.—

(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavits filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this

section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) An amount equal to the value of the property in question, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within twenty days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury. If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if it is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of set-off which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

§ 1-440.29. Denial of claim by garnishee; issues of fact.—

(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

(1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or

(2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within twenty days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defendant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time

since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) The amount specified in the jury's verdict, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

§ 1-440.30. Time of jury trial.—All issues arising under § 1-440.28 or § 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ 1-440.31. Payment to defendant by garnishee.—Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ 1-440.32. Execution against garnishee.—

(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by § 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.—

(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the *lis pendens* docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by § 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

(1) The lien attaches and relates back to the time of the filing of the notice of *lis pendens* if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the *lis pendens* docket of the county in which the land lies, as provided by subsection (a) of this section.

(2) The lien attaches only from the time of the docketing of the certificate of levy if no

entry of the issuance of the order of attachment has been made prior to the levy on the *lis pendens* docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by § 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a garnishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which began simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, s. 1.)

§ 1-440.34. Effect of defendant's death after levy.—

(a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.—The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property.

The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

Part 5. Miscellaneous Procedure Pending Final Judgment.

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

(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

Remedy in This Section Is Not Exclusive.—When the defendant contests the grounds on which the writ issued, this section provides a ready means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627. See § 1-440.41.

The jury having found that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.37. Modification of the order of attachment.—

At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

§ 1-440.38. Stay of order dissolving or modifying an order of attachment.—

Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien

of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

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

(a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

(1) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond.

(2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by §§ 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

§ 1-440.40. Defendant's objection to bond or surety.—

(a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

§ 1-440.41. Defendant's remedies not exclusive.

—The exercise by the defendant of any one or more rights provided by §§ 1-440.36 through 1-440.40 does not bar the defendant from exercis-

ing any other rights provided by those sections. (1947, c. 693, s. 1.)

Stated in *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.—

(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order of attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his possession by the sheriff shall be subject to all the provisions of this article relating to attached property. (1947, c. 693, s. 1.)

§ 1-440.43. Remedies of third person claiming attached property or interest therein.—Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

(1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

(2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

§ 1-440.44. When attached property to be sold before judgment.—

(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or

(2) If the property is not perishable, but

a. Will materially deteriorate in value pending litigation, or

b. Will likely cost more than one-fifth of its value to keep pending a final determination of the action, and

c. Is not discharged from the attachment lien in the manner provided by § 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by § 1-440.39, prior to such sale. The proceeds of such sale shall be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.—

(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by § 1-440.7,

(1) The defendant shall be entitled to have delivered to him

a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and

b. The proceeds of any sales and all money collected, and

c. All attached property remaining in the officer's hands, and

(2) Any garnishee shall be entitled to have vacated a ny judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) Upon judgment in his favor in the principal action, the defendant may thereafter, by motion in the cause, recover on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1; 1951, c. 837, s. 8.)

Editor's Note.—The 1951 amendment rewrote subsection (c).

Prior to 1947, there was no provision in this article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

Claim on Bond May Not Be Heard at Original Hearing.

—Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ or judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

Remedy Is by Motion after Judgment or Subsequent Independent Action.—Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.46. When plaintiff prevails in principal action.—

(a) If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

(1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.

(2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.

(3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by paragraph (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.

(4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.

(b) In order to secure the sale of the remaining debts and evidences of indebtedness as provided in subsection (a) (4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion

(1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and

(2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the purchaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein.

(e) When the judgment and all costs of the

proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1; 1951, c. 837, s. 9.)

Editor's Note.—The 1951 amendment changed the designation of former subsection (d) to (e), and inserted present subsection (d).

Part 7. Attachments in Justice of the Peace Courts.

§ 1-440.47. Powers of justice of the peace; procedure.—

(a) A justice of the peace has the same powers with respect to attachment proceedings in actions of which he has jurisdiction which a clerk or judge of the superior court had with respect to attachment proceedings in actions of which the superior court has jurisdiction.

(b) The procedure with respect to attachment in courts of justices of the peace shall conform as nearly as practicable to the procedure of the superior court, and the statutes relating to attachment in the superior court shall be in effect and shall govern the procedure in so far as it is practicable to apply them except as otherwise provided in §§ 1-440.48 through 1-440.56 of this article. (1947, c. 693, s. 1.)

§ 1-440.48. Return of order of attachment in justice of the peace courts.—The order of attachment shall not contain a return date but shall be returned to the justice of the peace who issued it. Such return must meet the requirements with respect to the return of orders of attachment issued in the superior court, as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.49. To whom order issued by justice of the peace is directed.—An order of attachment issued by a justice of the peace may be directed to any constable or other lawful officer of a county, who shall have the same powers and duties with respect thereto which the sheriff has with respect to an order of attachment issued by the superior court. (1947, c. 693, s. 1.)

§ 1-440.50. Issuance of order by justice of the peace to another county.—When a justice of the peace issues an order of attachment to a county other than his own, such order may not be served in such county unless there is endorsed on or attached to the order the certificate of the clerk of the superior court of the justice's county certifying that the justice issuing the order is a justice of the peace and that the signature on the order is in the handwriting of the justice. It is the duty of the clerk of the superior court to issue such certificate upon application and the payment of the fee therefor. (1947, c. 693, s. 1.)

§ 1-440.51. Notice of attachment in justice of the peace courts when no personal service.—When an order of attachment is issued by a justice of the peace and there is no personal service of the summons on the defendant against whom the attachment is issued, notice of the attachment need not be published in a newspaper, but, between the issuance of the order and the trial of the principal action, notice of the attachment must be posted for thirty days at the county courthouse door. Such notice shall state:

(1) The county and the township and the

name of the justice of the peace before whom the action is pending,

(2) The names of the parties,

(3) The purpose of the action, and

(4) The fact that on a date specified an order of attachment was issued against the defendant. (1947, c. 693, s. 1.)

§ 1-440.52. Allowance of time for attachment and garnishment procedure in justice of the peace courts.—In order that sufficient time may be allowed in any action before a justice of the peace for the parties to exercise such rights with respect to attachment and garnishment as are hereinbefore provided for, within the same periods of time as are allowed therefor in the superior court, the justice of the peace before whom the principal action has been, or is being, commenced has all such powers with respect to fixing the time for the defendant to appear and answer, granting continuances and fixing the time for the trial, as may be necessary or proper for that purpose, notwithstanding the provisions of §§ 7-136 and 7-149, Rule 15. (1947, c. 693, s. 1.)

§ 1-440.53. Certificates of stock and warehouse receipts; restraint of transfer not authorized in justice of the peace courts.—Nothing in this article is intended to authorize any justice of the peace to restrain or enjoin the transfer of a certificate of stock or a warehouse receipt. (1947, c. 693, s. 1.)

§ 1-440.54. Procedure in justice of the peace courts when land attached.—

(a) Upon securing the issuance of an order of attachment by a justice of the peace, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the *lis pendens* docket.

(b) A justice of the peace has no authority to issue an execution to sell real property attached in any action commenced in his court. Whenever in any such action real property has been attached, the justice of the peace, upon rendering judgment in the principal action, shall deliver to the clerk of the superior court of his county a copy of the judgment rendered by him together with the original order of attachment.

(c) If judgment was rendered against the defendant whose property was attached, the clerk shall docket the judgment and shall thereupon issue execution directing the sale of the real property attached as shown by the officer's return made pursuant to § 1-440.17, or so much thereof as may be necessary to satisfy the judgment. If judgment was not rendered against the defendant whose property was attached, the clerk shall make an entry on his judgment docket showing the discharge of the attachment.

(d) Notwithstanding the lack of authority of the justice of the peace to issue an execution to sell real property, the levy of the attachment issued by him on real property constitutes a lien on such property, but only under the conditions provided by § 1-440.33. (1947, c. 693, s. 1.)

§ 1-440.55. Trial of issue of fact in justice of the peace court.—When an issue of fact is raised pursuant to the provisions of § 1-440.28 or §

1-440.29, the justice of the peace may try such issue unless a jury trial is demanded. If a jury trial is demanded, proceedings with respect thereto shall be conducted as in other jury trials before a justice of the peace. (1947, c. 693, s. 1.)

§ 1-440.56. Jurisdiction with respect to recovery on bond in justice of the peace court.—Notwithstanding the provisions of § 1-440.45(c), the defendant may recover on the plaintiff's bond in the principal action in a court of the justice of the peace only when the amount of the bond does not exceed two hundred dollars (\$200.00). (1947, c. 693, s. 1.)

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57. Jurisdiction of inferior courts not affected.—Nothing in this article shall be construed to change in any manner the jurisdiction of any court inferior to the superior court with respect to attachment. (1947, c. 693, s. 1.)

Art. 37. Injunction.

§ 1-486. When solvent defendant restrained.

Continuing Trespass.—

When relief is sought against a continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. *Young v. Pittman*, 224 N. C. 175, 176, 29 S. E. (2d) 551.

§ 1-487. Timber lands, trial of title to.

Applied in *Chandler v. Cameron*, 227 N. C. 233, 41 S. E. (2d) 753.

§ 1-488. When timber may be cut.

Essential Elements.—

In accord with original. See *Chandler v. Cameron*, 227 N. C. 233, 41 S. E. (2d) 753.

§ 1-493. What judges have jurisdiction.

Restraining Orders.—

Where a restraining order is made returnable before a judge assigned to the district at a place outside of the district and after the courts were over, but before the end of the term of the assignment, such judge has jurisdiction to hear the application and to grant injunction until the hearing. *Reidsville v. Slade*, 224 N. C. 48, 54, 29 S. E. (2d) 215.

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action as proceeding to obtain possession against a tenant of the adverse party. *Massengill v. Lee*, 228 N. C. 35, 44 S. E. (2d) 356.

§ 1-498. Issued without notice; application to vacate.

Modification of Previously Granted Injunction.—

A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district, including restraining orders and injunctions, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215.

§ 1-499. When opposing affidavits admitted.

Stated in *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215.

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

Cited in *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215.

Art. 38. Receivers.

§ 1-501. What judge appoints.

Quoted in *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. (2d) 593.

§ 1-502. In what cases appointed.

In General.—

This section is expressly made applicable to all receivers. *Ledbetter v. Farmers Bank, etc., Co.*, 142 F. (2d) 147, 149.

Section Does Not Limit Power of Court to Appoint Receiver.—The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section or § 55-147. *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555.

Quoted in *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. (2d) 593.

§ 1-503. Appointment refused on bond being given.

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, "to refuse the appointment of a receiver." *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555.

Plaintiff Estopped by Acceptance of Bond by Court.—Plaintiffs who are parties at the time the court accepts bond filed pursuant to this section, and denies application for appointment of a receiver, are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants. *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555.

§ 1-504. Receiver's bond.

Effect of Failure to Require Bond.—

An order appointing a receiver is not void because of an inadequate bond. *Ledbetter v. Farmers Bank, etc., Co.*, 142 F. (2d) 147, 150, citing *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536.

The determination of the amount of the bond is within the discretion of the court. *Ledbetter v. Farmers Bank, etc., Co.*, 142 F. (2d) 147, 150.

And Mortgagee Is Not Liable for Suggesting Inadequate Bond.—The fact that mortgagees suggested an inadequate amount in the bond of a receiver was held not to thereby render them legally liable to the mortgagor. *Ledbetter v. Farmers Bank, etc., Co.*, 142 F. (2d) 147, 150.

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. Except as provided in G. S. § 1-506 the procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes (1931, c. 123, s. 1; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

Art. 39. Deposit or Delivery of Money or Other Property.

§ 1-510. Defendant ordered to satisfy admitted sum.

Tender of Judgment under § 1-541.—Where defendant admits liability under its own construction of the contract for a part of the amount alleged by plaintiff to be due thereunder, plaintiff is entitled, under this section, to judgment for such amount without prejudice to the litigation of the balance claimed to be due him, which right may not be defeated by defendant's tender of judgment under § 1-541. *McKay v. McNair Inv. Co.*, 228 N. C. 290, 45 S. E. (2d) 358.

Art. 40. Mandamus.

§ 1-511. Begun by summons and verified complaint.

Mandamus can confer no new authority, but will lie only to enforce a clear legal right of the party seeking the writ against a party under legal obligation to perform the act sought to be enforced. *Laughinghouse v. New Bern*, 232 N. C. 596, 61 S. E. (2d) 802.

Compelling City to Withdraw from State Retirement System.—Where a city has become an employer participating in the State Retirement System under authority conferred by General Statutes and by an act amending its charter, the repeal of the charter provision leaves its governing authorities with discretionary power to participate in the retirement system under authority conferred by the General Statutes, and mandamus will not lie to compel it to withdraw from the State Retirement System. *Laughinghouse v. New Bern*, 232 N. C. 596, 61 S. E. (2d) 802.

Art. 41. Quo Warranto.

§ 1-515. Action by attorney-general.

Determining Title to Public Office.—

For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose by the Attorney-General in the name of the State, upon his own information or upon the complaint of a private person. In *re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372.

§ 1-521. Trials expedited.—All actions to try the title or right to any state, county or municipal office shall stand for trial at the next term of court after the summons and complaint have been served for thirty days, regardless of whether issues were joined more than ten days before the term; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173; 1947, c. 781; C. S. 876.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 43. Nuisance and Other Wrongs.

§ 1-539. Remedy for nuisance.

The ancient writ of nuisance has been superseded under this section by civil action for damages or for a removal of the nuisance, or for both. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

When Equity Will Restrain.—Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

In order for an injury to be irreparable it is not required that it be beyond the possibility of repair or compensation in damages, but it is sufficient if it be one to which complainant should not be required to submit or the other party to inflict and is of such continuous and frequent recurrence that reasonable redress cannot be had in a court of law. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

When Special Damage Necessary.—

An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

An airport is not a nuisance per se, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

Obstruction of Fish in Their Passage Upstream.—The rule that a riparian owner is not entitled to maintain an action for the reason that he had sustained no peculiar injury through the obstruction of fish in their upstream passage to his fishery, has not been rendered obsolete by this section and the prescription of a right to sue in like cases. *Hampton v. North Carolina Pulp Co.*, 49 F. Supp. 625, 631.

Abatement of a private nuisance is not dependent upon recovery of damages. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. It was held that the complaint alleged a private nuisance, and upon verdict of the jury that the air-

port constituted a nuisance as alleged in the complaint, plaintiff was entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923.

§ 1-539.1. Damages for unlawful cutting or removal of timber.—Any person not being the bona fide owner thereof or agent of the owner who shall knowingly and without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed. (1945, c. 837.)

Art. 44. Compromise.

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

The acceptance of a lesser sum in full payment of a larger sum is valid under this section, but the payment of one account is not the settlement of another. And the acceptance of a lesser sum constitutes a settlement only as to those items of liability embraced in the settlement. *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218.

Where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement; but the principle, of course, does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts; but sometimes the evidence may be such as to make it a question for the jury. *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243; *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218.

Plaintiff's evidence was to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. It was held that the acceptance of weekly checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raised for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments. *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218.

§ 1-541. Tender of judgment.

A defendant may not defeat the purpose of § 1-510 by undertaking to make a tender under this section. *McKay v. McNair Inv. Co.*, 228 N. C. 290, 45 S. E. (2d) 358.

§ 1-543. Disclaimer of title in trespass; tender of judgment.—In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands against which the trespass is alleged, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. In the event of such disclaimer, defense and offer by the defendant, the plaintiff is required to file a reply before trial, with respect to the defendant's allegation that the trespass was negligent or involuntary, and that a sufficient tender has been made.

If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant or the plaintiff is nonsuited, other than voluntarily, then in either such event he is barred from the said action.

All costs incurred after the defendant's dis-

claimer and tender shall be charged against the plaintiff in the event the jury finds for the defendant on the issues of disclaimer and tender, or in the event the plaintiff is nonsuited. (Rev., s. 863; Code, s. 577; Rev. Code, c. 31, s. 79; 1715, c. 2, s. 7; 1947, c. 781; C. S. 898.)

Editor's Note.—The 1947 amendment inserted the second sentence of the first paragraph, added the last paragraph and made other changes.

Art. 45. Arbitration and Award.

§ 1-544. Agreement for arbitration.

Common Law Method of Arbitration Adopted.—Where the method of arbitration adopted by the parties is in accordance with procedure at common law, and not with that prescribed in this article, plaintiff's motion to strike report of arbitrator must be considered in light of common law. *Tarpley v. Arnold*, 226 N. C. 679, 40 S. E. (2d) 33.

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by this article. *Brown v. Moore*, 229 N. C. 406, 50 S. E. (2d) 5.

And Provisions of Article Are Cumulative and Concurrent.—The statutory methods of arbitration provided by this article are to be regarded merely as constituting an enlargement on the common-law rule, and the provisions of this article are cumulative and concurrent rather than exclusive. *Thomasville Chair Co. v. United Furniture Workers*, 233 N. C. 46, 62 S. E. (2d) 535.

Art. 46. Examination before Trial.

§ 1-568: Repealed by Session Laws 1951, c. 760, s. 2.

§ 1-568.1. Definitions.—As used in this article,

- (1) "Action" includes any civil action or special proceeding;
- (2) "Clerk" means the clerk of the superior court in which the action is pending;
- (3) "Examining party" means the party who procures the examination of a person pursuant to this article;
- (4) "Judge" means the judge having jurisdiction. (1951, c. 760, s. 1.)

Editor's Note.—Session Laws 1951, c. 760, s. 1, changed the title of this article from "Examination of Parties" to "Examination before Trial," and inserted §§ 1-568.1 to 1-568.27. Section 2 of the act repealed former §§ 1-568 through 1-576. For decisions under former sections, see *Sudderth v. Simpson*, 224 N. C. 181, 29 S. E. (2d) 550; *Fox v. Yarborough*, 225 N. C. 606, 35 S. E. (2d) 885; *Guy v. Baer*, 230 N. C. 748, 55 S. E. (2d) 501.

§ 1-568.2. Notice to attorney.—Whenever notice is required to be given to a party pursuant to this article, such notice may be given in lieu thereof to such party's attorney, as provided by G. S. 1-585, except when the party is the person to be examined. (1951, c. 760, s. 1.)

§ 1-568.3. Purposes for which examination may be had.—An examination may be had before trial pursuant to the provisions of this article—

- (1) For the purpose of obtaining information necessary to prepare a pleading or an amendment to a pleading, or
- (2) For the purpose of obtaining evidence to be used at the trial, or at any hearing incident to the trial, or
- (3) For both purposes. (1951, c. 760, s. 1.)

§ 1-568.4. Who may examine and be examined.—(a) Any party to an action may examine before trial any other party to the action.

(b) A plaintiff may also examine any person for whose immediate benefit the action is being defended even though such person is not a party to the action.

(c) A defendant may also examine any person for whose benefit the action is being prosecuted even though such person is not a party to the action.

(d) A person in whose behalf an action is being prosecuted or defended may be examined only under the same conditions and circumstances as the prosecuting or defending party might be examined pursuant to this article.

(e) An examination may be had of any officer, agent or employee of a corporation which is a party to the action.

(f) A person may be examined pursuant to this article irrespective of whether he is a resident or nonresident of this State. (1951, c. 760, s. 1.)

§ 1-568.5. Where examination may be held.—

(a) Except as provided by subsection (b), the examination shall be held in the county, or other corresponding governmental subdivision, in which the person to be examined resides.

(b) If a person is to be examined as an officer, agent or employee of a corporation, the examination may, at the option of the examining party, be held in the county, or other corresponding governmental subdivision, where the home or principal office of such corporation is located or where such officer, agent or employee resides, or where he regularly performs duties for the corporation in or out of this State.

(c) Upon application made by either the examining party or the person to be examined, and for good cause shown, the clerk may make an order changing the place of examination from that fixed by the original order of examination pursuant to subsections (a) and (b) to some place other than one of those prescribed by those subsections, or changing the time fixed therefor, or both. Such order may be made only upon notice of the application therefor to the other parties to the action and to the person to be examined if he is not the applicant. The notice shall be given as provided by G. S. 1-568.14 (b) and (c).

(d) By agreement of the examining party and the person to be examined, the examination may be held anywhere in or out of the State. (1951, c. 760, s. 1.)

§ 1-568.6. Examination held by commissioner.—

The examination shall be held by a commissioner appointed by the judge or clerk. (1951, c. 760, s. 1.)

§ 1-568.7. Powers of commissioner.—In addition to his other powers the commissioner may—

- (1) Grant continuances from time to time for good cause;
- (2) Administer oaths to witnesses; and
- (3) Designate a reporter to take and transcribe the examination. (1951, c. 760, s. 1.)

§ 1-568.8. Procedure exclusive; judge's or clerk's authority to fix details.—The procedure prescribed by this article is the sole procedure for the examination before trial of the persons designated in G. S. 1-568.4. The judge or the clerk, however, has authority to fix and determine all necessary procedural details with respect to such an examination in all instances in which this article does not make definite provision. (1951, c. 760, s. 1.)

§ 1-568.9. When examination is and when not matter of right.—(a) Before the examining party has filed his complaint, petition or answer, he may procure an examination pursuant to this article only upon showing by affidavit, as provided by G. S. 1-568.10, that the examination is necessary to enable him properly to prepare his complaint, petition or answer.

(b) After the examining party has filed his complaint, petition or answer, such party may not examine another person before such person or the party prosecuting or defending in his behalf has filed his complaint, petition or answer.

(c) After both the examining party and the person to be examined, or the party prosecuting or defending on his behalf, have filed their complaint, petition or answer, as the case may be, an examination is a matter of right, and may be had as provided by G. S. 1-568.11. (1951, c. 760, s. 1.)

§ 1-568.10. Preliminary procedure for examination before examining party's initial pleading has been filed.—

(a) Before a party has filed his complaint, petition or answer; he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who may be examined by him as provided by G. S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced and the purpose thereof;
- (2) That, in order to prepare his complaint, petition or answer, it is necessary for the applicant to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity;
- (3) That the information sought is not otherwise available to the applicant, together with a statement of the reasons therefor;
- (4) That, if the person proposed to be examined is not a party, the action is being prosecuted or defended in his behalf, together with facts in support thereof;
- (5) That the application is made in good faith; and
- (6) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of the examination, subject to the provisions of G. S. 1-568.5;
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination; and
- (4) Designating the particular matters about which the person may be examined. (1951, c. 760, s. 1.)

§ 1-568.11. Preliminary procedure for examination after initial pleadings have been filed.—

(a) After a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who has also filed his complaint, petition or answer, as the case may be,

or on whose behalf a complaint, petition or answer has been filed as provided by G. S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced;
- (2) That the applicant has filed complaint, petition or answer;
- (3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed;
- (4) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of the examination, subject to the provisions of G. S. 1-568.5; and
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination. (1951, c. 760, s. 1.)

§ 1-568.12. Subsequent procedure the same.—Except as provided in G. S. 1-568.10 and 1-568.11, the procedure for examining a person before the examining party has filed his complaint, petition or answer and the procedure for examining a person after the examining party and the person to be examined or the person filing such pleading in his behalf, have filed their complaint, petition or answer, as the case may be, are the same. (1951, c. 760, s. 1.)

§ 1-568.13. Service of order upon person to be examined.—(a) The examining party shall cause a copy of the order for examination to be served upon the person to be examined not less than 10 days before the date fixed for the examination, and no other notice of such examination need be given him.

(b) When a person is to be examined as an officer, agent or employee of a corporation, the service required by this section shall be had both upon the corporation and the officer, agent or employee thereof who is to be examined.

(c) Service of the order may be had on a corporation in the same manner as service of summons.

(d) Service on a nonresident outside this State may be had in the same manner as service of summons pursuant to G. S. 1-104.

(e) Service on a foreign corporation may also be had as follows:

A copy of the order may be mailed to the sheriff or other process officer of the county where the home or principal office of the corporation is located in the state in which such corporation is incorporated, with the request that it be served upon the corporation by delivering it to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof. If the sheriff or process officer serves a copy of the order, such service shall be valid for the purposes of this section. Such sheriff or process officer shall execute an affidavit of the service and send it to the party who forwarded the order for service together with a certificate from the clerk of a court of record of the jurisdiction in which the order was served, certifying

that the person who served the order was a person duly authorized by the laws of the State to serve legal process in that jurisdiction. Such affidavit and certificate shall be prima facie evidence of the service of the order. (1951, c. 760, s. 1.)

§ 1-568.14. Notice to other parties.—(a) The examining party shall give notice of the examination to all parties other than the party to be examined.

(b) Whenever any party is represented by a next friend, guardian, guardian ad litem or any other person acting in a representative capacity, the notice required by this section need be given only to such representative or his attorney of record.

(c) Such notice, which shall consist of a copy of the order for the examination, shall be delivered at least five days before the date fixed for the examination or shall be properly mailed at least 10 days before such date. For good cause shown the judge or clerk, without notice to parties, may make an order reducing the number of days notice or specifying the manner of giving notice. (1951, c. 760, s. 1.)

§ 1-568.15. When order not served or notice not given; new order.—In the event a person cannot be served as provided by G. S. 1-568.13, or notice cannot be given as provided by G. S. 1-568.14, such fact with the reason therefor may be reported to the clerk or judge, and a new order may be issued fixing a later date for the examination. Whenever a new order is issued, it shall be served as provided by G. S. 1-568.13 and notice shall be given as provided by G. S. 1-568.14. (1951, c. 760, s. 1.)

§ 1-568.16. The examination.—(a) An examination pursuant to this article shall be conducted in the same manner and subject to the same rules as if the examination were being had at the trial of the action, except as otherwise provided in this section.

(b) The commissioner before whom the deposition is to be taken shall put the witness on oath or affirmation, and, unless the parties agree otherwise, shall personally, or by someone acting under his direction, record the testimony of the witness in his presence, and cause it to be transcribed.

(c) All objections made at the time of the examination to the qualifications of the commissioner taking the deposition, or to the conduct of any person, and any other objection to the proceedings, shall be recorded and transcribed as part of the deposition.

(d) Evidence objected to shall be taken subject to the objection, except that, when an objection is made on the ground of privilege or on the ground that the question goes beyond the proper scope of the examination, the person being examined may refuse to answer the question, in which case such refusal and the grounds therefor shall be recorded and transcribed as part of the deposition. The procedure when the person being examined refuses to answer a question is governed by G. S. 1-568.18 and 1-568.19.

(e) Any party may examine the person being examined and may make all proper objections to the proceedings and to the evidence taken, but the scope of an examination ordered pursuant to

G. S. 1-568.10 shall not thereby be enlarged beyond the scope specified in the order for the examination. (1951, c. 760, s. 1.)

§ 1-568.17. Written interrogatories. — (a) An examining party may examine upon written interrogatories as provided in this section. Except as otherwise provided in this section, such examination shall be subject to all the provisions of this article.

(b) A party desiring to examine any person designated in G. S. 1-568.4 upon written interrogatories shall deliver a copy of the order for the examination, and a copy of the interrogatories, to all other parties. Within 10 days after any party is so served, he may deliver cross interrogatories to the examining party. Within five days thereafter the examining party may deliver redirect interrogatories to any party who has thus served cross interrogatories. Within three days after being thus served with redirect interrogatories, such party may deliver recross interrogatories to the examining party. Upon application without notice and for good cause, the judge or clerk may extend the time limits fixed herein.

(c) A copy of the order for the examination and of any other orders relating thereto together with copies of all interrogatories thus served shall be delivered by the examining party to the commissioner designated in the order who shall proceed promptly to take the testimony of the person to be examined in response to the interrogatories and to prepare, certify, and file it with the clerk, or send it by registered mail to the clerk for filing, together with the copies of all orders and interrogatories received by him. (1951, c. 760, s. 1.)

§ 1-568.18. Refusal to answer question; procedure to compel answer. — If the person being examined refuses to answer any question propounded, the examination may be completed on other matters or it may be adjourned, as the propounder of the question may prefer. The propounder may, upon notice, as provided by G. S. 1-568.14 (b) and (c), given to the person examined and to all other parties, make a motion before the judge or clerk that the person examined be required to answer the question or questions he had refused to answer and to answer any additional questions which relate to the matter or matters as to which he had refused to testify. If the motion is granted, the judge or clerk shall fix a time and place for such further examination. No additional notice of such further examination need be given. (1951, c. 760, s. 1.)

§ 1-568.19. Failure to appear for examination or to answer question as ordered.—If the person to be examined fails to appear at the time and place fixed in an order for his examination or in an order issued pursuant to G. S. 1-568.18, or refuses, without good cause, to answer any question required to be answered pursuant to G. S. 1-568.18, such failure to appear or refusal to answer constitutes contempt of court and is punishable as such. The judge or clerk may also make all proper orders in regard to the failure to appear, or the refusal to answer any question, including the taxing of costs incident thereto, the striking out of pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing

the action or any part thereof, or rendering a judgment by default or by default and inquiry against the disobedient party. (1951, c. 760, s. 1.)

§ 1-568.20. Submission of transcript of testimony to witness; changes; signing. — When the testimony is transcribed, such transcript shall be submitted to the witness for examination. Any changes in form or substance which the witness desires to make shall be entered by the commissioner on the record immediately following the recorded testimony of the witness, together with a statement of the reasons given by the witness for such changes. The transcript shall then be signed by the witness. Both the submission of the transcript to the witness and the signing thereof by him may be waived by the witness or his counsel, or by the parties, and neither is necessary if the witness cannot be found or is ill or for any other reason is unable to examine the transcript or sign it. If the transcript is not submitted to or is not signed by the witness, the commissioner shall sign it and state on the record the reason for the witness not signing it. The record may then be used as if signed, unless on motion to suppress, subject to the provisions of G. S. 1-568.22, the court holds that the reasons for the refusal to sign require rejection of the testimony in whole or in part. (1951, c. 760, s. 1.)

§ 1-568.21. Certification and filing of record of examination; notice. — The commissioner shall certify on the record of the examination that the witness was duly sworn by him and that the record is a true record of the examination. He shall then securely seal the record in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the clerk or send it by registered mail to the clerk for filing. No formal opening of the deposition is necessary, but, upon receipt thereof, the clerk shall open it, file it with the other papers in the action, and notify all parties that it is on file and open for inspection. (1951, c. 760, s. 1.)

§ 1-568.22. Motion to suppress deposition or resume examination; order. — (a) Within 10 days after the deposition is filed, any party may file a written motion to suppress the deposition for any error or irregularity not waived as provided by G. S. 1-568.23, or to resume the examination when the witness has made changes in his testimony as permitted by G. S. 1-568.20. The motion shall state the grounds upon which it is based. For good cause shown, the clerk may, without notice, make an order extending the time within which such motions may be filed.

(b) Upon the filing of a motion to suppress the deposition, the clerk shall make an order fixing a time for the same to be heard before him, and the moving party shall promptly serve a copy of the motion and a copy of the clerk's order upon all other parties.

(c) No notice of a motion to resume an examination is necessary, and the clerk shall pass thereon. An order therefor shall be served pursuant to G. S. 1-568.13 upon the person to be examined. Notice to other parties of such order shall be given pursuant to G. S. 1-568.14. The procedure for a resumed examination shall be the same as in the case of an original examination. (1951, c. 760, s. 1.)

§ 1-568.23. Waiver of errors and irregularities.

—(a) All errors and irregularities in the notice for taking an examination are waived unless written objection is promptly served upon the party giving the notice.

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are waived by failure to make them before or during the taking of the deposition, if the ground of the objection is one which might have been obviated or removed if presented at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) Objections to the form of written interrogatories submitted under G. S. 1-568.17 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

(e) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed or otherwise dealt with are waived unless a motion to suppress the deposition or some part thereof is made within 10 days after the filing of the deposition. (1951, c. 760, s. 1.)

§ 1-568.24. Use of deposition at trial.—(a) Upon the trial of the action or at any hearing incident thereto, any party may offer in evidence the whole, but, if objection is made, not a part only, of any deposition taken pursuant to this article, but such deposition shall not be used as evidence against any party not notified of the taking thereof as provided by G. S. 1-568.14.

(b) Subject to the provisions of subsection (c) of this section and G. S. 1-568.23, objection may be made at the trial or hearing to the receiving in evidence of testimony of a person examined pursuant to the provision of this article for any reason which would require the exclusion of the testimony if the witness were then present and testifying.

(c) Objections to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time. (1951, c. 760, s. 1.)

§ 1-568.25. Effect of taking deposition and of introducing deposition; rebuttal.—(a) A party by examining a person pursuant to the provisions of this article does not make such person his witness; but the party who introduces the deposition in evidence, or who first introduces any part thereof in evidence, does make such person his witness.

(b) If the person whose deposition, or part thereof, has been introduced in evidence, testifies at the trial or hearing, he is not subject to cross-examination or impeachment by the party whose witness he is, but such party may nevertheless

show the facts to be otherwise than as testified to by such person. (1951, c. 760, s. 1.)

§ 1-568.26. Commissioner's fee and reporter's compensation taxed as costs.—Upon the termination of the action, a reasonable fee for the commissioner, and reasonable compensation for the reporter, shall be fixed by the clerk and taxed as part of the costs. (1951, c. 760, s. 1.)

§ 1-568.27. Right to change of venue not affected by examination.—An examination of a person pursuant to the provisions of this article does not affect or prejudice the right of any party to a change of venue when such change is authorized by law. (1951, c. 760, s. 1.)

§§ 1-569 to 1-576: Repealed by Session Laws 1951, c. 760, s. 2.

Art. 47. Motions and Orders.

§ 1-581. Notice of motion.—When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order made without notice, prescribe a shorter time. (Rev., s. 877; Code, s. 595; C. C. P., s. 346; 1951, c. 837, s. 10; C. S. 912.)

Editor's Note.—

The 1951 amendment substituted the words "made without notice" for the words "to show cause" near the end of the section.

§ 1-584. Petition to remove to federal court; order by the court.—When it shall appear to a court of this state that a petition for removal of any action or proceeding pending therein has been filed in a district court of the United States, the state court may then, upon its own motion or the motion of a party to the action or proceeding, order that no further proceedings be had in the state court unless and until the action or proceeding has been remanded to the state court by the United States court and a certified copy of the order of remand is filed with the clerk; but failure to enter such order shall not entitle the state court or any party to proceed; the appearance of a party for the purpose of making the above mentioned motion shall not affect or be deemed a waiver of the right to remove. (Ex. Sess. 1921, c. 92, s. 16; 1925, c. 282, s. 2; 1949, c. 808, s. 2; C. S. 913(b).)

Editor's Note.—The 1949 amendment rewrote this section. For a brief comment on this amendment, see 27 N. C. Law Rev. 477.

Art. 48. Notices.**§ 1-586. Service upon attorney.****Notice to Attorney Is Notice to Client.**—

In accord with original. See *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227.

Notice of Motion.—

Nothing else appearing, an attorney of record continues in this relationship to the client not only until the rendition of final judgment but also so long as the opposing party has the right, by statute or otherwise, to challenge the validity of the judgment, and therefore such attorney may be served with notice of motion in the cause to set aside the judgment on the ground of fraud upon the jurisdiction of the court, and such notice is notice to the party. *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227.

§ 1-589. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summonses for jurors by telephone or by registered

mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt requested of the addressee and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; 1925, c. 98; 1945, c. 635; C. S. 918.)

Editor's Note.—

The 1945 amendment substituted in the last sentence the words "requested of the addressee" for the word "demanded."

Art. 49. Time.

§ 1-593. How computed.

Actions on Judgments.—Where a judgment was rendered on October 20, 1873, and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was not a defense. *Cook v. Moore*, 95 N. C. 1. Judgment in this case was inadvertently entered for the defendant; the mistake was corrected in *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587.

Art. 50. General Provisions as to Legal Advertising.

§ 1-596. Charges for legal advertising.—The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this state shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; 1945, c. 635; 1949, c. 205, s. 1½; C. S. 2536.)

Local Modification.—Nash: 1949, c. 205, s. 2.

Editor's Note.—The 1945 amendment substituted the first "or" in line six for "of" and rewrote the form last sentence of the first paragraph so as to make it subject to the former limitations prescribed by § 1-99 with respect to the cost of service by publication. The 1949 amendment struck out such last sentence.

§ 1-598. Sworn statement prima facie evidence of qualification; affidavit of publication.—Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of § 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meet-

ing all of the requirements and qualifications prescribed by § 1-597, such sworn written statement shall be received in all courts in this state as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of § 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named was at the time stated therein a qualified newspaper within the meaning of § 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of § 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of § 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of § 1-597. (1939, c. 170, s. 1½; 1947, c. 213, ss. 1, 2.)

Editor's Note.—The 1947 amendment rewrote this section. A provision making a false statement a misdemeanor was eliminated from this section by the 1947 amendment. The effect of this deletion may well be to bring false swearing in the affidavit within the purview of the perjury statute, § 14-209, thus making it a felony. 25 N. C. Law Rev. 450.

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.—(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor, business or circulation manager, advertising, classified advertising or any other advertising manager, or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2.)

Chapter 2. Clerk of Superior Court.

Sec. Art. 4. Powers and Duties.

- 2-16.1. Validation of oaths administered by clerks.
2-16.2. Validation of oaths administered to public officers.

Art. 6. Money in Hand; Investments.

- 2-52. Payment of insurance to persons under disability.

Art. 1. The Office.

§ 2-1. Judge of probate abolished; clerk acts as judge.—The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court.

In the exercise of his duties in matters relating to his probate jurisdiction, any clerk of the superior court may sign his name as "Clerk Superior Court, Ex Officio Judge of Probate". (Rev., s. 889; Code, s. 102; 1951, c. 158; C. S. 925.)

Editor's Note.—

The 1951 amendment added the second paragraph.

Art. 2. Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint an assistant clerk of the superior court, who before entering upon his duties shall take and subscribe the oath prescribed for clerks: Provided, that not more than one such assistant clerk shall hold office at one time in any county having a population of less than twenty-five thousand (25,000); that in counties having a population of twenty-five thousand (25,000) but not over fifty thousand (50,000), two such assistant clerks may be appointed; that in counties having a population of over fifty thousand (50,000) but not over eighty thousand (80,000), three such assistant clerks may be appointed; that in counties having a population of eighty thousand (80,000) or over, four such assistant clerks may be appointed. Upon compliance with the provisions of this article such assistant clerk or clerks shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1; 1951, c. 159, ss. 1, 2; C. S. 934(a).)

Local Modification.—Forsyth: 1937, c. 331, repealed by 1951, c. 968; New Hanover: 1951, c. 93.

Editor's Note.—The 1951 amendment rewrote the proviso to the first sentence, and inserted the words "or clerks" in the second sentence. Section 3 of the amendatory act, which repeals all laws in conflict with the act, excepts "any local statutes pertaining to the appointment or number of assistant clerks of the superior court."

Art. 4. Powers and Duties.

§ 2-16. Powers enumerated.

2. To administer any and all oaths, including oaths of office to any and all public officers of this state, and to take acknowledgment of the execution of all instruments or writings.

(1949, c. 57, s. 1; 1951, c. 28, s. 1.)

Cross References.—As to fixing compensation of commissioners for division of lands, see § 46-7.1.

As to clerk acting as temporary guardian of children of certain service men, see § 33-67.

Editor's Note.—The 1949 amendment made changes in subsection 2. The 1951 amendment, which does not apply to litigation instituted prior to July 1, 1951, inserted in subsection 2 the words "including oaths of office to any and all public officers of this State." As the rest of the section was not affected by the amendments it is not set out.

Jurisdiction—Limited.—

The clerk of the superior court is a court of very limited jurisdiction. *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

Vacating, etc., Decrees or Orders—Fixing Time for Hearings.—Within his jurisdiction the clerk of the superior court has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351.

Probate of Wills.—This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330.

§ 2-16.1. Validation of oaths administered by clerks.—The act of any clerk of the superior court in administering any oath prior to the ratification of this section, when such was not necessary in the exercise of the powers and duties of his office, is hereby ratified and validated; provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 57, s. 2.)

Editor's Note.—The act inserting this section was ratified Feb. 11, 1949, and became effective July 1, 1949.

§ 2-16.2. Validation of oaths administered to public officers.—All official oaths heretofore administered to public officers by the clerks of the superior courts of this State are hereby, in all respects, ratified, confirmed and validated. (1951, c. 28, s. 2.)

Editor's Note.—The act inserting this section does not apply to litigation instituted prior to July 1, 1951.

§ 2-20. Disqualification unwaived; cause removed or judge acts.

Cited in *In re Estate of Smith*, 226 N. C. 169, 37 S. E. (2d) 127.

§ 2-22. Custody of records and property of office.

Two Distinct Remedies Provided.—Our statutes provide two separate and distinct remedies—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in § 109-34, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. *State v. Watson*, 223 N. C. 437, 441, 27 S. E. (2d) 144; *State v. Watson*, 224 N. C. 502, 31 S. E. (2d) 465.

Where Clerk Sought to Be Removed Made Affirmative Allegations.—In an action by the clerk of the Superior Court against his predecessor in office, for possession of records, books and funds, under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. *State v. Watson*, 223 N. C. 437, 27 S. E. (2d) 144.

§ 2-24. Location of and attendance at office.

Provided, that the clerk's office in the respective counties may observe such office hours and holidays as authorized and prescribed by the board of county commissioners for all county offices. (Rev., s. 909; Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136; 1939, c. 82; 1941, c. 329; 1949, c. 122, s. 1; C. S. 945.)

Editor's Note.—The 1949 amendment rewrote the proviso appearing as the last sentence of the section. As the first two sentences were not changed they are not set out.

§ 2-25. Obtaining leave of absence from office.

Provided, it shall not be necessary when a clerk has an assistant clerk to secure an order permitting a leave of absence; and, provided further, it shall not be necessary when a clerk has a deputy clerk, but no assistant clerk, to secure an order permitting a leave of absence unless such absence extends more than forty-eight hours. (Rev., s. 910; 1903, c. 467; 1935, c. 348; 1949, c. 122, s. 2; C. S. 946.)

Editor's Note.—The 1949 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-26. Fees of clerk of superior court.

Five per cent commission shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three per cent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter forty-five; and upon the excess over five hundred dollars of such sums, one per cent.

(1945, c. 635.)

Local Modification.—Richmond: 1947, e. 235, s. 8; Transylvania: 1951, c. 1212, s. 1; Wake: 1945, c. 733.

Editor's Note.—

The 1945 amendment substituted "forty-five" for "fifty-four" in line eight of the next to the last paragraph. As the rest of the section was not affected by the amendment it is not set out.

Cited in *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535.

§ 2-27. Local modifications as to clerk's fees.

Local Modification.—Richmond: 1947, c. 235, s. 11.

§ 2-28. Fees for probating and recording federal crop liens and chattel mortgages.

Provided that this section shall not apply to Beaufort, Brunswick, Cabarrus, Camden, Caswell, Currituck, Guilford, Harnett, Haywood, Hertford, Macon, Moore, Nash, Pamlico, Person, Polk, Richmond, Stokes, Surrey and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 260, 369; 1939, c. 211; 1945, cc. 78, 312, 880, 913; 1949, c. 368, s. 1; 1951, c. 40, s. 1; c. 419.)

Local Modification.—Beaufort: 1949, c. 368, s. 21; Cabarrus: 1945, c. 880, s. 2; Johnston: 1945, c. 517; Transylvania: 1951, c. 1212, s. 2.

Editor's Note.—

The first 1945 amendment inserted "Nash" in the list of counties in the proviso, the second inserted "Camden", the third inserted "Cabarrus," and the fourth inserted "Currituck," and the 1949 amendment inserted "Beaufort" in the list of counties. The first 1951 amendment inserted "Pamlico" and the second 1951 amendment inserted "Guilford" in the list of counties. As the rest of the section was not changed it is not set out.

§ 2-29. Advance court costs.

Local Modification.—Catawba: 1949, c. 414; Transylvania: 1951, c. 1212, s. 3.

§ 2-30. Advance costs on appeal from justice of the peace.

Local Modification.—Transylvania: 1951, c. 1212, s. 4.
Cited in *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535.

§ 2-31. Fee for cross-indexing names of parties.

Local Modification.—Transylvania: 1951, c. 1212, s. 5.

§ 2-32. Fee for docketing judgment.

Local Modification.—Transylvania: 1951, c. 1212, s. 6.

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.

Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 5; 1945, c. 1036, s. 1.)

Local Modification.—Anson and Lee: 1945, c. 1036, s. 2½; Transylvania: 1951, c. 1212, s. 7.

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.

Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 6; 1945, c. 1036, s. 2.)

Local Modification.—Anson and Lee: 1945, c. 1036, s. 2½; Durham: 1945, c. 115; Transylvania: 1951, c. 1212, s. 8.

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.

Local Modification.—Transylvania: 1951, c. 1212, s. 9.

§ 2-36. Certain counties not subject to sections

2-29 to 2-35.—Sections 2-29 to 2-35 shall not apply to the counties of: Alleghany, Ashe, Avery, Bladen, Buncombe, Burke, Caldwell, Caswell, Catawba, Chowan, Cleveland, Columbus, Cumberland, Davidson, Davie, Duplin, Edgecombe, Franklin, Guilford, Haywood, Iredell, Jackson, Jones, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Person, Pitt, Richmond, Robeson, Rockingham, Rowan, Stokes, Swain, Tyrrell, Union, Vance, Washington, Wayne, Wilson. Provided, that section 2-29 shall apply to Iredell county. (1935, c. 379, s. 8; 1935, c. 494; 1937, cc. 148, 149, 290; 1945, c. 296; 1947, c. 269; 1949, c. 386.)

Editor's Note.—

The 1945 amendment struck out "Cabarrus" from the list of counties appearing in this section, the 1947 amendment struck out "Surry" and the 1949 amendment struck out "Franklin."

§ 2-41. To endorse date of issuance on process.

Applied in *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. (2d) 44.

§ 2-42. To keep books; enumeration.

Local Modification.—Forsyth: 1949, c. 963, s. 4.

Art 5. Reports.

§ 2-44. List of justices of the peace to be sent to secretary of state.—The clerk of the superior court

of each county shall, on or before February first of each year, send to the secretary of state a list of the qualified justices of the peace in his county as of January first of that year. The list shall include the following information with respect to each such justice of the peace:

1. The township for which he was elected or appointed.
2. The date of his election or appointment, and if appointed, by whom so appointed.
3. The term for which he was elected or appointed.
4. The date of his qualification. (Rev., s. 916; Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326; 1945, c. 161; C. S. 954.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 6. Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.

Provided, further, that in the event the accounts of any clerk of the superior court are audited at least once each year by a certified public accountant, and the report and audit made by such certified public accountant sets forth all of the facts and items required by this section and is approved by the clerk and accepted by the board of county commissioners, such audit shall become and constitute the annual report required by this section. (Rev., s. 918; 1891, c. 580; 1931, c. 156; 1951, c. 187; C. S. 956.)

Local Modification.—Forsyth: 1945, c. 11; Halifax: 1949, c. 389; Hertford: 1945, c. 101; Lenoir: 1945, c. 201.

Editor's Note.—The 1951 amendment added the above proviso at the end of this section. As the rest of the section was not changed by the amendment it is not set out.

§ 2-47. Approval, registration, and publication of report.

Local Modification.—Forsyth: 1945, c. 11; Wilson: 1943, c. 555.

§ 2-50. Unclaimed fees of jurors and witnesses paid to school fund.

Local Modification.—Chatham: 1949, c. 906; Randolph: 1949, c. 519.

§ 2-52. Payment of insurance to persons under disability.—Where a minor, incompetent or insane person is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, or prior to the restoration of competency or sanity of such incompetent or insane person, and the total proceeds of such policy or policies do not exceed five hundred dollars (\$500.00), such proceeds may be paid to the public guardian or clerk of the superior court of the county where such beneficiary resides, to be administered by the public guardian or clerk for the benefit of such beneficiary, and the receipt of the public guardian or clerk shall be a full and com-

plete discharge of the insurer issuing the policy or policies. Moneys so paid to the clerk or public guardian shall be held and disbursed in the manner and subject to the limitations provided by § 2-53. (1937, c. 201; 1945, c. 160, s. 1.)

Editor's Note.—This section applied only to minors prior to the 1945 amendment, which also added the second sentence and made other changes.

§ 2-53. Payment of money for indigent children and persons non compos mentis.—When any moneys in the amount of five hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom there is no guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out of the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession \$500.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; Ex. Sess. 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1945, c. 160, s. 2; 1949, c. 188; C. S. 962.)

Editor's Note.—

The 1945 amendment substituted the words "there is no" in line four for the words "no one will become," and omitted the former third and fourth sentences relating to minor child as beneficiary of life insurance policy.

The 1949 amendment increased the maximum amount mentioned in this section from "\$300.00" to "\$500.00."

§ 2-54. Limitation on investment of funds in clerk's hands.

Cited in State v. Sawyer, 223 N. C. 102, 25 S. E. (2d) 443.

§ 2-55. Investments prescribed; use of funds in management of lands of infants, incompetents.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 2-56. Securing bank deposits.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Chapter 3. Commissioners of Affidavits and Deeds.

§ 3-1. Appointment by governor; term; oath.—The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall

take and subscribe an oath before a justice of the peace or clerk of a court of record in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. (Rev., ss. 926, 927; Code, ss. 632, 633; 1945, c. 635; C. S. 963.)

Editor's Note.—The 1945 amendment inserted after the word "peace" in line twelve the words "or clerk of a court of record."

Chapter 4. Common Law.

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

Extent of Common Law.—

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this state. *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350; *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105; *Henson v. Thomas*, 231 N. C. 173, 56 S. E. (2d) 432, 12 A. L. R. (2d) 1171; *Friendly Finance Corp. v. Quinn*, 232 N. C. 407, 61 S. E. (2d) 192; *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73.

The common law rights and disabilities of husband and wife are in force in this state except in so far as they have been abrogated or repealed by statute. *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350.

The common law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. In re

Taylor, 230 N. C. 566, 53 S. E. (2d) 857; *State v. Daniels*, 231 N. C. 17, 56 S. E. (2d) 2.

Survival of Actions.—Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105.

Punishment When No Penalty Expressly Provided.—The common-law rule obtains in this state that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. *State v. Bishop*, 228 N. C. 371, 45 S. E. (2d) 858.

Applied in *State v. Sullivan*, 229 N. C. 251, 49 S. E. (2d) 458.

Cited in *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858.

Chapter 5. Contempt.

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

I. GENERAL CONSIDERATION.

Nature of Offenses—Jury Trial.—Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577.

IV. SUBDIVISION IV.

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. *Lamm v. Lamm*, 229 N. C. 248, 49 S. E. (2d) 403.

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony pendente lite was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. *Id.*

An order of court not "lawfully issued" may not be the basis on which to found a proceeding for contempt. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658; *Greensboro v. Black*, 232 N. C. 154, 59 S. E. (2d) 621.

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. *Id.*

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of the process nor voluntary appearance thereunder, can waive the defect or vitalize the process so as to make the willful disobedience of the subpoena a basis for contempt proceedings. *State v. Black*, 232 N. C. 154, 59 S. E. (2d) 621.

Temporary Restraining Orders.—A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577.

Failure to Comply with Separation Agreement.—Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. *Brown v. Brown*, 224 N. C. 556, 31 S. E. (2d) 529.

§ 5-6. Courts and officers empowered to punish.—Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or the utilities commission, or member of the industrial commission, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652; 1933, c. 134, s. 8; 1941, c. 97; 1945, c. 533; C. S. 983.)

Editor's Note.—The 1945 amendment inserted the words "or member of the industrial commission."

§ 5-9. Trial of proceedings in contempt.—Proceedings as for contempt shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make

the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceed-

ings for the disobedience of a judicial order rendered in any pending action. (Rev., s. 945; Code, s. 855; 1915, c. 4; 1947, c. 781; C. S. 986.)

Editor's Note.—The 1947 amendment rewrote the first sentence.

Chapter 6. Costs.

Art. 1. Generally.

§ 6-1. Items allowed as costs.

This section does not include expenses for returning defendants to this state from points without the state. *State v. Patterson*, 224 N. C. 471, 473, 31 S. E. (2d) 380.

Expense of Transporting Witnesses.—A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party, held to mean "expense," since such "costs" are no part of the costs of the action. *Nichols v. Goldston*, 231 N. C. 581, 58 S. E. (2d) 348.

§ 6-5. Jurors' tax fees.—On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars unless a different jury tax is prescribed elsewhere. In every civil action in any court of record for which different jury taxes are not prescribed by law the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs; and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof. (Rev., s. 1253; Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348; 1909, c. 1; 1919, c. 319; 1945, c. 635; C. S. 1229.)

Editor's Note.—The 1945 amendment inserted the words "unless a different jury tax is prescribed elsewhere" at the end of the first sentence. It also inserted in the second sentence the words "for which different jury taxes are not prescribed by law."

§ 6-7. Clerk to state in detail in entry of judgment.

Costs Properly Adjudged after Decision of the Supreme Court.—After decision of the supreme court modifying and affirming a judgment of the superior court on appeal from the referee allowances constituting items of costs may be adjudged as provided by this section. *Clark v. Cagle*, 226 N. C. 230, 37 S. E. (2d) 672.

§ 6-12. Clerks to tax solicitors fees; paid to school fund.

Local Modification.—Columbus: 1951, c. 710.

Art. 3. Civil Actions and Proceedings.

§ 6-20. Costs allowed or not, in discretion of court.

Where one of defendants in injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. *Chandler v. Camper*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

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

The expense of employing attorneys in the successful defense of a suit for damages for tort is not allowable as part of the costs or recoverable in the absence of an express agreement therefor. *Queen City Coach Co. v. Lumberton Coach Co.*, 229 N. C. 534, 50 S. E. (2d) 288.

Allowance to Referee.—

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court pro rating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277.

§ 6-22. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands where the petitioner alone is benefited.

(1945, c. 635.)

Editor's Note.—The 1945 amendment added at the end of subsection 1 the words "where the petitioner alone is benefited." As the other subsections were not affected by the amendment they are not set out.

Art. 5. Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.—In a criminal action, if there is no prosecutor designated by the court as liable for the costs under the provisions of General Statutes § 6-49, and the defendant is acquitted or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247; 1947, c. 781; C. S. 1259.)

Editor's Note.—The 1947 amendment rewrote the first part of the first sentence.

§ 6-37. Local modification as to counties paying costs.

In New Hanover County, in a criminal action, if the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half of the fees as provided in the first sentence of General Statutes § 6-36. (Rev., s. 1283; 1905, c. 511; 1947, c. 781; C. S. 1260.)

In Northampton and Sampson counties where in criminal proceedings before the recorder's court, the grand jury, or superior court the defendant is found not guilty or a true bill is not found by the grand jury, or the defendant is found guilty and is sentenced by the court to serve on the roads or a term in jail, then the said county shall pay full fees to the sheriff, officer, or constable who served any process in such proceeding. (1937, c. 43; 1947, c. 427.)

Editor's Note.—The 1947 amendments rewrote the next to last paragraph and made the last paragraph applicable to Sampson County. As the rest of the section was not affected by the amendments it is not set out.

§ 6-38. Liability of county when defendant acquitted in supreme court.

Provided, where the cause has been removed, said costs shall be paid by the county in which the offense was committed instead of the county from which the appeal is taken. (Rev., s. 1284; 1947, c. 781; C. S. 1261.)

Editor's Note.—The 1947 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 7. Liability of Prosecutor for Costs.

§ 6-49. Prosecutor liable for cost: in certain cases; court determines prosecutor.—In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecutor to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecutor's special request.

Every judge or justice is authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1869-9, c. 277; 1874-5, c. 151; 1879, c. 49; 1947, c. 781; C. S. 1271.)

Editor's Note.—The 1947 amendment rewrote this section. The word "of" at the beginning of line twelve was probably used inadvertently in place of "or" which would seem to better express the legislative intent.

Art. 8. Fees of Witnesses.

§ 6-52. Fees and mileage of witnesses.—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Alexander, Alleghany, Anson, Ashe, Brunswick, Burke, Clay, Cleveland, Dare, Franklin, Graham, Greene, Harnett, Haywood, Henderson, Johnston, Mitchell, Nash, Polk, Stanly, Swain, Transylvania and Union, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and re-

turning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day, in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of the justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, but no prosecutor or complainant shall pay any costs except as provided by General Statutes, §§ 6-49 and 6-50: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the utilities commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, state highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territorial boundaries in which such officer has authority to make an arrest: Provided, further, that in all criminal cases tried in the state where the crime charged is of the grade of a felony, all witnesses who have been held in jail incommunicado pending the trial of such case shall be paid witness fees for each such day which such witness is so held in jail, in addition to the witness fees provided by law in criminal actions. (Rev., s. 2803; Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; P. L. 1911, c. 402; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; 1947, cc. 270, 781; 1949, c. 520; C. S. 3893.)

Local Modification.—Montgomery: 1951, c. 61.

Editor's Note.—The first 1947 amendment struck out "Surry" from the list of counties in the first sentence, and the second 1947 amendment made changes in the first proviso.

The 1949 amendment struck out "Randolph" from the list of counties.

§ 6-57. Repealed by Session Laws 1947, c. 781.

§ 6-58. County to pay state's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts, except in actions or proceedings in which a justice of the peace has final jurisdiction, which are commenced or tried in a court of a justice of the peace, mayor, or in a county or recorder's court, where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards re-

taken, the court shall order the witnesses to be paid. (Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253; 1947, c. 781; C. S. 1281.)

Editor's Note.—The 1947 amendment inserted the exception clause beginning in line four.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. **Liability for criminal costs before justice, mayor, county or recorder's court.**—In no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor or in a county or recorder's court, shall the county be liable to pay any costs. Any defendant or prosecuting witness shall have the right of appeal to the superior court. (Rev., s. 1307; Code, s. 895;

1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; 1931, c. 252; 1947, c. 781; C. S. 1288.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 6-65. **Imprisonment of defendant for nonpayment of fine and costs.**—If a justice of the peace, mayor or judge of a county or recorder's court sentences a party found by him to be guilty to pay a fine and costs in a criminal action or proceeding within the jurisdiction of a justice of the peace, and the same are not immediately paid, the justice of the peace, mayor or judge of a county or recorder's court shall commit the guilty person to the county jail until the same are paid, or he is otherwise discharged according to law. (Rev., s. 1308; Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15; 1947, c. 781; C. S. 1289.)

Editor's Note.—The 1947 amendment rewrote this section.

Chapter 7. Courts.

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7-285. [Repealed.]

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Art. 38. Judicial Council.

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7-455. Compensation of members.

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SUBCHAPTER I. SUPREME COURT.

Art. 1. Organization and Terms.

§ 7-3. Salaries of supreme court justices.—Each justice of the supreme court shall be paid an annual salary of fourteen thousand four hundred (\$14,400) dollars, payable in equal monthly installments. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; 1921, c. 25, s. 2; 1925, c. 214; 1927, c. 69, s. 1; 1939, c. 252; 1949, c. 158, s. 1; C. S. 3883.)

Editor's Note.—Prior to the 1949 amendment each justice received an annual salary of \$7,500.00 and an additional amount in lieu of expenses. Section 2 of the amendatory act made the compensation provided in the above section effective as of Jan. 1, 1949.

Taxable Income.—Justice held not entitled to deduction of living expenses at Raleigh and traveling expenses between there and his home in computing his taxable income under the federal statute. *Barnhill v. Commissioner of Internal Revenue*, 148 F. (2d) 913.

Art. 2. Jurisdiction.

§ 7-11. Power to render judgment and issue execution.

Where error is manifest on the face of the record, even though it be not the subject of an exception, the Supreme Court may correct it *ex mero motu*. *Gibson v. Central Mfrs' Mut. Ins. Co.*, 232 N. C. 712, 62 S. E. (2d) 320.

§ 7-16. Certificates to superior courts; execution for costs; penalty.

Cited in *Cannon v. Cannon*, 226 N. C. 634, 39 S. E. (2d) 821.

Art. 3. Officers of Court.

§ 7-29.1. Administrative assistant to Chief Justice.—1. The Chief Justice of the Supreme Court of North Carolina is hereby authorized and empowered to appoint some competent person to act as his administrative assistant in performing the duties imposed upon the Chief Justice by section 11, Article IV of the Constitution of North Carolina. Such person so appointed shall hold said position at the will of the Chief Justice.

2. The person named by the Chief Justice as his administrative assistant, as provided in the preceding section, shall be paid such salary as may be fixed by the Chief Justice.

3. The Chief Justice of the Supreme Court of North Carolina shall have the authority to prescribe the functions and duties of the administrative assistant appointed by him as may be deemed by the Chief Justice to be necessary to enable him to properly carry out the administrative duties imposed upon him by section 11, Article IV of the Constitution of North Carolina. The administrative assistant shall be furnished with such secretarial and stenographic personnel as shall be recommended by the Chief Justice.

4. The administrative assistant may also perform the duties of executive secretary of the judicial council or the duties of the Supreme Court Reporter.

5. The funds necessary for the payment of expenses operating under the terms of this section shall be paid from the Contingency and Emergency Fund until the first day of July, 1951, and thereafter such expenses shall be paid on ap-

proved budgets as applicable to other maintenance expenditures. (1951, c. 243.)

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.

§ 7-42. Salaries of superior court judges.—The salary of each of the judges of the superior court shall be ten thousand dollars (\$10,000.00) per annum, and each judge shall be allowed the sum of two thousand five hundred dollars (\$2,500.00) in lieu of necessary traveling expenses and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence. (Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; C. S. 3884.)

Editor's Note.—The 1949 amendment rewrote this section. Section 2 of the 1949 amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-43.1. Assistant solicitor appointed by county board of commissioners.—The board of commissioners of any county in the State where no inferior court has been established as provided by chapter 7 of the General Statutes, as amended, is hereby authorized and empowered, in its discretion, to appoint a competent attorney of the county to assist the solicitor of the solicitorial district, in which said county is included, in the prosecution of the criminal docket of the superior court of said county: Provided, that no one shall be appointed assistant solicitor under this section unless and until he has first been recommended and nominated for such position or office by the solicitor of the solicitorial district in which said county is included. The solicitor of the solicitorial district in which said county is located shall designate and define the duties of the assistant solicitor appointed under this section and is authorized and empowered to remove the said assistant solicitor from office at any time without hearing: Provided, written notice of said removal is delivered to said assistant solicitor and the chairman of the board of commissioners of the county more than thirty (30) days prior to the effective date of said removal. The first term of the office of the assistant solicitor appointed under the authority of this section shall begin on such date as the board of county commissioners of the county concerned shall designate and shall end on the last day of the calendar year in which said appointment is made, and thereafter, the term of office of said assistant solicitor shall begin on January 1st of each year and shall end on December 31st of the same calendar year. At the end of any term of the position or office of the assistant solicitor, the board of county commissioners of the county concerned may, in its discretion, leave the office of assistant solicitor vacant for the ensuing term, or any portion thereof; but this provision shall not prevent the board of commissioners from appointing an assistant solicitor upon recommendation and nomination of the solicitor at any time when the office is vacant. The salary of the assistant solicitor shall be fixed from term to term by the board of county commissioners of the county in which such appointment is made and shall be in such an amount as the board of county commissioners of the county shall deem proper,

just and reasonable, in its discretion, taking into consideration the amount, type and kind of services to be performed, and said salary shall be paid in equal monthly installments from the general fund of the county. The solicitor of the solicitorial district in which said county is located, and for which said assistant solicitor is appointed, shall at all times have the power and authority to define and fix the duties of said assistant solicitor. (1951, c. 1116, s. 1.)

Editor's Note.—Section 3 of the act inserting the above section provided: "This act shall not be construed as repealing any public, public-local or special act heretofore enacted or which may be enacted at the 1951 Session of the General Assembly providing for an assistant solicitor as set forth in such public, public-local or special act."

§ 7-43.2. Designating prosecuting attorney of inferior court to assist solicitor.—In any county in this State where there has been established or may be established, an inferior court under the provisions of chapter 7 of the General Statutes, as amended, and such inferior court has, or shall have, criminal jurisdiction over the entire county in which said court is established, or may be established, the board of county commissioners of such county is hereby authorized and empowered, in its discretion, to designate the prosecuting attorney for such inferior court to assist the solicitor of the solicitorial district, in which said county is included or located, in the prosecution of the criminal docket of the superior court of said county: Provided, that the said prosecuting attorney shall not be so designated unless and until the solicitor of the solicitorial district has advised with the board of county commissioners of said county as to the necessity for such action and approves such appointment. The solicitor of the solicitorial district in which such county is included or located shall define and fix the duties of said prosecuting attorney in assisting the solicitor of said solicitorial district, and the duties of the prosecuting attorney of the inferior court, after such appointment and designation, in assisting the solicitor of the solicitorial district shall be additional duties as prosecuting attorney of the inferior court, and the performance of his duties in assisting the solicitor of the solicitorial district shall not be construed as creating or establishing a new or additional office. The board of county commissioners of the county in which the prosecuting attorney of such inferior court is appointed to assist the solicitor of the solicitorial district may, in its discretion, provide for additional salary that may be paid to said prosecuting attorney of such inferior court by reason of his additional duties in assisting the solicitor of the solicitorial district. Such additional salary, if so provided, shall be fixed in such an amount as, in the discretion of the board of commissioners, shall be considered proper, reasonable and just, taking into consideration the amount, type and kind of services to be performed by the prosecuting attorney in giving such assistance and shall be paid in equal monthly installments from the general fund of the county concerned. The first period of time in which the prosecuting attorney shall begin the performance of his duties in assisting the solicitor of the solicitorial district shall begin on such date as the board of commissioners of the county concerned shall designate and shall end on the last day of the calendar year in which such beginning

period is fixed or instituted. Thereafter, the period of time in which such assistance shall be performed shall begin on the first day of each calendar year and shall end on the last day of such calendar year. At the end of any period of time in which such assistance to the solicitor of the solicitorial district is performed by the prosecuting attorney, as herein provided, the board of commissioners of the county concerned may, in its discretion, discontinue such assistance on the part of the prosecuting attorney for the ensuing period of time, or any portion thereof; but this provision shall not prevent the board of county commissioners of such county from again designating the prosecuting attorney of such inferior court to perform the duties herein authorized upon the approval of the solicitor of the solicitorial district at any time when such assistance has theretofore been discontinued. In lieu of designating the prosecuting attorney of such inferior court, as herein provided, the board of county commissioners of such county may appoint a competent attorney of the county to perform such duties as provided by § 7-43.1. (1951, c. 1116, s. 2.)

Cross Reference.—See note under § 7-43.1.

§ 7-43.3. Assistant solicitor to represent State during absence or disability of regular solicitor.—1. When any solicitor of the superior court who has been elected to that office or appointed by the Governor to fill a vacancy occurring therein shall, because of illness or injury or necessary absence, or by reason of any other temporary disability be unable or unavailable to discharge the duties of his office, such regular solicitor, with approval of the resident or presiding judge, is hereby authorized and empowered to appoint as assistant to the solicitor some competent and otherwise well qualified member of the bar in any one or more of the counties in such solicitor's solicitorial district, the person or persons so appointed being hereby authorized and empowered as such assistant to discharge for and on behalf of the solicitor all the duties of the office of solicitor, in the respective counties from which they are appointed, during the absence or disability of the solicitor, or until such time as their appointment terminates.

Such appointment of assistants to solicitors in the respective counties of the several solicitorial districts shall be for such periods of time as the appointing solicitor may designate, but all such appointments shall be subject to termination at any time, by the appointing solicitor.

2. Within their respective counties, the assistants to solicitors appointed and serving pursuant to this section shall, until such time as their appointments expire or are terminated, or until the solicitor shall resume his duties, be vested with all the powers and authority given by statute or otherwise to the office of such solicitor, and shall be charged with all the duties and responsibilities relating thereto, as fully in all respects, and at all times, in term or otherwise, as the same are vested in or devolve upon the solicitor.

All official acts of any such assistant to the solicitor appointed and serving pursuant to this section are hereby given the same force and effect as if they were the official acts of the solicitor.

3. All assistants to solicitors appointed pursuant to this section shall take an oath of office similar to that required of regular solicitors.

4. Any solicitor appointing or terminating the appointment of any assistant to the solicitor pursuant to the provisions of this section shall cause a record of such appointment or termination, together with the dates thereof and a statement of reasons therefor, to be entered upon the court records of the clerk of the superior court of the county in which such appointment is made.

5. In the event any solicitor authorized to make or terminate the appointment of assistants to solicitors under the provisions of this section should become incapacitated to such an extent as to render him physically or mentally incapable of exercising such authority, then the resident judge of the judicial district or the presiding judge in such solicitorial district is hereby authorized and empowered to exercise all the rights and powers of appointment and termination of appointment herein granted such solicitors, in the same manner and to the same extent as provided in this section in respect to such regular solicitors.

6. The compensation, if any, paid to such assistant to the solicitor shall be paid by the regular solicitor.

7. This section shall not modify or repeal any local act providing for the appointment of an assistant solicitor. (1951, c. 180.)

§ 7-44. Solicitors; general compensation.—The several solicitors of the solicitorial districts of the state of North Carolina shall each receive, as full compensation for services as solicitor, the sum of sixty-five hundred dollars (\$6500.00) to be paid in equal monthly installments out of the state treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of fees or other compensation, except the expenses allowed in § 7-45. (Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; 1949, c. 189, s. 1; C. S. 3890.)

Editor's Note.—The 1949 amendment rewrote this section and increased the solicitor's salary from \$4,500.00 to \$6,500.00. Section 3 of the amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-45. Appropriation for expenses of solicitor.—Each solicitor shall receive, in addition to the salary named in § 7-44, the sum of fifteen hundred dollars (\$1500.00) per annum, which will cover all of his expenses while engaged in duties connected with his office. Said sum shall be paid in equal monthly installments out of the state treasury upon warrant duly drawn thereon. (1923, c. 157, s. 2; 1933, c. 78, s. 2; 1937, c. 348; 1949, c. 189, s. 2; C. S. 3890(a).)

Editor's Note.—The 1949 amendment rewrote this section and increased the amount allowed for expenses from \$500.00 to \$1,500.00. Section 3 of the amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-46. Judicial districts; resident judge; rotation; special superior court judges; assignment of superior court judges by Chief Justice.—Each judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. Special or emergency superior court judges not assigned to any judicial district may be designated from time to time by the Chief Justice of the Supreme Court to hold court in

any district or districts within the State. The Chief Justice, when in his opinion the public interest so requires, may assign any superior court judge to hold one or more terms of superior court in any district. (Const., Art 4, s. 11; 1951, c. 491, s. 2; C. S. 1432.)

Editor's Note.—The 1951 amendment rewrote this section and substituted "Chief Justice of the Supreme Court" for "Governor". Section 1 of the amendatory act provided that this chapter of the General Statutes be hereby amended by striking out "Governor" and inserting in lieu thereof the words "Chief Justice of the Supreme Court" in certain listed sections and in all other places where the same may be necessary in order to confer upon the Chief Justice all the powers and duties now exercised or performed by the Governor with respect to the assignment of judges and the calling of terms of court, but not including any power of appointment of any superior court judge.

§ 7-47. Oath of office.—Every judge before he shall act as such shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, or before any clerk of the superior court, take the oath appointed for public officers, and also an oath of office. The officer or court before whom the judge shall qualify shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return the oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one-half to the use of the state and the other half to the person who shall sue for the same. (Rev., s. 1497; Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45; 1951, c. 28, s. 1½; C. S. 1433.)

Editor's Note.—The 1951 amendment, which inserted in the first sentence the words "or before any clerk of the superior court", does not apply to litigation instituted prior to July 1, 1951.

§ 7-50. Emergency judges; duties; compensation.—The persons embraced within the provisions of section 7-51 are hereby constituted emergency judges of the superior court under article four (4), section eleven (11), of the constitution of this state, and are authorized to hold the superior courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the Chief Justice of the Supreme Court, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifty dollars per week, to be paid by the county in which such special term is held.

In case of emergency arising as provided in said section, the Chief Justice of the Supreme Court shall designate the person to act as emergency judge who shall receive his actual expenses only incurred while so acting, to be paid by the treasurer upon warrant of the auditor, upon certificate of the judge: Provided, that the county asking the Chief Justice of the Supreme Court for an emergency judge shall have the privilege of requesting the assignment of a particular judge. Such emergency judges shall be subject to all the regulations respecting superior court judges except as otherwise provided in §§ 7-50, 7-52, and 7-53.

Where any justice of the Supreme Court or any judge of the superior court (regular or special) heretofore has retired, under the provisions of any statute or law authorizing such retirement at the time, and such act of retirement has been recognized and approved by the Governor and the assistant to the Director of the Budget, such judge shall be entitled to receive the retirement pay provided by G. S. 7-51, notwithstanding the circumstance that such retired judge, by reason of the nature and cause for his retirement, or by reason of his physical condition, cannot be assigned to hold terms of court or perform other judicial functions; and the State Auditor is authorized to issue vouchers to such retired judge for the retirement payment provided in G. S. 7-51. (1921, c. 125, ss. 2, 3; Ex. Sess. 1921, c. 20, s. 3; 1941, c. 52, s. 1; 1951, c. 491, s. 1; c. 1004, s. 1; C. S. 1435(a).)

Editor's Note.—

The first 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor" in the first two paragraphs, and the second 1951 amendment added the last paragraph.

The recitation of an erroneous date in the concluding part of a commission to an emergency judge to hold a term of court will not invalidate the commission, when it is manifestly a clerical error without tendency to mislead when the commission is construed in its entirety in the light of the dates for the commencement of the terms of court. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

A special judge who retired under former provisions of § 7-51 for total disability was held not an emergency judge. *Alpine Motors Corp. v. Hagwood*, 233 N. C. 57, 62 S. E. (2d) 518.

§ 7-51. Salaries of resigned or retired justices of Supreme Court and judges of superior courts.—Every justice of the Supreme Court and regular or special judge of the superior court who has heretofore resigned during his term of office or retired from office at the end of his term, or who shall hereafter resign or retire during his term of office or at expiration of his term, who has attained the age of sixty-five (65) years at the date of his resignation or retirement, and who has served for fifteen (15) years on the Supreme Court or on the superior court, or on the Supreme Court and the superior court combined, or twelve (12) consecutive years on the Supreme Court, or who, while serving on the Supreme Court, has attained the age of eighty (80) years, shall receive for life two-thirds (2/3) of the annual salary from time to time received by the justices of the Supreme Court or judges of superior courts, respectively, payable monthly; in addition to the retirement pay provided in this section, each emergency judge of the superior court shall be paid by the State fifty dollars (\$50.00) for each week of any regular term of court held by such emergency judge, together with his actual expenses: Provided, that any such justice or judge, who has or shall have served as such for twenty-four years or longer (whether continuously or not) shall be entitled to all of the benefits of this section from and after the date of his resignation or retirement, and shall also be subject to the other provisions of this section. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; 1927, cc. 133, 201; 1935 cc. 233, 400; 1937, c. 199; 1939, c. 258; 1943, c. 543; 1951, c. 1004, s. 2; C. S. 3884(a).)

Editor's Note.—

The 1945 amendment provided for retirement of supreme court justices upon attaining age of 80 years.

The 1949 amendment inserted a provision relating to the compensation of retired judges for holding court.

The 1951 amendment rewrote this section.

A special judge who retired under former provisions of this section for total disability was held not an emergency judge under the provision of § 7-50 that persons embraced within the provisions of this section are constituted emergency judges. *Alpine Motors Corp. v. Hagwood*, 233 N. C. 57, 62 S. E. (2d) 518.

§ 7-51.1. Salaries of justices or judges retired because of accident or disease.—Every justice of the Supreme Court and regular or special judge of the superior court who has served eight (8) years or more on either the Supreme Court or superior court, without regard to the age of such justice or judge, and while still in active service thereon, shall have become totally disabled, through accident, physical impairment or disease, to perform efficiently the duties of his office and who resigns by reason of such disability or retires at the end of his term, shall receive for life two-thirds (2/3) of the annual salary from time to time received by the justices of the Supreme Court or judges of the superior court, respectively, payable monthly, but such judge shall not be required to qualify or serve as an emergency judge. Whenever hereafter such justice of the Supreme Court or regular or special judge of the superior court shall claim to be entitled to be retired on account of total disability, through accident, physical impairment or disease, to perform efficiently the duties of his office, the Governor and Council of State, acting together, shall, after notice and opportunity for hearing is given such justice or judge, by a majority vote of said body, determine and find the facts with respect thereto from the evidence offered, which shall be filed with the Council of the State, and enter upon the minutes of the Council of State such findings. The findings so made shall be conclusive as to such matters and determine the right of the justice or judge to the retirement benefits hereunder. If thereafter such justice or judge regains his mental or physical faculties to such an extent that he can perform the functions and duties of the office of justice or judge in the capacity of limited service, then such justice or judge may perform the duties of emergency judge as provided by G. S. 7-50. The Governor and Council of State, acting together upon their own motion, or upon petition of any such justice or judge asking to be restored to limited service, and after notice and opportunity for hearing is given such justice or judge, shall, by a majority vote of said body, determine and find the facts with respect thereto from the evidence offered, which shall be filed with the Council of State, and enter upon the minutes of the Council of State such findings. The findings so made shall be conclusive as to such matters and determine the right of the justice or judge to perform limited service as herein provided.

Provided further, that subsequent to the end of the term during which the said judge or justice became disabled, if said judge or justice shall regain his mental or physical faculties in full, then the Governor and Council of State, acting together, upon their own motion, and after a hearing and determination that such judge or justice has fully recovered, shall file such findings with the Council of State, and thereafter, said judge or justice shall no longer be eligible to serve as an emergency judge or to receive the retirement benefits provided in this section. The findings so

made shall be conclusive as to the right of said judge or justice to continue to serve as an emergency judge or to receive the retirement benefits referred to herein. (1951, c. 1004, s. 3.)

§ 7-51.2. Retired justices and judges subject to assignment as emergency judges.—All justices of the Supreme Court and judges of the superior court and regular or special judges who are retired hereunder or under any other provision of law previously enacted shall be subject to the assignment as emergency judges by the Chief Justice of the Supreme Court of North Carolina, except justices or judges retired under the provisions of G. S. 7-51.1 who have not been restored to duty for limited service, and when so assigned, shall perform all the duties and shall have all powers which are now or may hereafter be conferred upon emergency judges of the State of North Carolina. (1951, c. 1004, s. 3.)

§ 7-52. Jurisdiction of emergency judges.—Emergency superior court judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later. (Ex. Sess. 1921, c. 94, s. 1; 1925, c. 8; 1941, c. 52, s. 2; 1951, c. 88; C. S. 1435(b).)

Editor's Note.—

The 1951 amendment rewrote this section.

§ 7-53. Orders returnable to another judge; notice.—If any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the Chief Justice of the Supreme Court to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matter. (Ex. Sess. 1921, c. 94, s. 2; 1951, c. 401, s. 1; C. S. 1435(c).)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor."

§ 7-54. Governor to make appointment of four special judges.—The governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven, of the constitution, and who shall take the same oath of office and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements of residence in a particular district, to be special judges of the superior court of the state of North Carolina. Two of the said judges shall be appointed from the Western Judicial Division and two from the Eastern Judicial Division, as now established. The governor shall issue a commission to each of said judges so ap-

pointed whose term of office shall begin from his appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-three, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior court during the time named herein. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 1; 1935, c. 97, s. 1; 1937, c. 72, s. 1; 1939, c. 31, s. 1; 1941, c. 51, s. 1; 1943, c. 58, s. 1; 1945, c. 153, s. 1; 1947, c. 24, s. 1; 1949, c. 681, s. 1; 1951, c. 1119, s. 1.)

Editor's Note.—

Present §§ 7-54 to 7-61 were codified from Session Laws 1951, c. 1119, which was practically a re-enactment of the former sections without change except as to dates.

For comment on the 1943 amendment to this and the following seven sections, see 21 N. C. Law Rev. 342.

§ 7-55. Removal of special judges; filling vacancies.—Each special judge so appointed by the governor shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occurring in the offices created by §§ 7-54 to 7-61 shall be filled by the governor in like manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2; 1937, c. 72, s. 2; 1939, c. 31, s. 2; 1941, c. 51, s. 2; 1943, c. 58, s. 2; 1945, c. 153, s. 2; 1947, c. 24, s. 2; 1949, c. 681, s. 2; 1951, c. 1119, s. 2.)

§ 7-56. Further appointments.—The governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding four additional judges, two of whom shall be residents of the Western Judicial Division and two of whom shall be residents of the Eastern Judicial Division, whose terms of office shall begin from his or their appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-three. All of the provisions of §§ 7-54 to 7-61 applicable to the four special judges authorized to be appointed under § 7-54 shall be applicable to the four special judges authorized to be appointed under this section. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3; 1937, c. 72, s. 3; 1939, c. 31, s. 3; 1941, c. 51, s. 3; 1943, c. 58, s. 3; 1945, c. 153, s. 3; 1947, c. 24, s. 3; 1949, c. 681, s. 3; 1951, c. 1119, s. 3.)

§ 7-57. Extent of authority.—The authority herein conferred upon the governor, pursuant to article four, section eleven, of the constitution of North Carolina, to appoint such special judges shall extend to regular as well as special terms of the superior court, with either civil or criminal jurisdiction, or both, as may be designated by the statutes or by the governor pursuant to law. (1927, c. 206, s. 4; 1929, c. 137, s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c. 97, s. 4; 1937, c. 72, s. 4; 1939, c. 31, s. 4; 1941, c. 51, s. 4; 1943, c. 58, s. 4; 1945, c. 153, s. 4; 1947, c. 24, s. 4; 1949, c. 681, s. 4; 1951, c. 1119, s. 4.)

§ 7-58. Same power and authority as regular judges.—To the end that such special judges shall have the fullest power and authority sanctioned by article four, section eleven, of the constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold,

with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the court of a particular county shall have during said term of court, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s. 5; 1933, c. 217, s. 5; 1935, c. 97, s. 5; 1937, c. 72, s. 5; 1939, c. 31, s. 5; 1941, c. 51, s. 5; 1943, c. 58, s. 5; 1945, c. 153, s. 5; 1947, c. 24, s. 5; 1949, c. 681, s. 5; 1951, c. 78, s. 1; c. 1119, s. 5.)

Editor's Note.—The second 1951 act, effective April 14, 1951, re-enacted this section in the language set out above. The first 1951 act, effective February 20, 1951, had previously rewritten this section to read as follows: "Special superior court judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold, that regular judges holding the same courts would have. A special judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later."

Motions in the Cause Made at Term in Civil Actions.—Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. *Shepard v. Leonard*, 223 N. C. 110, 113, 25 S. E. (2d) 445.

Special Judge May Hear Matter out of Term by Consent.—Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445.

Proceeding to Obtain Custody of Child.—A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re *Cranford*, 231 N. C. 91, 56 S. E. (2d) 35.

§ 7-59. Salary and expenses; terms; practice of law.—The special judges so appointed shall receive the same salary and traveling expenses as now are, or may be, paid or allowed to judges of the superior court for holding their regularly assigned courts, and they shall hold all such regular and special terms of court as they may be directed and assigned by the chief justice of the supreme court to hold, without additional compensation: Provided, that no person appointed under §§ 7-54 to 7-61 shall engage in the practice of law. (1927, c. 206, s. 6; 1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s. 6; 1935, c. 97, s. 6; 1937, c. 72, s. 6; 1939, c. 31, s. 6; 1941, c. 51, s. 6; 1943, c. 58, s. 6; 1945, c. 153, s. 6; 1947, c. 24, s. 6; 1949, c. 681, s. 6; 1951, c. 491, s. 1; 1951, c. 1119, s. 6.)

Editor's Note.—The 1947 act omitted the word "private" formerly appearing before the word "practice" in the last line. The first 1951 act substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-60. Powers after commission expires.—The special judges herein provided for are hereby fully authorized and empowered to settle cases on appeal and to make all proper orders in regard thereto after the time for which they were commissioned has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7; 1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97,

s. 7; 1937, c. 72, s. 7; 1939, c. 31, s. 7; 1941, c. 51, s. 7; 1943, c. 58, s. 7; 1945, c. 153, s. 7; 1947, c. 24, s. 7; 1949, c. 681, s. 7; 1951, c. 1119, s. 7.)

§ 7-61. Effect on sections 7-50 and 7-51.—Nothing in §§ 7-54 to 7-60 shall in any manner affect §§ 7-50 to 7-51. (1927, c. 206, s. 8; 1929, c. 137, s. 8; 1931, c. 29, s. 8; 1933, c. 217, s. 8; 1935, c. 97, s. 8; 1937, c. 72, s. 8; 1939, c. 31, s. 8; 1941, c. 51, s. 8; 1943, c. 58, s. 8; 1945, c. 153, s. 8; 1947, c. 24, s. 8; 1949, c. 681, s. 8; 1951, c. 1119, s. 8.)

§ 7-61.1. Powers of elected judges holding courts by assignment, exchange or otherwise.—A judge of the superior court elected by a vote of the people or his successor appointed to fill a vacancy as provided by law, duly assigned to hold the courts of a county or judicial district, or holding such courts by exchange or otherwise as provided by law, shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later. (1951, c. 740.)

Art. 8. Jurisdiction.

§ 7-63. Original jurisdiction.

I. IN GENERAL.

Action in Summary Ejectment.—Superior courts and courts of justices of the peace have concurrent jurisdiction of actions in summary ejectment. *Stonestreet v. Means*, 228 N. C. 113, 44 S. E. (2d) 600.

Awarding Custody of Child.—After a decree for absolute divorce entered by the recorder's court of Nash county, the court entered an order awarding the custody of the child of the marriage under § 50-13, and defendant appealed to the superior court. It was held that if the recorder's court had jurisdiction to enter the order, the hearing in the superior court on appeal was de novo, while if the jurisdiction of the recorder's court did not include jurisdiction to award the custody of the child, the petition might be considered an application to the judge of the superior court, and the superior court had jurisdiction to enter a different order awarding the custody of the child, since in no event was its jurisdiction derivative. *Brake v. Brake*, 228 N. C. 609, 46 S. E. (2d) 643.

Cited in *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394.

§ 7-64. Concurrent jurisdiction.

Provided, that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. (1919, c. 299; 1923, c. 98; 1941, c. 265; 1945, c. 164; c. 628, s. 1; C. S. 1437.)

Editor's Note.

The 1945 amendments struck out "Cumberland" and "Halifax" from the list of counties exempted from the provisions of this section, thereby making it applicable to said counties. As only the proviso was affected by the amendments the rest of the section is not set out.

Court First Taking Cognizance Excludes Other Court.—Where a recorder's court and the superior court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. *State v. Reavis*, 228 N. C. 18, 44 S. E. (2d) 354.

Where Record Failed to Show Conflict of Jurisdiction.—While an appeal from a judgment of recorder's court upon warrant charging unlawful possession of intoxicating liquor for the purpose of sale on a certain date was pending in Superior Court, that court did not have jurisdiction to try

defendant on a bill of indictment, of later date than the warrant, charging the same offense, where the record contained nothing to show that the offenses were the same. Hence, the record failed to present conflict of jurisdiction between recorder's court under § 7-222, and Superior Court under this section. *State v. Suddreth*, 223 N. C. 610, 613, 27 S. E. (2d) 623.

Cited in *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394.

§ 7-65. Jurisdiction in vacation or at term.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term: Provided, that in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time: Provided, further, that all matters and proceedings heretofore passed upon by the resident judge of the judicial district according to and in conformity with the proviso first above set forth, prior to the date of the ratification of this Act, are hereby validated and declared to be in full force and effect, and all decisions, orders, decrees and judgments of whatsoever nature and kind heretofore entered and signed by the resident judge of the judicial district prior to the date of the ratification of this Act and according to and in conformity with the proviso first above set forth, are hereby validated and declared to be lawful, in full force and effect and binding upon the parties thereto, except that nothing herein contained shall be construed as applicable to or in any manner affecting pending litigation (Rev., s. 1501; Code, c. 10, s. 230; 1871-2, c. 3; 1939, c. 69; 1945, c. 142; 1951, c. 78, s. 2; C. S. 1438.)

Editor's Note.—

The 1945 amendment added the provisos.

The 1951 amendment inserted in the second sentence and in the first proviso thereto the references to any special superior court judge residing in the district.

As to jurisdiction of resident judge, see 23 N. C. Law Rev. 329.

Jurisdiction to Order Payment of Expenses Out of the Recovery.—In an action by taxpayers against public officers under § 128-10, to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery, and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. *Hill v. Stanbury*, 224 N. C. 356, 30 S. E. (2d) 150, commented on in 23 N. C. Law Rev. 40.

Proceeding to Obtain Custody of Child.—A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re *Cranford*, 231 N. C. 91, 56 S. E. (2d) 35.

Resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658.

Stated in *State Distributing Corp. v. Travelers Indemnity Co.*, 224 N. C. 370, 30 S. E. (2d) 377 (dis. op.).

Art. 9. Judicial and Solicitorial Districts and Terms of Court.

§ 7-70. Terms of court.

Eastern Division

First District

Currituck—First Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; 1945, c. 179; C. S. 1443.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for three weeks, the first week for the trial of civil cases only and the second and third weeks for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; ninth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September for the trial of civil cases only; fifth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only. (1913, c. 196; Ex. Sess., 1913, c. 51; 1921, c. 105; 1923, c. 232; Pub. Loc. 1925, c. 631; 1929, c. 167; 1933, cc. 3, 129; 1949, c. 878; C. S. 1443.)

Perquimans—Fifth Monday before the first Monday in March for civil cases only; sixth Monday after the first Monday in March; fourth Monday after the first Monday in September for civil cases only, for which term a special judge shall be assigned by the Chief Justice of the Supreme Court to hold the same; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess., 1913, c. 51; 1931, c. 6; 1933, c. 286; 1949, c. 266; 1951, c. 57; C. S. 1443.)

Second District

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week to be for the trial of civil cases only and the second week to be for the trial of criminal cases only; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only; eleventh Monday after the first Monday in March, for one week, for the trial of civil cases only; sixteenth Monday after the first Monday in March, for one week, for the trial of civil cases only; first Monday in September, for one week, for the trial of civil or criminal cases, or both; third Monday after the first Monday in September, for one week, for the trial of criminal cases only; fourth Mon-

day after the first Monday in September, for one week, for the trial of civil cases only; seventh Monday after the first Monday in September, for one week, for the trial of criminal cases only; eighth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in September, for one week, for the trial of civil or criminal cases, or both. During the years 1951 and 1952, the following terms of court shall also be held in Wilson county: Fifth Monday before the first Monday in March, for one week, for the trial of civil cases only; first Monday before the first Monday in September, for one week, for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the second judicial district with the terms above set out, the said terms of court here established shall be considered special terms, and the Chief Justice of the Supreme Court shall assign a regular, special or emergency judge to hold such said special term. (1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; 1921, c. 10; 1937, c. 104; 1947, c. 1057; 1951, c. 1054, s. 1; C. S. 1443.)

Third District

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; the last Monday in July for one week; sixth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, cc. 140, 200; 1935, cc. 102, 276; 1939, c. 40; 1947, c. 282; 1951, c. 468; C. S. 1943.)

Bertie—Third Monday before the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; tenth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247; 1941, c. 367, s. 1; 1947, c. 61; 1951, c. 1139, s. 1; C. S. 1443.)

Halifax—Fifth Monday before the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, to continue for two weeks, the first week for the trial of civil cases only, and the second week for the trial of civil cases and of criminal cases when the defendant is confined in jail or otherwise imprisoned; eighth Monday after the first Monday in March, for the trial of both criminal and civil cases, to continue for one week, and for this term of court the Chief Justice of the Supreme Court is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; thirteenth Monday after the first Monday in March to continue for two weeks, the first week of which shall be for the trial of civil cases only, and the second week for trial of criminal or civil cases, or both; third Monday before the first Monday in September to continue for two weeks, for the trial of civil and criminal cases; fourth Mon-

day after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for this term of court the Chief Justice is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; seventh Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, and for this term of court the Chief Justice is hereby directed to appoint a judge to hold the same from among the regular, special or emergency judges; twelfth Monday after the first Monday in September, for the trial of civil and criminal cases, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78; 1924, c. 87; 1925, cc. 36, 47; 1929, c. 160; 1941, c. 367, s. 1; 1951, c. 1139, s. 2; C. S. 1443.)

Warren—Eighth Monday before the first Monday in March for criminal cases only; sixth Monday before the first Monday in March for civil cases only; ninth Monday after the first Monday in March for civil cases only; twelfth Monday after the first Monday in March for criminal cases only; first Monday after the first Monday in September for criminal cases only; fourth Monday after the first Monday in September for civil cases only; each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; 1941, c. 367, s. 1; 1951, c. 1139, s. 3; C. S. 1443.)

Vance—Seventh Monday before the first Monday in March for criminal cases only; first Monday in March for criminal cases only; third Monday after the first Monday in March for civil cases only; fifteenth Monday after the first Monday in March for criminal cases only; sixteenth Monday after the first Monday in March for civil cases only; third Monday after the first Monday in September for criminal cases only; fifth Monday after the first Monday in September for civil cases only, each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; 1925, cc. 66, 165; 1927, c. 169, s. 1; 1951, c. 1139, s. 4; C. S. 1443.)

Fourth District

Lee—Fifth Monday before the first Monday in March, to continue for two weeks, the first week for the trial of civil cases, the second week for the trial of criminal and civil cases, provided that, for this term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; third Monday after the first Monday in March to continue for two weeks, the first week for the trial of criminal cases, and the second week for the trial of civil cases; fifteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases, provided that for said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; seventh Monday before the first Monday in September, to continue for two weeks, the first week for the trial of criminal cases and the second week for the trial of civil cases; first Monday after the first Monday in September, to continue for two weeks for the trial of civil cases, provided that for the second week of said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; eighth Mon-

day after the first Monday in September for one week for the trial of criminal cases; fourteenth Monday after the first Monday in September for one week for the trial of civil cases, provided that for said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; 1929, c. 162; 1931, c. 86; 1939, c. 194; 1947, c. 385; C. S. 1443.)

Fifth District

Pitt—Seventh Monday before the first Monday in March for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March for civil cases only; second Monday after the first Monday in March for civil and criminal cases; third Monday after the first Monday in March for the trial of both civil and criminal cases; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases and criminal cases where defendants are confined in jail; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for civil cases only; fourth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases; fifth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, to continue for one week for trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March, and the eleventh Monday after the first Monday in September, the governor may appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56; Ex. Sess. 1920, c. 29; 1921, c. 159; 1929, c. 153; 1931, c. 94; 1935, c. 73; 1939, c. 43; 1947, c. 686; 1949, cc. 867, 1246; 1951, c. 677; C. S. 1443.)

Craven—Eighth Monday before the first Monday in March and the thirteenth Monday after the first Monday in March, for the trial of civil cases and criminal cases; the first Monday in September, to continue for two weeks, for the trial of civil cases and criminal cases; fifth Monday after the first Monday in March for the trial of civil cases and criminal cases; fifth Monday before the first Monday in March to continue for one week for the trial of civil cases only; fourth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March for the trial of civil cases and criminal cases; fourth Monday after the first Monday in September and eleventh Monday after the first Monday in September, each to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in Septem-

ber for the trial of civil cases and criminal cases; tenth Monday after the first Monday in March for the trial of civil cases only. If the judge regularly holding the courts for the fifth judicial district is not available to hold the term beginning on the tenth Monday after the first Monday in September or the second week of the term beginning the first Monday in September, the Chief Justice of the Supreme Court shall assign a judge to hold the same from among the regular or special superior court judges. (1913, c. 196; 1915, c. 111; 1917, c. 217; 1929, c. 166; 1945, c. 42; 1947, c. 1034; 1949, c. 1187; 1951, c. 434; C. S. 1443.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the governor shall assign a judge from among the regular, special or emergency judges. Provided, that in all instances where there are consecutive weeks of superior court calendared for Greene county, each such week shall constitute a separate term of such court for all purposes whatsoever. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; 1935, c. 109; 1947, c. 775; C. S. 1443.)

Sixth District

Lenior—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before the first Monday in March, to continue for one week, for the trial of civil cases only; first Monday before the first Monday in March for the trial of civil cases only; second Monday after the first Monday in March, to continue for one week for the trial of criminal or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; seventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases or civil cases, or both; tenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; eleventh Monday after the first Monday in March to continue for one week, for the trial of civil cases only; fourteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; fifteenth Monday after the first Monday in March, to continue for one week, for the trial of civil cases only; sixteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; second Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; first Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases, or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the state of North Carolina; third Monday after the first Monday in September, to continue for one week for the trial of civil cases only; eighth Monday after the first Monday in September, to continue for one week for the trial of criminal

cases or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; ninth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the state of North Carolina.

At all criminal terms of the superior court in the county of Lenoir, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters not requiring a jury, and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13; Pub. Loc. 1925, c. 5; 1931, c. 271; 1933, c. 234, s. 1; 1947, c. 909; 1949, c. 1099; C. S. 1443.)

Duplin—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, to continue for one week for the trial of criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; fifth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; first Monday before the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; fifth Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only.

At all criminal terms of the superior court in the county of Duplin, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters, not requiring a jury trial and make any order, judgment or decree respecting the confirmation of judicial sales.

(1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79; 1931, c. 271; 1933, c. 234, s. 1; 1935, cc. 157, 289; 1941, c. 321; 1947, c. 909; 1951, c. 808, s. 1; C. S. 1443.)

Onslow—Second Monday in January, to continue for two weeks, for the trial of civil or criminal cases, or both; first Monday in March to continue for one week, for the trial of criminal cases, or civil cases, or both; twelfth Monday after the first Monday in March to continue for two weeks, for the trial of criminal and civil cases; seventh Monday before the first Monday in September, to continue for one week, for the

trial of civil cases and jail cases, in accordance with the next succeeding paragraph; fourth Monday after the first Monday in September, to continue for one week for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases. (1913, c. 196; Ex. Sess. 1913, c. 75; 1915, c. 240; Ex. Sess. 1921, c. 78, s. 1; 1927, c. 179, s. 1; 1933, c. 234, s. 1; 1941, c. 321; 1943, c. 389; 1951, c. 808, s. 2; c. 969, s. 1; C. S. 1443.)

The July term of the superior court for Onslow County, is hereby authorized, in the discretion of the board of county commissioners signified by resolution duly adopted in apt time, to try any or all state cases which involve defendants or witnesses confined in jail to await trial. In the event such trials are ordered, by such resolution, the board of county commissioners shall cause to be drawn and summoned in the usual manner sufficient jurors to provide for the empaneling of a grand jury and to also provide for a trial jury or juries. (1931, c. 341.)

Seventh District

Franklin—The sixth Monday before the first Monday in March for two weeks for the trial of civil cases only; the third Monday before the first Monday in March one week for the trial of criminal cases; sixth Monday after the first Monday in March one week for the trial of criminal cases; eighth Monday after the first Monday in March two weeks for the trial of civil cases only; second Monday after the first Monday in September two weeks for the trial of civil cases only; fifth Monday after the first Monday in September one week for the trial of criminal cases; twelfth Monday after the first Monday in September two weeks for the trial of civil cases only.

The courts provided in the above paragraph shall be held by the judge regularly riding the seventh judicial district.

At all criminal terms provided for in the second preceding paragraph, all motions and divorce cases may be heard, and, by consent, jury trials in all civil cases may be heard at said criminal terms. (1913, c. 196; 1917, c. 116; 1937, c. 387, ss. 1, 3; 1939, c. 184; 1941, c. 189; 1943, c. 699; 1945, c. 630; C. S. 1443.)

Eighth District

New Hanover—Seventh Monday before the first Monday in March, a term of one week for the trial of criminal cases only; fourth Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; first Monday before the first Monday in March, a term of two weeks for the trial of criminal cases only; first Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; sixth Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; eleventh Monday after the first Monday in March, a term of one week for the trial of criminal cases only; twelfth Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in March, a term of one week for the trial of criminal cases only; sixth Monday before the first Monday in September, a term of one week for the trial of criminal cases

only; third Monday before the first Monday in September, a term of one week for the trial of criminal cases only; second Monday before the first Monday in September, a term of two weeks for the trial of civil cases only; fourth Monday after the first Monday in September, a term of one week for the trial of criminal cases only; fifth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, a term of two weeks for the trial of criminal cases only; thirteenth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1949, c. 692; 1951, c. 722; C. S. 1443.)

Pender—Eighth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; eighth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday after the first Monday in September, a term of one week for the trial of civil and criminal cases; seventh Monday after the first Monday in September, a term of two weeks for the trial of civil cases only. (1913, c. 196; 1921, c. 14; 1933, c. 153; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 2; 1951, c. 814; C. S. 1443.)

Columbus—Eighth Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, a term of two weeks for the trial of criminal cases only; second Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; ninth Monday after the first Monday in March, a term of one week for the trial of criminal cases only; fifteenth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; first Monday in September, a term of two weeks for the trial of criminal cases only; third Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; fifth Monday after the first Monday in September, a term of one week for the trial of criminal cases only; eighth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; eleventh Monday after the first Monday in September, a term of two weeks for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246; 1937, c. 52; 1941, c. 367, s. 1; 1943, c. 541; 1945, c. 740; 1949, c. 474; 1951, c. 815; C. S. 1443.)

Brunswick—Sixth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday before the first Monday in March, a term of one week for the trial of civil cases only; fifth Monday after the first Monday in March, a term of one week for the trial of civil cases only; tenth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; second Monday after the first Monday in September, a term of one week for the trial of civil and criminal cases; fourth Monday

after the first Monday in September, a term of one week for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 1; 1951, c. 723; C. S. 1443.)

Ninth District

Hoke—Sixth Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday before the first Monday in September, to continue for one week; tenth Monday after the first Monday in September. The commissioners of Hoke County, whenever in their discretion the best interests of the county demand it, shall have and are hereby granted the power and authority, by order, to abrogate, in any year, the holding of any one of the above set forth terms of court, and when said term is so abrogated, thirty days' notice of the same shall be given by said commissioners by the publication of same in a newspaper published in said county and at the courthouse door: Provided, that in the event the regular term at which the grand jury is selected shall be the term abrogated then the grand jury shall continue to serve until the following term of court at which time a new grand jury shall be selected. (1913, c. 196; 1917, c. 233; Ex. Sess. 1921, c. 81; 1927, c. 155; 1931, c. 96; 1933, c. 333; 1939, c. 108; 1951, c. 959, s. 1; C. S. 1443.)

Tenth District

Alamance—Fourth Monday before first Monday in March, sixth Monday after first Monday in March, fourteenth Monday after first Monday in March, third Monday before first Monday in September, sixth Monday after first Monday in September, seventh Monday after first Monday in September and twelfth Monday after first Monday in September, all for the trial of criminal cases.

Seventh Monday before first Monday in March, sixth Monday before first Monday in March, third Monday after first Monday in March, fourth Monday after first Monday in March, eleventh Monday after first Monday in March, twelfth Monday after first Monday in March, first Monday in September, first Monday after first Monday in September, ninth Monday after first Monday in September and tenth Monday after first Monday in September, all for the trial of civil cases.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and a special judge may be named to hold said terms of the superior court of Alamance County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 53; 1921, c. 134; Ex. Sess. 1921, c. 36; 1929, c. 172; 1931, c. 228; 1951, c. 756; C. S. 1443.)

Durham—Eighth Monday before the first Monday in March, for one week, for the trial of criminal cases only; seventh Monday before the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; third

Monday before the first Monday in March, for one week, for the trial of criminal cases; second Monday before the first Monday in March, for one week, for the trial of criminal cases only; first Monday before the first Monday in March, to continue for four weeks, the first three weeks to be for the trial of civil cases only, and the fourth week to be for the trial of civil or criminal cases or both; third Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only; fifth Monday after the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; eighth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in March, for one week, for the trial of criminal cases; eleventh Monday after the first Monday in March, for one week, for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases or both; fifteenth Monday after the first Monday in March, for one week, for the trial of criminal cases; sixteenth Monday after the first Monday in March, for one week, for the trial of criminal cases only; seventh Monday before the first Monday in September, for one week, for the trial of criminal cases only; fifth Monday before the first Monday in September, to continue for two weeks, for the trial of civil or criminal cases, or both; first Monday before the first Monday in September, for one week, for the trial of criminal cases; first Monday in September, to continue for two weeks, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; fifth Monday after the first Monday in September, for one week, for the trial of criminal cases only; sixth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of civil cases only, and the second week to be for the trial of civil or criminal cases or both; twelfth Monday after the first Monday in September, for one week, for the trial of criminal cases; thirteenth Monday after the first Monday in September, for one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in September, for one week, for the trial of criminal cases.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court here established shall be considered special terms, and the Chief Justice of the Supreme Court shall assign a regular, special or emergency judge to hold each said special term. (1913, c. 196; 1915, c. 68; Ex. Sess. 1921, c. 36; Ex. Sess. 1924, c. 39; 1929, c. 243; 1931, cc. 224, 419; 1941, cc. 274, 367, s. 1; 1951, c. 1180, s. 1; C. S. 1443.)

Person—Fifth Monday before the first Monday in March; fourth Monday before the first Monday in March; seventh Monday after the first Monday in March; first Monday before the first Monday in September; sixth Monday after the first Monday in September. All of said terms shall be for the trial of criminal and civil cases, except the term beginning on the fourth Monday before the first Monday in March, which shall be for the trial of civil cases only. (1913, c. 196; 1915, c. 54; Ex. Sess. 1921, c. 36; 1929, c. 23; 1941, c. 367, s. 1; 1951, c. 437; C. S. 1443.)

Western Division

Eleventh District

Alleghany—Fifth Monday before the first Monday in March; eighth Monday after the first Monday in March; third Monday before the first Monday in September; fourth Monday after the first Monday in September. All terms to be held by the regular judge, and to be for the trial of civil and criminal cases. (1913, c. 196; 1935, c. 246; 1937, c. 413, s. 4; 1941, c. 367, s. 1; 1949, c. 456; C. S. 1443.)

Forsyth—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday before the first Monday in March, to continue for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; third Monday before the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; first Monday in March, to continue for two weeks, for trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday after the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned, and the last two weeks to be presided over by a regular judge to be assigned; fourth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; sixth Monday after the first Monday in March, to continue for three weeks, the first week of said term to be presided over by a special judge to be assigned, the second week to be presided over by a regular judge to be assigned and the third week to be presided over by a special judge to be assigned; tenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday after the first Monday in March for three weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; fourteenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; fifteenth Monday after the first Monday in March,

to continue for two weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; ninth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; second Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases only, the first two weeks of said term to be presided over by a regular judge to be assigned and the last week to be presided over by a special judge to be assigned; fifth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second week to be presided over by a regular judge to be assigned; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, to be presided over by a regular judge to be assigned; thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned.

The governor shall assign a special, emergency or any regular judge to hold the courts hereinbefore provided for when the regular judge assigned to the district is unable to hold same for any cause set out in article IV, section eleven of the constitution.

In the terms of court herein designated as criminal terms, motions in civil actions may be heard upon due notice; trials in civil actions may be heard by consent of the parties, and uncontested divorce actions may be tried. At such criminal terms motions for confirmation or rejection of referee's reports may be heard upon ten days notice and judgment entered on said reports. (1913, c. 196; 1917, c. 169; Pub. Loc. 1917, c. 375; 1919, c. 87; 1923, c. 151; Pub. Loc. 1925, c. 19; 1927, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246; 1937, c. 158; 1937, c. 413, ss. 4, 5; 1941, c. 367, s. 1; 1945, c. 166; C. S. 1443.)

Twelfth District

The twelfth district is composed of Guilford County and Davidson County. The superior court of Guilford County is composed of two divisions, the Greensboro division and the High Point division; and the superior court thereof shall be opened and held at the following times and places, to wit:

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only.

Eighth Monday before the first Monday in March, one week; (R);

Fourth Monday before the first Monday in March, two weeks (R);

First Monday in March, one week (A);

Second Monday after the first Monday in March, two weeks (R);

Seventh Monday after the first Monday in March, one week (A);

Tenth Monday after the first Monday in March, two weeks (A);

Fourteenth Monday after the first Monday in March, two weeks (A);

Eighth Monday before the first Monday in September, one week (R);

Sixth Monday before the first Monday in September, two weeks (R);

First Monday before the first Monday in September, one week (R);

First Monday after the first Monday in September, two weeks (A);

Fifth Monday after the first Monday in September, two weeks (A);

Ninth Monday after the first Monday in September, two weeks (R);

Thirteenth Monday after the first Monday in September, one week (A);

Fifteenth Monday after the first Monday in September, one week (R);

In the High Point division at the county building in High Point for the trial of criminal cases only:

Seventh Monday before the first Monday in March, two weeks (A);

Second Monday before the first Monday in March, two weeks (A);

First Monday after the first Monday in March, one week (A);

Fourth Monday after the first Monday in March, two weeks (R);

Eighth Monday after the first Monday in March, one week (R);

Twelfth Monday after the first Monday in March, one week (R);

Seventh Monday before the first Monday in September, one week (R);

Third Monday after the first Monday in September, two weeks (A);

Seventh Monday after the first Monday in September, two weeks (R);

Fourteenth Monday after the first Monday in September, one week (R);

In the Greensboro division at the county courthouse in Greensboro for the trial of civil cases only:

Eighth Monday before the first Monday in March, three weeks (1st week—A) (2nd & 3rd—R);

Fourth Monday before the first Monday in March, two weeks (A);

First Monday in March, two weeks (R);

Fourth Monday after the first Monday in March, two weeks (A);

Sixth Monday after the first Monday in March, two weeks (R);

Eighth Monday after the first Monday in March, two weeks (A);

Thirteenth Monday after the first Monday in March, three weeks (R);

Eighth Monday before the first Monday in September, two weeks (A);

First Monday after the first Monday in September, two weeks (A);

Third Monday after the first Monday in September, two weeks (R);

Fifth Monday after the first Monday in September, two weeks (R);

Seventh Monday after the first Monday in September, two weeks (A);

Eleventh Monday after the first Monday in September, two weeks (R);

In the High Point division at the county building in High Point, for the trial of civil cases only:

Fifth Monday before the first Monday in March, one week (A);

Second Monday after the first Monday in March, two weeks (A);

Tenth Monday after the first Monday in March, two weeks (R);

Sixteenth Monday after the first Monday in March, one week (A);

Fifth Monday before the first Monday in September, one week (A);

Ninth Monday after the first Monday in September, two weeks (A);

Thirteenth Monday after the first Monday in September, one week (R).

The regular judge holding the courts of the twelfth judicial district shall hold all terms in the foregoing schedule designated (R), and the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold all terms in the foregoing schedule designated (A), in both the Greensboro division and the High Point division. And if for any reason the judge holding the courts of the twelfth judicial district is unable to hold any of said terms, the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold said terms.

Any of the terms of court assigned or provided as above set out to be held in either the Greensboro division or the High Point division of the superior court of Guilford County may be transferred to, and held in, the other division of the said superior court of Guilford County by order of the resident judge of the twelfth judicial district, or the judge regularly assigned to hold the courts of the twelfth judicial district, upon publication of notice in a daily newspaper published in Greensboro and a daily newspaper published in High Point ten days prior to the term.

Defendants bound and witnesses recognized to appear at a term of the superior court which is ordered transferred and held in the other division, shall make their appearance at the next succeeding criminal term of the superior court held in the division to which they were originally bound or recognized. This statute shall in no wise affect the right provided for change of venue.

Davidson County

In Davidson County at the courthouse in Lexington for the trial of civil and criminal cases:

Fifth Monday before the first Monday in March, one week (R);

Ninth Monday after the first Monday in March, one week (R);

Sixteenth Monday after the first Monday in March, one week (R);

Second Monday before the first Monday in September, one week (R);

Eleventh Monday after the first Monday in September, two weeks (A);

In Davidson County at the courthouse in Lexington for the trial of civil cases only:

Second Monday before the first Monday in March, two weeks (R);

Fifth Monday after the first Monday in March, two weeks (A);

Twelfth Monday after the first Monday in March, two weeks (A);

First Monday after the first Monday in September, two weeks (R);

Fourth Monday after the first Monday in September, two weeks (A);

The regular judge holding the courts of the twelfth judicial district shall hold all terms in the foregoing schedule designated (R), and the Chief Justice of the Supreme Court shall assign a special, emergency or any regular judge to hold all terms in the foregoing schedule designated (A). And if for any reason the judge holding the courts in the twelfth judicial district is unable to hold any of said terms, the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold said term. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, cc. 22, 42; 1923, c. 169; 1927, c. 211; 1931, c. 114; 1933, cc. 14, 404; 1935, c. 184; 1939, c. 42; 1941, c. 367, s. 1; 1943, c. 682; 1945, c. 654; 1947, c. 1050; 1951, c. 994, s. 1; C. S. 1443.)

Thirteenth District

Moore County—Sixth Monday before the first Monday in March, for the trial of criminal cases only, to continue for one week; third Monday before the first Monday in March, for the trial of civil cases only, to continue for one week; third Monday after the first Monday in March, for the trial of civil cases only, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only and the second week for the trial of civil cases only; third Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; the first Monday in November, for the trial of civil cases only, to continue for one week (1949, c. 454; 1951, c. 75.)

Richmond—Eighth Monday before the first Monday in March to continue for one week; fifth Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in September to continue for one week; fourth Monday after the first Monday in September to continue for one week, all for the trial of criminal cases; fourth Monday before the first Monday in March to continue for one week; second Monday after the first Monday in March to continue for one week; twelfth Monday after the first Monday in March to continue for one week; fifteenth Monday after the first Monday in March to continue for two weeks; seventh Monday before the first Monday in September to continue for one week; first Monday in September to continue for one week; ninth Monday after the first Monday in September to continue for one week, all for the trial of civil cases.

Each of the terms designated for the trial of criminal cases shall also be the return term for

such civil process as may be returnable at term, and for the hearing of motions in civil actions; and civil cases requiring a jury, may, by consent of the parties thereto, be tried at such criminal terms.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Richmond County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1915, c. 72; 1917, s. 117; 1919, c. 98; 1921, c. 77; Ex. Sess. 1921, c. 16; 1923, cc. 112, 184; 1925, c. 241; 1931, c. 82; 1935, c. 3; 1951, c. 791; C. S. 1443.)

Fifteenth District

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for one week, for civil cases only; first Monday in March, to continue for one week, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; fourteenth Monday after the first Monday in March, to continue for two weeks, for civil cases only; second Monday before the first Monday in September, to continue for one week, for criminal cases only; first Monday before the first Monday in September, to continue for one week, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases; tenth Monday after first Monday in September, to continue for one week, for civil cases only; thirteenth Monday after the first Monday in September, to continue for one week, for civil cases only.

The governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Cabarrus County when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; 1921, c. 121, s. 2; 1933, c. 76; 1935, c. 177; 1939, c. 377; 1951, c. 186; C. S. 1443.)

Alexander—First Monday in February, to continue for two weeks, for the trial of civil and criminal cases; second Monday in April, to continue for one week, for the trial of civil and criminal cases; fourth Monday in September, to continue for two weeks, for the trial of civil and criminal cases. For these terms of court, the Chief Justice may assign a judge to hold the same from among the regular, special, or emergency judges. (1913, c. 196; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2; 1937, c. 214; 1949, c. 458; 1951, c. 416, 1185; C. S. 1443.)

Sixteenth District

Cleveland—First Monday in February for two weeks for the trial of civil cases only. Third Monday after the first Monday in March for two weeks; eleventh Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September for two weeks; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; second Monday after the first Monday in September, one week, for the trial of civil cases

only; eighth Monday after the first Monday in September for two weeks; eighth Monday before the first Monday in March, for one week.

For the terms commencing on the eleventh Monday after the first Monday in March, and on the first Monday after the first Monday in September, the governor may assign a judge to hold such terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 173; 1917, c. 245; 1927, c. 154; 1931, cc. 240, 456; 1935, cc. 194, 195; 1951, c. 56; C. S. 1443.)

Lincoln—Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only; eighth Monday after the first Monday in March, to continue for one week; for the trial of both criminal and civil cases; sixth Monday after the first Monday in September, to continue for two weeks, the second week for the trial of civil cases only. (1913, c. 196; 1915, c. 210; 1925, c. 26; 1951, c. 101, s. 1; C. S. 1443.)

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; third Monday after the first Monday in September, to continue for three weeks, for the trial of civil and criminal cases; fourteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases: Provided, however, that the board of commissioners of Burke county, in any year, upon written petition of a majority of the practicing attorneys resident in said county, may, by resolution duly adopted, dispense with and abrogate the holding of that term of said court which by the provisions of this section commences on the thirteenth Monday after the first Monday in March. (1913, c. 196; 1915, c. 67; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3; Pub. Loc. 1925, c. 306; 1931, c. 343; 1947, c. 26; C. S. 1443.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks for the trial of civil and criminal cases; eleventh Monday after the first Monday in March, to continue two weeks, for the trial of civil and criminal cases; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases; the eighth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; fourth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March to continue two weeks, for the trial of civil cases only; first Monday in September, to continue two weeks, for the trial of civil cases only. For the last five terms provided for above, the Chief Justice of the Supreme Court may assign a regular, special, or emergency judge when the judge

regularly assigned to the district is unable to hold said terms for any cause set out in Article IV, Section 11, of the Constitution.

If the regular judge holding the courts in the sixteenth district is not available for any cause set out in Article IV, Section 11, of the Constitution, to hold any of the terms of court provided for in this statute, the Chief Justice of the Supreme Court shall assign a judge to hold such term or terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 35; Ex. Sess. 1921, c. 90, s. 2; 1941, c. 367, s. 1; 1949, c. 453; 1951, c. 35; c. 1200, s. 1; C. S. 1443.)

Catawba—The regular April term of the superior court of Catawba County, consisting of two weeks shall be for the trial of civil cases exclusively during the first week and shall be for the trial of both civil and criminal cases during the second week. Fifth Monday after the first Monday in March, to continue for two weeks, for the trial of both civil and criminal cases: Provided, that the board of county commissioners may by resolution, adopted not less than 30 days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the Chief Justice of the Supreme Court of North Carolina to the end that the judge assigned to said court may be relieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47; c. 90, s. 1; 1923, c. 18; 1925, c. 18, ss. 1, 2; 1933, c. 311; 1949, c. 1126; 1951, c. 101, s. 2; C. S. 1443.)

Watauga—Seventh Monday after the first Monday in March; second Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for a term of two weeks, trial of civil cases only; the tenth Monday after the first Monday in September to continue for a term of two weeks, for the trial of civil cases only; provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; 1945, c. 696; 1949, c. 689; C. S. 1443.)

Seventeenth District

Davie—Third Monday after the first Monday in March for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, for the trial of civil cases only; first Monday before the first Monday in September, for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, for the trial of civil cases only. (1913, c. 196; 1921, cc. 31, 121, 166; 1935, c. 105, s. 2; 1947, c. 587; C. S. 1443.)

Wilkes—Seventh Monday before the first Monday in March for three weeks for the trial of civil cases only; first Monday in March for three weeks for the trial of both civil and criminal cases; eighth Monday after the first Monday in March for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for two weeks for the trial of both civil and criminal cases; fifteenth Monday after the first Monday in March for two weeks for the trial of civil cases only, without the intervention of a

grand jury; seventh Monday before the first Monday in September for one week for the trial of civil cases only; fourth Monday before the first Monday in September for three weeks for the trial of both civil and criminal cases; first Monday after the first Monday in September for one week for the trial of civil cases only; fourth Monday after the first Monday in September for two weeks for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September for two weeks for the trial of civil and criminal cases. (1913, c. 196; 1919, c. 165; 1921, c. 166; 1935, c. 105, s. 1; c. 192; 1937, c. 48; 1941, c. 367, s. 1; 1947, c. 587; 1949, c. 994; C. S. 1443.)

Yadkin—Eighth Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; fourth Monday before the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; tenth Monday after the first Monday in March, to continue for one week, for the trial of civil and criminal cases; second Monday before the first Monday in September, to continue for one week for the trial of criminal cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases. (1913, c. 126; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65; 1941, c. 367, s. 1; 1947, c. 587; 1951, c. 1215, s. 1; C. S. 1443.)

Avery—Sixth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; ninth Monday before the first Monday in September, for two weeks, for the trial of both criminal and civil cases; sixth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 169; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90; 1931, c. 84; 1933, cc. 152, 250, s. 1; 1941, c. 212, s. 1, c. 367, s. 1; 1943, c. 162; 1945, c. 66; C. S. 1443.)

Nineteenth District

Buncombe—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases; sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases; sixth Monday before the first Monday in September, to continue for one week for the trial of criminal cases.

Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases; second Monday before the first Monday in March, to continue for one week for the trial of criminal cases; first Monday in March, to continue for two weeks for the trial of civil cases; second Monday after the first Monday in March, to continue for one week for the trial of criminal cases; fourth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; sixth Monday after the first Monday in March, to continue for one week for the trial of

criminal cases; ninth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; eleventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; fifteenth Monday after the first Monday in March, to continue for one week for the trial of criminal cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases; second Monday before the first Monday in September, to continue for one week for the trial of criminal cases; first Monday in September, to continue for two weeks for the trial of civil cases; second Monday after the first Monday in September, to continue for one week for the trial of criminal cases; fourth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases; sixth Monday after the first Monday in September, to continue for one week for the trial of criminal cases; ninth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases; eleventh Monday after the first Monday in September, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases; fifteenth Monday after the first Monday in September, to continue for one week for the trial of criminal cases. The foregoing designation of terms of court "for the trial of civil cases" or "for the trial of criminal cases" shall serve to indicate the primary function of each such term of court, and cases for hearing or trial at such term shall be calendared and jury lists drawn accordingly: Provided, at all said terms of court both civil and criminal actions may be tried.

(1951, c. 1195, s. 1.)

Madison—First Monday before the first Monday in March, to continue for one week; fourth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, to continue for one week; sixteenth Monday after the first Monday in March, to continue for one week; first Monday before the first Monday in September, to continue for one week; fourth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in September, to continue for one week.

The board of county commissioners shall, at the time of drawing the jurors for the terms of court provided in the preceding paragraph, designate whether the terms shall be for the trial of civil or criminal cases, and draw the jurors accordingly.

In addition to the terms provided for above, there shall be held in Madison county a term of the superior court to which a judge shall be assigned beginning on the fifth Monday before the first Monday in March to continue for one week, for the trial of civil cases. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1929, c. 205; 1931, c. 25; 1941, c. 367, s. 1; 1947, c. 549, ss. 1, 2; 1949, c. 1101; C. S. 1443.)

Twentieth District

Jackson—Second Monday before the first Mon-

day in March; eleventh Monday after the first Monday in March, each term to continue for two weeks and both to be for the trial of criminal and civil cases; fourteenth Monday after the first Monday in March, for the trial of civil cases only, and for this term of court the governor shall assign a judge to hold same from among the regular, special or emergency judges; fifth Monday after the first Monday in September to continue for two weeks.

The county commissioners, may, in their judgment abrogate the term herein provided to be held on the fourteenth Monday after the first Monday in March, the jurors for this term to be drawn at the same time as those for the May term, service to be withheld pending the decision of the county commissioners. (1913, c. 196; 1933, c. 107; 1939, c. 212; 1947, c. 556; C. S. 1443.)

Twenty-First District

Caswell—The second Monday after the first Monday in March, to continue for one week, for the trial of criminal cases; the fifth Monday after the first Monday in March, to continue for one week, for the trial of civil cases; the fourth Monday after the first Monday in September, to continue for one week, for the trial of civil cases; the tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases. (1913, c. 196; 1919, c. 289; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246; 1937, cc. 107, 413, s. 5; 1941, c. 367, s. 1; 1945, c. 143; 1951, c. 361; C. S. 1443.)

Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for one week; second Monday after the first Monday in September to continue for one week; eleventh Monday after first Monday in September to continue for one week; fifteenth Monday after the first Monday in September to continue for one week; all the above terms to be for the trial of criminal and civil cases.

Seventh Monday before the first Monday in March to continue for one week; second Monday before the first Monday in March to continue for two weeks; eighth Monday after the first Monday in March to continue for one week; thirteenth Monday after the first Monday in March to continue for one week; eighth Monday before the first Monday in September to continue for two weeks; third Monday after the first Monday in September to continue for two weeks; all the above terms to be for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 9; Pub. Loc. 1925, c. 417; 1931, c. 251; 1933, cc. 180, 413; 1935, c. 246; 1937, cc. 210, 413, s. 5; 1945, c. 174; 1951, c. 415; C. S. 1443.)

Editor's Note.—

The 1945, 1947, 1949 and 1951 amendatory acts have been cited at the ends of the paragraphs affected thereby. Only the parts of the section affected by such acts have been set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 344.

Judicial Notice of Dates of Terms.—The courts will take judicial notice of the dates of the terms of the superior courts. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

§ 7-70.1. Assignment of judges to hear nonjury matters.—The Chief Justice of the Supreme Court, whenever he considers that such course will expe-

dite the disposition of pending cases or otherwise aid in the administration of justice, may assign any judge of the superior court, regular, special or emergency, to hear and to determine in any specified county or counties any controversy in civil actions or proceedings pending therein not requiring the intervention of a jury or in which a jury trial has been waived and to conduct pre-trial conferences in civil actions or proceedings pending therein, such assignment having no relation to the existence or convening of any term of court, and such judge, when so assigned and commissioned by the Chief Justice of the Supreme Court shall have, during the period specified in the commission and without relation to any term of court, in the specified county or counties the same jurisdiction as that of the resident judge and of the regularly presiding judge of the judicial district in which such county or counties are located with reference to the hearing and determination of civil matters in vacation. (1951, c. 77.)

§ 7-71. Chief Justice of the Supreme Court to assign judges to hold terms of court when regular judges are not available.—If the regular judge holding the courts for any district is not available for any cause set out in article four, section eleven, of the Constitution to hold any of the terms of court provided for in chapter 367 of the Public Laws of 1941, amending § 7-70, the Chief Justice of the Supreme Court shall assign a judge to hold such term or terms from among the regular, special or emergency judges. (1951, c. 367, s. 2; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-71.1. Chief Justice of the Supreme Court authorized to cancel terms of court; judges available for assignment elsewhere.—The Chief Justice of the Supreme Court is authorized and empowered, upon a finding by him that any term of superior court for any of the counties of the state is not necessary due to the lack of sufficient official business to be transacted, to cancel any term of superior court scheduled to be held in any of the counties of the state: Provided, that any term of superior court canceled hereunder shall be canceled at least ten days prior to the time for the convening of said court.

Upon the cancellation of any term of superior court the judge scheduled to hold said term of court shall be available for assignment by the Chief Justice of the Supreme Court to hold superior court in any other county in the state. (1943, c. 348, ss. 1, 2; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

For comment on this and the following section, see 21 N. C. Law Rev. 336.

§ 7-71.2. Cancellation not to affect subsequent terms.—The cancellation of any term of court by the Chief Justice of the Supreme Court, as provided in § 7-71.1 shall dispense with the holding of the term of court during the year for which it is canceled, but it shall not affect the terms of court provided by law for the county during succeeding years. (1943, c. 348, s. 3; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-72. Civil cases at criminal terms.—At crimi-

nal terms of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days' notice and judgment entered on said reports. At criminal terms of court, the court is also authorized and empowered to enter consent orders and consent judgments and to try uncontested civil actions and uncontested divorce cases. (Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; 1931, c. 394; 1947, c. 25; C. S. 1444.)

Editor's Note.—The 1947 amendment added the last sentence, which represents a further step towards flexibility in the handling of judicial business. 25 N. C. Law Rev. 389.

§ 7-73.1. Calendar for all terms for trial of criminal cases.—1. Filing with Clerk; Fixing Day for Trial of Each Case.—At least one week before the beginning of any term of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of the superior court a calendar of the cases he intends to call for trial at that term. The calendar shall fix a day for the trial of each case included thereon.

2. Grand Jury Cases.—The solicitor may place on the calendar for the first day of the term all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day.

3. Trial of Case before Day Fixed.—No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court.

4. Cases Docketed after Calendar Completed.—All cases docketed after the calendar has been made and filed with the clerk of superior court may be placed on the calendar at the discretion of the solicitor.

5. Subpoenaing of Witnesses.—All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses.

6. Proof of Attendance of Witnesses.—Witnesses shall not be entitled to prove their attendance for any days prior to the day on which the case in which they are witnesses is set for trial unless otherwise ordered by the presiding judge.

7. Authority of Court Unaffected.—Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial. (1949, c. 169.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 451.

§ 7-74. Rotation of judges.

Jurisdiction of "in Chambers" Matters.—Within the period of assignment the judge so assigned to a district has jurisdiction of all "in Chambers" matters arising in the district. Moreover, "the judge assigned to the district" is specifically designated by § 1-493 as one of the judges to whom all restraining orders and injunctions shall be made returnable. *Reidville v. Slade*, 224 N. C. 48, 54, 29 S. E. (2d) 215. See also, *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617.

§ 7-76. Court adjourned by sheriff when judge not present.

Editor's Note.—For comment on this section, see 21 N. C. Law Rev. 338.

Art. 10. Special Terms of Court.

§ 7-77. Chief Justice of the Supreme Court may designate judge.—The Chief Justice of the Su-

preme Court has the power to appoint any judge to hold special terms of the superior court in any county. (Rev., s. 1511; Code, s. 913; 1879, c. 11; Const., Art. 4, s. 11; 1951, c. 491, s. 1; C. S. 1449.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-78. Chief Justice of the Supreme Court may order special terms.—Whenever it shall appear to the Chief Justice of the Supreme Court by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall order a special term and issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district, and hold for such time as he may designate, unless the business be earlier disposed of. The Chief Justice, when in his opinion the public interest so requires, may order a special term of court to be held by a regular, special, or emergency judge of the superior court in any county or district during the holding of a regular term in such county or district. (Rev., s. 1512; Code, s. 914; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Ex. Sess. 1924, c. 100; 1951, c. 491, s. 3; C. S. 1450.)

Editor's Note.—

The 1951 amendment substituted in the first sentence "Chief Justice of the Supreme Court" for "Governor", and inserted therein the words "order a special term and". It also rewrote the second sentence.

§ 7-79. Compensation of judge.—Any regular judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week and his actual expenses incurred in attending such special term by the county in which the special term is held. But any such judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the Chief Justice of the Supreme Court, enough extra weeks of court to make out twenty weeks for the six months. (Rev., s. 1512; Code, s. 914; 1913, c. 63; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; 1909, c. 85, s. 1; 1951, c. 491, s. 1; C. S. 1451.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-80. Notice of special terms.—Whenever the Chief Justice of the Supreme Court shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement. (Rev., s. 1513; Code, s. 915; 1868-9, c. 273; 1951, c. 491, s. 1; C. S. 1452.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-82. Grand juries at special terms.—There shall be no grand jury at any special term, unless the same shall be ordered by the Chief Justice of the Supreme Court. (Rev., s. 1515; Code, s. 921; 1868-9, c. 273; 1951, c. 491, s. 1; C. S. 1454.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

Art. 11. Special Regulations.

§ 7-89. Court reporters.

Local Modification.—Cleveland County: 1945, c. 505.

§ 7-90. Official court reporter for second judicial district.

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem: Provided, however, such compensation shall not exceed sixteen dollars per day and actual expenses upon a weekly basis. (1947, c. 794; 1951, c. 803.)

Editor's Note.—The 1947 amendment substituted "thirteen" for "ten" in line four of the fifth paragraph, and the 1951 amendment substituted sixteen for thirteen. As the rest of the section was not affected by the amendments it is not set out.

§ 7-91. Official court reporter for fifth judicial district.

Local Modification.—Pitt: 1947, c. 759; 1949, c. 1185.

§ 7-92. Official court reporter for sixth judicial district.

The resident judge shall likewise fix the compensation to be received, by said reporter, and said reporter pro tem, provided, however, such compensation shall not exceed twelve and one-half dollars per day and actual expenses upon a weekly basis.

(1951, c. 940, s. 1.)

Editor's Note.—The 1951 amendment inserted the words "twelve and one-half" in lieu of the word "ten" formerly appearing in the fourth line of the fifth paragraph. As only the fifth paragraph was affected by the amendment, the rest of the section is not set out.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Art. 13. Domestic Relations Courts.

§ 7-101. Establishment by county or city or both.—The board of county commissioners of any county or the governing body of any incorporated city shall have authority to establish a "domestic relations court", which court may be a joint county and city court, as provided in § 7-102 or a court for the county or city as may be determined by the governing authorities. In counties with two or more cities, any city may join any other city or cities in such county in establishing a domestic relations court; or any number of cities may join the county in which they are situate in establishing a domestic relations court.

As used in this section, "city" means any incorporated city or town with a population of at least five thousand as shown by the latest decennial census. (1929, c. 343, s. 1; 1949, cc. 420, 957; 1951, c. 1111, s. 2.)

Local Modification.—Henderson: 1951, c. 1111, s. 3; Franklin: 1951, c. 1111, s. 3; Transylvania, 1951, c. 1111, s. 3.

Editor's Note.—The 1951 amendment rewrote this section eliminating the population requirements. It also rewrote the title to this article.

By virtue of Session Laws 1947, c. 142, and Session Laws 1949, cc. 78, 334 and 707, the counties of New Hanover, Gaston, Durham and Guilford, respectively, should be stricken from the list of counties appearing under Local

Modification set out under this section in the original volume. The acts referred to above made the counties mentioned subject to the provisions of this article, which was also made applicable to the city of High Point by Session Laws 1947, c. 962.

§ 7-103. Jurisdiction.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 343.

An exclusive remedy to compel a father to provide for the support of his illegitimate child is provided by this section and chapter 49 of General Statutes, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. (2d) 18.

Cited in *In re Morris*, 224 N. C. 487, 491, 31 S. E. (2d) 539.

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.

Local Modification.—Buncombe: 1947, c. 989; Mecklenburg (and city of Charlotte): 1949, c. 949.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 343.

§ 7-106. Procedure, practice and punishment.

Editor's Note.—

For comment on the 1943 amendment to this and the following section, see 21 N. C. Law Rev. 343.

§ 7-110. Cases transferred from superior court.

—Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court and the clerk of any inferior criminal court of the county shall immediately transfer from the superior court and from any inferior criminal courts of the county to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1; 1949, c. 600.)

Editor's Note.—The 1949 amendment inserted the provisions for transfer of cases from inferior criminal courts to domestic relations courts. For brief comment on amendment, see 27 N. C. Law Rev. 441.

SUBCHAPTER V. JUSTICES OF THE PEACE.

Art. 14. Election and Qualification.

§ 7-113. Election and number of justices.

Cross Reference.—For repeal of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

§ 7-114. Oath of office; vacancies filled.

Cross Reference.—As to repeal of the last two sentences of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Appointed by Clerk.—

In accord with original. See *Etheridge v. Leary*, 227 N. C. 636, 637, 43 S. E. (2d) 847.

§ 7-115. Governor may appoint justices.

Cross Reference.—For repeal of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Art. 14A. Appointment by Judge and Abolition of Fee System.

§ 7-120.1. Determination by county commis-

sioners of number of justices to be appointed.—The board of commissioners of any county in the state, upon the adoption of a resolution on the first Monday in March, 1950, or any even numbered year thereafter, shall, for the term beginning the first Monday in December thereafter, fix the number of justices of the peace to be appointed in such county, taking into consideration the population, the business then being transacted by justices of the peace in such county and the future business as may be reasonably anticipated, and having due regard for all other factors to the end that a sufficient number of justices of the peace are appointed to serve adequately the needs of the county and the various localities therein. (1949, c. 1091, s. 1.)

For brief discussion of article, see 27 N. C. Law Rev. 442.

§ 7-120.2. Appointment and removal by the resident judge.—The justices of the peace for each county adopting this article shall be appointed by the resident judge of the superior court of the district in which the county is situated. Any justice of the peace may, after due notice and hearing, be removed from office by such resident judge for misfeasance, malfeasance, nonfeasance or other good cause. (1949, c. 1091, s. 2.)

§ 7-120.3. Term of office.—The term of office of every justice of the peace appointed pursuant to this article shall be two years. The term shall commence on the first Monday in December, 1950, and biennially thereafter. (1949, c. 1091, s. 3.)

§ 7-120.4. Salaries and fees.—Each justice of the peace shall be paid an annual salary, to be fixed by the board of county commissioners, in its discretion, to be paid out of the general fund of the county. Such salary shall be in lieu of all fees as compensation for a justice of the peace in connection with any criminal or civil case, but he shall continue to collect such fees as are provided by law with respect to criminal or civil cases and pay them into the general fund of the county. Each such justice of the peace shall be permitted to collect and retain for his own use, in addition to the salary fixed by the county board of commissioners, all fees provided by law with respect to any matter other than a criminal or a civil case. (1949, c. 1091, s. 4.)

§ 7-120.5. Deposits and reports.—Every justice of the peace appointed pursuant to this article shall be subject to the provisions of G. S. § 153-135, known as the "Daily Deposit Law", and shall also make monthly reports to the board of county commissioners, showing in full detail all fees, fines and forfeitures collected by him, in such form and manner as the board may require. (1949, c. 1091, s. 5.)

§ 7-120.6. Jurisdiction and places for holding court.—Every justice of the peace shall have county-wide jurisdiction, but the board of commissioners shall designate the place or places where each justice of the peace shall sit regularly for the transaction of business, which place shall be so designated as to serve reasonably the convenience of the citizens of the county. The board of county commissioners shall provide adequate space or quarters, either in county buildings, or through renting appropriate space, or otherwise, in which each justice of the peace may hold court

and perform the other duties of his office. (1949, c. 1091, s. 6.)

§ 7-120.7. **Vacancies.**—Any vacancy other than a vacancy arising by expiration of a term shall be filled by appointment by the clerk of the superior court of the county in which such vacancy occurs. (1949, c. 1091, s. 7.)

§ 7-120.8. **Expiration of terms of present justices; transfer of pending cases.**—In those counties accepting the provisions of this article, the terms of all persons holding the office of justice of the peace, other than those appointed pursuant to this article, shall expire on the first Monday after the adoption of the provisions of this article, and any case or proceeding pending on such date before any justice of the peace shall be transferred to a justice of the peace appointed pursuant to this article, in such manner as may be directed by the board of county commissioners. (1949, c. 1091, s. 8.)

§ 7-120.9. **Bond.**—Every justice of the peace appointed pursuant to this article, prior to assuming the duties of his office, shall furnish a bond payable to the county in and for which he is appointed, in such amount as the board of commissioners may determine, conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds paid into his hands by virtue of or under color of his office. The premium on such bond shall be paid by the board of county commissioners out of the general fund of the county. (1949, c. 1091, s. 9.)

§ 7-120.10. **Counties exempt from article.**—This article shall not apply to the counties of Alamance, Alexander, Alleghany, Ashe, Avery, Beaufort, Bertie, Brunswick, Cabarrus, Carteret, Caswell, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Davidson, Duplin, Durham, Forsyth, Franklin, Gates, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Hyde, Jackson, Johnston, Lee, Lincoln, Macon, Madison, Martin, McDowell, Mitchell, Moore, Nash, Northampton, Pamlico, Pitt, Polk, Randolph, Richmond, Robeson, Rutherford, Sampson, Surry, Swain, Transylvania, Tyrrell, Union, Wake, Washington, Watauga, Wayne, Wilkes, Wilson, Yadkin, Yancey, Rockingham, Catawba, Caldwell, New Hanover, Scotland, Warren, Person, Jones, and Sampson. (1949, c. 1091, s. 10.)

§ 7-120.11. **Conflicting laws repealed.**—Section 7-113, the last two sentences of § 7-114, and § 7-115, and all other laws and clauses of laws in conflict with this article are hereby repealed. (1949, c. 1091, s. 11.)

Art. 15. Jurisdiction.

§ 7-121. Jurisdiction in actions on contract.

I. ACTIONS EX CONTRACTU.

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the constitution, Art. IV, sec. 27, and statutes. He has no equitable powers. *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644.

And Justice Has No Jurisdiction in Action for Penalty Plus Attorney's Fees.—Neither the constitution nor any statutes enacted pursuant thereto, give jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644.

§ 7-127. Justice may act anywhere in county.

Local Modification.—Caldwell: 1951, c. 608.

§ 7-129. Jurisdiction in criminal actions.

Cited in *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140; *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394.

Art. 17. Fees.

§ 7-134. Fees of justices of the peace.

Justices of the peace in the counties of Alamance, Alexander, Anson, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Chatham, Cherokee, Chowan, Clay, Columbus, Cumberland, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gates, Granville, Greene, Halifax, Harnett, Haywood, Henderson, Hertford, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, McDowell, Macon, Madison, Mitchell, Montgomery, Nash, Northampton, Onslow, Orange, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rowan, Stanly, Stokes, Swain, Transylvania, Tyrrell, Vance, Wake, Watauga, Wayne, Wilkes and Yadkin shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpoena for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil actions, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (Rev., s. 2788; Code, ss. 2135, 3748; 1870-1, c. 130, s. 9; 1883, c. 368; 1885, c. 86; 1903, c. 225; 1907, c. 967; 1917, c. 260; 1921, c. 113; Ex. Sess. 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303; 1945, c. 150; 1947, c. 337; C. S. 3923.)

Local Modification. — Catawba: 1949, c. 348; Davidson: 1949, c. 643; Franklin: 1945, c. 167; 1949, c. 258; Granville: 1945, c. 1066; Haywood: 1947, c. 687; Jackson: 1949, c. 252; Lincoln: 1947, c. 138; Polk: 1949, c. 729; Randolph: 1947, c. 337; Robeson: 1949, c. 619; Transylvania: 1947, c. 1003; Wake: 1951, c. 866; Watauga: 1947, c. 983.

Editor's Note.—

The 1945 amendment inserted "Yadkin" in line fourteen of the second paragraph. The 1947 amendment struck out "Randolph" from the list of counties in the second paragraph. As the first paragraph was not affected by the amendments it is not set out.

Art. 19. Pleading and Practice.

§ 7-149. Rules of practice.

Rule 12, No process quashed for want of form.

Amendment of Warrants.—The superior court, under Rule 12 of this section, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended

to be charged in the original warrant. *State v. Brown*, 225 N. C. 22, 24, 33 S. E. (2d) 121.

A warrant may be defective in form and substance and yet contain sufficient information to inform defendant of the accusation made against him. Such a warrant may be amended. *Id.*

It is contemplated in the law, that magistrates, not learned in the law, may sometimes issue papers defective in form, and even in substance, but the method of correction is provided by this section. *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

On appeal to the superior court from a county court upon conviction for assault, the superior court has power to allow an amendment of the warrant by the addition of the words "inflicting serious injury" provided the charge as amended is within the jurisdiction of the county court since the amendment does not change the offense with which the defendant was charged. *State v. Carpenter*, 231 N. C. 229, 56 S. E. (2d) 713.

Stated in *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609.

Rule 17, Attachment proceedings. Attachment proceedings before justices of the peace are governed by the provisions of §§ 1-440.47 through 1-440.56. (Rev., s. 1474; Code, s. 853; 1947, c. 693, s. 2; C. S. 1500.)

Editor's Note.—The 1947 amendment rewrote Rule 17. As the rest of the section was not affected by the amendment it is not set out.

Art. 22. Appeal.

§ 7-179. Manner of taking appeal.

Time.—

In accordance with practice and procedure in courts of justices of peace, an appeal to the superior court means to the next term of the court to which an appeal in orderly and regular course would go. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848.

§ 7-180. No written notice of appeal in open court.

If notice of appeal be given in open court, the adverse party being present in person or by attorney at the time appeal is prayed, no written notice is required. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848.

§ 7-181. Justice's return on appeal.

Remedy Where Justice Fails in His Duty.—Upon failure of a justice of the peace to make a return to notice of appeal, appellant, if in no default, should move at the next ensuing term of the superior court for a writ of recordari to compel the justice of the peace to make the return and to file the papers, etc., as required by this section. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848.

Art. 23. Forms.

§ 7-184. Forms to be used in justice's court.—[No. 3]—[No. 16], [No. 47] Repealed by Session Laws 1947, c. 693, s. 3.

SUBCHAPTER VI. RECORDERS' COURTS.

Art. 24. Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.

As to validation of resolutions and ordinances establishing a municipal recorder's court of the city of Burlington, see Session Laws 1947, c. 950, s. 5.

§ 7-186. Recorder's election and qualification; term of office and salary.

Local Modification.—City of Belmont: 1949, c. 871, s. 1; city of Burlington: city of New Bern: 1949, c. 649; city of Randleman: 1947, c. 930, s. 1; town of Asheboro: 1947, c. 930, s. 1; town of Dallas: 1951, c. 963, s. 1.

§ 7-190. Criminal jurisdiction.

Local Modification.—City of Belmont: 1949, c. 871, s. 2, amended by 1951, c. 964, s. 1; city of Burlington: 1951, c. 452; town of Mocksville: 1947, c. 1053.

§ 7-191. Jurisdiction to recover penalties.

Local Modification.—City of Belmont: 1949, c. 871, s. 3; city of Burlington: 1951, c. 452; town of Dallas: 1951, c. 963, s. 2.

§ 7-192. Disposition of cases when jurisdiction not final.

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, to be assigned to work under the state highway and public works commission; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. (1919, c. 277, s. 8; 1945, c. 635; C. S. 1545.)

Editor's Note.—The 1945 amendment struck out the words "and assign him to work on the public roads of the county as provided by law" in the fifth, sixth and seventh lines, and inserted in lieu thereof the words "to be assigned to work under the state highway and public works commission." It also struck out the former provision relating to sentence to work upon the roads of another county.

§ 7-195. Appeal to superior court.

Local Modification.—City of Belmont: 1949, c. 871, s. 4; town of Dallas: 1951, c. 963, s. 3.

§ 7-197. Seal of court.

Local Modification.—City of Belmont: 1949, c. 871, s. 5; town of Dallas: 1951, c. 963, s. 4.

§ 7-193. Issuance and service of process.

Local Modification.—City of Belmont: 1949, c. 871, s. 6; town of Dallas: 1951, c. 963, s. 5.

§ 7-199. Vice recorder; election and duties.

Local Modification.—City of Belmont: 1949, c. 871, s. 7; town of Dallas: 1951, c. 963, s. 6.

§ 7-200. Clerk of court; election and duties; removal; fees.

Local Modification.—City of Belmont: 1949, c. 871, s. 8, amended by 1951, c. 964, s. 2; town of Dallas: 1951, c. 963, s. 7.

§ 7-201. Clerk to keep records.

Local Modification.—City of Belmont: 1949, c. 871, s. 9; town of Dallas: 1951, c. 963, s. 8.

§ 7-203. Prosecuting attorney; duties and salary.

Local Modification.—Lenoir: 1949, c. 1237; city of Belmont: 1949, c. 871, s. 11; city of Fayetteville: 1951, c. 213; town of Dallas: 1951, c. 963, s. 9.

§ 7-204. Jury trial, as in justice's court.

Local Modification.—Currituck: 1951, c. 972, ss. 2, 3; Halifax: 1945, c. 628, s. 2; Martin: 1951, c. 183; Washington: 1951, c. 589; town of Asheboro: 1947, c. 930, s. 2; city of Belmont: 1949, c. 871, s. 12; town of Cherryville: 1951, c. 660; town of Dallas: 1951, c. 963, s. 10; city of Randleman: 1947, c. 930, s. 2.

§ 7-206. Officers' fees; fines and penalties paid.

Local Modification.—City of Belmont: 1949, c. 871, s. 13; town of Dallas: 1951, c. 963, s. 11.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public works of the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon such public works, then the county shall be liable for and shall pay to the treasurer of the municipality one-half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient

length to reimburse the county for one-half of such costs. (1919, c. 277, s. 19; 1945, c. 635; C. S. 1558.)

Local Modification.—City of Belmont: 1949, c. 871, s. 14; town of Dallas: 1951, c. 963, s. 12.

Editor's Note.—The 1945 amendment substituted in line three the words "works of" for the words "roads or other public work in" and made other alterations in phraseology in conformity to such change.

§ 7-211. Jurisdiction of justice of the peace after three months delay.

Local Modification.—City of Belmont: 1949, c. 871, s. 15; town of Dallas: 1951, c. 963, s. 13.

Art. 25. County Recorders' Courts.

§ 7-218. Established by county commissioners.

Local Modification.—Halifax: 1945, c. 627; Orange: 1947, c. 214, s. 1.

§ 7-219. Recorder's election, qualification, and term of office.

Local Modification.—Orange: 1947, c. 214, s. 2; Perquimans: 1951, c. 42; Washington: 1949, c. 1102.

§ 7-222. Criminal jurisdiction.

Cross Reference.—

See annotations under § 7-64.

Local Modification.—Orange: 1947, c. 214, s. 4.

§ 7-228. Jury trial as in municipal court.

Local Modification.—Caldwell: 1951, c. 369; Halifax: 1945, c. 628, s. 2; Martin: 1945, c. 113; Orange: 1947, c. 214, s. 3; Pender: 1945, c. 60; Randolph: 1951, c. 414.

§ 7-229. Sentence imposed; fines and costs paid.

—Whenever any person is convicted or pleads guilty of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which court is held, and he may assign him to work under the state highway and public works commission. Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308; 1945, c. 635; C. S. 1573.)

Editor's Note.—The 1945 amendment rewrote the first sentence.

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.

The preceding sentence shall not apply to recorder's courts in Bladen, Brunswick, Camden, Gates, Halifax, Martin, Moore, Perquimans, Forsyth and Vance counties. (1919, c. 277, s. 36; 1935, c. 346; 1947, c. 214, s. 5; C. S. 1576.)

Local Modification.—Mecklenburg: 1949, c. 955.

Editor's Note.—The 1947 amendment struck out "Orange" from the list of counties in the last sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 7-232. Deputy clerk may be appointed.

This section shall not apply to Bladen, Bruns-

wick, Camden, Gates, Guilford, Halifax, Lee, Martin, Moore, Perquimans, Forsyth and Vance counties. (1919, c. 277, s. 36; 1935, c. 346; 1947, c. 214, s. 5; C. S. 1576.)

Local Modification.—Mecklenburg: 1949, c. 955.

Editor's Note.—The 1947 amendment struck out "Orange" from the list of counties in the last sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 7-235. Prosecuting attorney may be elected.

Local Modification.—Perquimans: 1951, c. 41.

Art. 28. Civil Jurisdiction of Recorders' Courts.

§ 7-249. Trial by jury in civil actions.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-250. Jurors drawn and summoned.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-251. Talesmen and challenges.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-252. Jury as in superior court.

Local Modification.—Halifax: 1945, c. 628, s. 2.

Art. 29. Elections to Establish Recorders' Courts.

§ 7-256. Election required.—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except municipal recorders' courts which are established without a popular vote pursuant to the provisions of article 29A of this chapter, and except the governing body of any municipality having an estimated population of more than twenty thousand (20,000) on the first day of January, 1945, may establish municipal recorders' courts and/or the board of county commissioners of any county may establish county recorders' courts without a vote of the people. (1919, c. 277, s. 58; 1921, c. 110, s. 14; 1947, c. 840, s. 1; c. 1021, s. 1; C. S. 1599.)

Editor's Note.—

The 1947 amendments rewrote this section. For brief comment on amendments, see 25 N. C. Law Rev. 400.

§ 7-264. Certain districts and counties not included.—This subchapter shall not apply to the following judicial districts; the tenth, except as to Granville, Orange and Alamance counties; the eleventh; the seventeenth; the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Jackson, Haywood and Swain counties; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; 1947, c. 1021, s. 2; C. S. 1608.)

Editor's Note.—The 1947 amendment inserted the reference to Alamance county.

Art. 29A. Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

§ 7-264.1. Establishment of municipal recorders' courts without election.—(a) Notwithstanding the provisions of article 29 of this chapter, the governing body of any municipality authorized by this subchapter to establish a court may, by adoption of an appropriate resolution, create a mu-

municipal recorder's court after giving due notice and holding a public hearing with respect thereto.

(b) Such public notice shall set forth that the governing body is considering the creation of a municipal recorder's court without holding an election thereon and shall name a time and place for a public hearing thereon, at which time all interested persons may appear and be heard.

(c) Such notice shall be published at least once a week for four successive weeks in some newspaper published within the corporate limits of the municipality and shall be posted on the official bulletin board in the city hall of such municipality during the period of publication.

(d) After a public hearing is held pursuant to the provisions of this section, the governing body of the municipality is authorized, in its discretion, to establish a municipal recorder's court without holding an election thereon. (1947, c. 840, s. 2.)

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.

§ 7-270. Costs.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-272. Terms of court.

Local Modification.—Duplin: 1947, c. 899.

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-279. Civil jurisdiction, extent.

Cited in McLean v. McLean, 233 N. C. 139, 63 S. E. (2d) 138.

§ 7-285: Repealed by Session Laws 1949, c. 896, s. 1.

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Art. 33. With Jurisdiction Not to Exceed \$3000.

§ 7-314. How actions commenced.—All actions shall be commenced in said court by summons running in the name of the state and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the superior court. The plaintiff shall file complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motions in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7; 1947, c. 781.)

Editor's Note.—The 1947 amendment struck out the words "and, retain" formerly appearing after the word "file" in line six.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Art. 36. County Criminal Courts.

§ 7-394. Jury trials.

Local Modification.—Anson: 1949, c. 773; Burke: 1951, c. 689.

§ 7-395. Process.—The clerks of the superior court as ex officio clerks and/or the clerks of

county criminal courts or any of their deputies, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants, peace warrants, subpoenas, and/or other processes of law in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases, and shall be directed to the sheriff or other lawful officer of the county, and the service thereof shall be lawfully made when made by the sheriff or deputy sheriff of the county, or any constable of said county, or by any rural policeman or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of the superior court as ex officio clerk or the clerk of such court, when attested by the seal of said court, shall run anywhere in the state of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the superior court. (1931, c. 89, s. 12; 1947, c. 130.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 7-404. Certain counties excepted from provisions of article.—This article shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay, Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Duplin, Durham, Edgecombe, Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes, Yancey and Richmond. (1931, c. 89, s. 21, c. 270; 1935, c. 8; 1939, c. 41; 1951, c. 699.)

Editor's Note.—The 1951 amendment struck out Davie from the list of counties.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Art. 37. Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.

Cited in State v. Carpenter, 231 N. C. 229, 56 S. E. (2d) 713.

§ 7-435. Criminal jurisdiction.

Stated in State v. Carpenter, 231 N. C. 229, 56 S. E. (2d) 713.

SUBCHAPTER XI. JUDICIAL COUNCIL.

Art. 38. Judicial Council.

§ 7-448. Establishment and membership.—A judicial council is hereby created which shall consist of the chief justice of the supreme court or some other member of that court designated by him, two judges of the superior court designated by the chief justice, the attorney general, and eight additional members, two of whom shall be appointed by the governor, one by the president of the senate, one by the speaker of the house of representatives, and four by the council of the North Carolina state bar. All appointive members of the judicial council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the council of the North Carolina

state bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1.)

For a summary of article, see 27 N. C. Law Rev. 405.

§ 7-449. Terms of office.—Members of the council shall hold office for the following terms:

1. If he designates no other member of the supreme court, the chief justice during his term of office.

2. The attorney general during his term of office.

3. All other members for a term of two years. (1949, c. 1052, s. 2.)

§ 7-450. Vacancy appointments.—Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3.)

§ 7-451. Chairman of council.—The member from the supreme court shall serve as chairman of the council. (1949, c. 1052, s. 4.)

§ 7-452. Meetings.—The council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5.)

§ 7-453. Duties of council.—It is the duty of the judicial council:

1. To make a continuing study of the administration of justice in this state, and the methods of administration of each and all of the courts of the state, whether of record or not of record.

2. To receive reports of criticisms and suggestions pertaining to the administration of justice in the state.

3. To recommend to the legislature, or the courts, such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable. (1949, c. 1052, s. 6.)

§ 7-454. Annual report; submission of recommendations.—The council shall annually file a report with the governor. The council shall submit any recommendations it may have for the improvement of the administration of justice to the governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7.)

§ 7-455. Compensation of members.—The members of the council shall be paid the sum of seven dollars (\$7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8.)

§ 7-456. Executive secretary; stenographer or clerical assistant.—The council, by and with the advice, consent and approval of the governor and council of state, may employ an executive secretary who shall be a licensed attorney either full-time or part-time and fix his salary in an amount not to exceed three thousand dollars (\$3,000.00) per annum and also a stenographer or clerical assistant and fix her or his salary, said salaries to be paid out of the contingency and emergency fund. The executive secretary shall perform such duties as the council may assign to him. (1949, c. 1052, s. 9.)

Chapter 8. Evidence.

Art. 3A. Findings, Records and Reports of Federal Officers and Employees.

Sec.

8-37.1. Findings of presumed death.

8-37.2. Report or record that person missing, interned, captured, etc.

8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.

Art. 4A. Photographic Copies of Business and Public Records.

8-45.1. Photographic reproductions admissible; destruction of original.

8-45.2. Uniformity of interpretation.

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8-45.4. Title of article.

Art. 7. Competency of Witnesses.

8-50.1. Competency of evidence of blood tests.

Art. 1. Statutes.

§ 8-3. Laws of other states or foreign countries.

Laws of Tennessee.—This section requires our courts to take judicial notice of the laws of Tennessee. *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

Applied in *Lewis v. Furr*, 228 N. C. 89, 44 S. E. (2d) 604; *Caldwell v. Abernathy*, 231 N. C. 692, 58 S. E. (2d) 763; *Johnson v. Salsbury*, 232 N. C. 432, 61 S. E. (2d) 327.

§ 8-5. Town ordinances certified.

No Evidence of Certification or Publication.—The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in § 160-272. *Toler v. Savage*, 226 N. C. 208, 37 S. E. (2d) 485, 486.

Art. 2. Grants, Deeds and Wills.

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

Cited in *Merchants, etc., Bank v. Sherrill*, 231 N. C. 731, 58 S. E. (2d) 741.

§ 8-20. Certified copies registered in another county and used in evidence.

Cited in *Universal Finance Co. v. Clary*, 227 N. C. 247, 41 S. E. (2d) 760.

Art. 3A. Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. Finding of presumed death.—A written finding of presumed death, made by the secretary of war, the secretary of the navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P. L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U. S. C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this state as prima facie evidence of the death

of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 731, s. 1.)

§ 8-37.2. Report or record that person missing, interned, captured, etc.—An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.—For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

Art. 4. Other Writings in Evidence.

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

Stated in *Peel v. Calais*, 224 N. C. 421, 31 S. E. (2d) 440.

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; 1945, c. 97; C. S. 1785.)

Editor's Note.—The 1945 amendment inserted the words "or in the trial of any criminal action" in lines two and three.

§ 8-42. Book accounts under sixty dollars.

Cited in *Perry v. First-Citizens Bank, etc., Co.*, 223 N. C. 642, 27 S. E. (2d) 636.

§ 8-43. Book accounts proved by personal representative.

Cited in *Perry v. First-Citizens Bank, etc., Co.*, 223 N. C. 642, 27 S. E. (2d) 636.

§ 8-45. Itemized and verified accounts.

Stated in *Haines v. Clark*, 230 N. C. 751, 55 S. E. (2d) 693.

Art. 4A. Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.—If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (1951, c. 262, s. 1.)

Editor's Note.—The act from which this article was codified became effective on July 1, 1951.

As to photographic reproductions of papers filed, docketed or recorded in county offices, see §§ 153-9.1 to 153-9.7, 153-15.1 to 153-15.6.

§ 8-45.2. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. (1951, c. 262, s. 2.)

§ 8-45.3. Photographic reproduction of records of department of revenue.—The State department of Revenue is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the department, including tax returns required by law to be made to the department, and said photographs, photocopies, or microphotocopies, when certified by the department as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings and matters as the originals thereof would have been (1951, c. 262, s. 3.)

§ 8-45.4. Title of article.—This article may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act." (1951, c. 262, s. 4.)

Art. 5. Life Tables.

§ 8-46. Mortuary tables as evidence.

Formal Proof Unnecessary.—The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999.

Tables Not Conclusive.

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violates the evidence rule, but also § 1-180 prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211.

Life Expectancy of Child under Ten.—Although the tables set out in this section do not afford evidence of the life expectancy of a child under ten years of age, this does not leave the plaintiff destitute of proof, and the jury may consider evidence as to the constitution, health, vigor, habits and the like of the deceased as a basis for determining probable expectancy of life. *Rea v. Simowitz*, 226 N. C. 379, 38 S. E. (2d) 194, 196.

This statutory mortality table is not founded on any statistical information based on experience concerning children under ten years of age and does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999.

Before a jury may consider the mortuary table there must be precedent proof of age, bringing the deceased clearly within the class of selected lives tabulated in the table, and in the absence of such proof it is error to direct the jury to consider it. *Id.*

However, a jury may consider evidence as to the constitution, health, vigor, habits and the like of an infant as a basis for determining his probable expectancy of life and other available mortality tables which list ages below ten years may be used in evidence upon proper identification and authentication. *Id.*

§ 8-47. Present worth of annuities.

Interest Rate.—Annuities, under this section, must be computed at four and one-half per cent and not at six per cent. *Smith v. Smith*, 223 N. C. 433, 27 S. E. (2d) 137.

Art. 7. Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

Editor's Note.—The trend of the development of the rules of evidence has been to remove personal disqualification to testify. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

§ 8-50.1. Competency of evidence of blood tests.

—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person.

In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person. (1949, c. 51.)

Editor's Note.—For a brief discussion of this section, see 27 N. C. Law Rev. 456.

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

I. GENERAL CONSIDERATION.

Test of Incompetency.—This section does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:*

1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? *Peck v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542.

The door is opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739.

Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which are prohibited by the "dead man's statute." *In re Will of McDowell*, 230 N. C. 259, 52 S. E. (2d) 807.

Stated in State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Cited in Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266; *Bell v. Chatwick*, 226 N. C. 598, 39 S. E. (2d) 743; *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316.

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Testimony of Representative of Deceased.—When defendant, representative of deceased, is examined in behalf of himself and his co-representative concerning a personal transaction between plaintiff and deceased, under this section, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739.

Testimony as to Handwriting of Deceased.—The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739.

B. Persons Interested in the Event of the Action.

2. Applications.

A. Partner.

Where one partner is (a) a party to the action, (b) is interested in the event of the action, and (c) the other partner is dead, because his lips are sealed in death the living partner is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the co-partnership and to relate certain conversations he had with deceased about the assets of the partnership. *Wingler v. Miller*, 223 N. C. 15, 20, 25 S. E. (2d) 160.

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under this section. *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160.

III. WHEN THE DISQUALIFICATION EXISTS.

Where Adverse Party Non Compos Mentis.—A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged non compos mentis. *Price v. Whisnant*, 232 N. C. 653, 62 S. E. (2d) 56.

Receipt of Money from Person Now Deceased.—Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part

thereof, and is incompetent under this section. *Wilson v. Ervin*, 227 N. C. 396, 397, 42 S. E. (2d) 468.

Testimony by the maker of notes as to transactions with deceased payee tending to establish non-liability was properly excluded as coming within prohibition of this section. *Perry v. First Citizens Nat. Bank, etc., Co.*, 226 N. C. 667, 30 S. E. (2d) 116.

IV. SUBJECT MATTER OF THE TRANSACTION.

A personal transaction or communication within the purview of this section is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542.

A person seeking to recover for personal services rendered a decedent is precluded by this section from testifying that he expected to receive pay for his services "after she (the decedent) said go ahead" when such testimony tends to prove her agreement to pay for the services. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542.

Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify, directly that he rendered such services nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542.

This section applies to caveat proceedings notwithstanding that they are in rem, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. In *re Lomax's Will*, 226 N. C. 498, 39 S. E. (2d) 388.

Illustrative Case.—In a civil action by plaintiffs against defendant for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by this section as personal transactions and communications with defendant's intestate. *McMichael v. Pegram*, 225 N. C. 400, 35 S. E. (2d) 174.

V. EXCEPTIONS.

Grounds for Exceptions.—

Testimony otherwise incompetent under this section is rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic is given in evidence concerning the same transaction or communication. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542.

Testimony Relating Solely to Issue of Mental Capacity.—A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. *Goins v. McLoud*, 231 N. C. 655, 58 S. E. (2d) 634.

Illustrations.—

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In *re Lomax's Will*, 226 N. C. 498, 39 S. E. (2d) 388.

§ 8-53. Communications between physician and patient.

Relationship of Physician and Patient Must Exist.—

The relationship of patient and physician within the purview of this section, does not exist between a defendant and an alienist examining him in regard to his sanity. *State v. Litteral*, 227 N. C. 527, 528, 43 S. E. (2d) 84.

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

Editor's Note.—For note concerning confessions, see 23 N. C. Law Rev. 364.

As to compelling accused to speak so that witness may identify his voice, see note in 27 N. C. Law Rev. 262.

Treated as Other Witnesses.—

In accord with 1st paragraph in original. See *State v. Austin*, 223 N. C. 203, 25 S. E. (2d) 613.

Same—Where Introduced by Defendant.—

In accord with 2nd paragraph in original. See *State v. McKinnon*, 223 N. C. 160, 25 S. E. (2d) 606.

Admission before Magistrate.—

There is a distinction to be observed between the statement made by a prisoner on his preliminary examination before a magistrate under § 15-89, and his testimony given under this section as a witness on the trial of the cause. On the former, he is to be advised of his rights, and such examination is not to be on oath. On the latter, accused, at his own request, but not otherwise, is competent but not compellable to testify, and, of course, his testimony thus given is received under the sanction of an oath. *State v. Farrell*, 223 N. C. 804, 806, 28 S. E. (2d) 560.

Where the examining magistrate takes the preliminary statement of a prisoner under the compulsion of an oath, contrary to the provisions of § 15-89, and without the advice of counsel, such statement may not be used against him on the trial, because, being thus induced, it is deemed to be involuntary. But this has no application to the testimony of a defendant given voluntarily as a witness in his own behalf under this section. *State v. Farrell*, 223 N. C. 804, 807, 28 S. E. (2d) 560.

Erroneous Instructions. —

A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. *State v. Austin*, 223 N. C. 203, 25 S. E. (2d) 613.

Proper Instruction.—

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. *State v. Wood*, 230 N. C. 740, 55 S. E. (2d) 491.

Failure to Testify—How Far Subject to Comment.—The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733.

§ 8-55. Testimony enforced in certain criminal investigations; immunity.

Cited in *State v. Foster*, 228 N. C. 72, 44 S. E. (2d) 447.

§ 8-56. Husband and wife as witnesses in civil action.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (Rev., s. 1636; Code, s. 588; C. C. P., s. 341; 1866, c. 43, ss. 3, 4; 1919, c. 18; 1945, c. 635; C. S. 1801.)

Editor's Note.—

The 1945 amendment struck out the words "except to

prove the fact of marriage" formerly appearing after the word "adultery" in line fifteen, and added the proviso at the end of the second sentence.

As to competency of husband and wife to testify in action for criminal conversation, see 26 N. C. Law Rev. 206.

Same—Protected.—

In the wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant are incompetent. *Knighen v. McClain*, 227 N. C. 682, 683, 44 S. E. (2d) 79.

§ 8-57. Husband and wife as witnesses in criminal actions.—The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, or to prove the fact of marriage in case of criminal cohabitation in violation of the provisions of G. S. 14-183, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, and/or his children, or for neglecting to provide for her support, and/or the support of his children, it shall be lawful to examine the wife in behalf of the state against the husband. (Rev., ss. 1634, 1635, 1636; Code, ss. 588, 1353, 1354; 1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; 1933, c. 13, s. 1; 1933, c. 361; 1951, c. 296; C. S. 1802.)

Editor's Note.—

The 1951 amendment inserted in the fourth sentence the words "or to prove the fact of marriage in case of criminal cohabitation in violation of the provisions of G. S. 14-183".

Testimony Is Limited to Proof of Marriage.—Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent. *State v. Setzer*, 226 N. C. 216, 37 S. E. (2d) 513.

Art. 9. Attendance of Witnesses from without State.

§ 8-65. Definitions.

Cited in *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840; *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

§ 8-68. Exemption from arrest and service of process.

A nonresident defendant while in the state in compliance with conditions of a bail bond is not exempt from the service of process. *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840.

Art. 10. Depositions.

§ 8-71. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order

therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, or any commissioner of oaths or commissioner of deeds of any foreign country, or by any officer of the army of the United States or marine corps having the rank of captain or higher, by any officer of the United States navy or United States coast guard having the rank of lieutenant, senior grade, or higher, or by any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, without a commission issuing from the court. No official seal shall be required of said military or naval officials, but they shall sign their name, designate rank, name of ship or military division, and date, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent, subject, however, to such objections as subsequently might be made according to law.

Any party in a civil action or special proceeding in the courts of this state, may take the depositions of any person in the armed forces of the United States or any person in the service of the United States government in a civilian capacity while serving outside of continental United States, by filing in the office of the clerk of the court where such action or proceeding is pending, a statement showing the name and post office or fleet post office address of such person, together with the written interrogatories which are desired to be propounded to such person, and serve a copy thereof on the adverse party or parties to such action, or their attorneys, whereupon, within ten days after the service of said copy, said adverse party or parties may file in said clerk's office such written cross-interrogatories as said adverse party or parties may desire to propound to such person, and after the expiration of said ten days, and as promptly as may be, the clerk of said court shall issue a commission to any commissioned officer of any of the armed forces of the United States, without otherwise naming him, with which the person to be so examined is connected, and mail the same, together with said interrogatories and cross-interrogatories, if any, to the person so to be examined, at the address stated, authorizing any such officer upon presentation of such papers to him to propound the interrogatories and cross-interrogatories to said person, under oath, and re-

cord his answers thereto, and the deposition so taken shall be signed by such person and sworn to before, and subscribed by, his said officer, and returned to the said clerk in a sealed envelope.

Any deposition taken in the manner herein provided and transmitted to the clerk of the court where such action or special proceeding is pending, shall be deemed legal evidence, if the witness be competent, subject to opening such deposition and passing upon the same as provided by this section. (Rev., s. 1652; Code, s. 1357; 1911, c. 158; R. C., c. 31, s. 63; 1881, c. 279; 1893, c. 360; 1943, c. 160, s. 1; 1945, c. 22; 1947, c. 781; 1949, c. 864; C. S. 1809.)

Editor's Note.—

The 1945 amendment added the last two paragraphs and the 1947 amendment added the reference to objections at the end of the third paragraph.

The 1949 amendment inserted, beginning in line four of the fourth paragraph the words "or any person in the service of the United States government in a civilian capacity while serving outside of continental United States."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 346.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 339.

The competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 380, 26 S. E. (2d) 904.

Attorney Mailing Deposition to Clerk.—Where the notary public taking a deposition in another state seals the same in an envelope addressed to the clerk of the superior court, the fact that the attorney of the party offering the deposition in evidence brings the sealed envelope back with him to this state and drops it in the mail, as requested by the notary, does not render the deposition incompetent. *Randle v. Grady*, 228 N. C. 159, 45 S. E. (2d) 35.

§ 8-75. Depositions in justices' courts.—Any party in civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action, and in order to do so may apply to the clerk of the superior court for a commission to take the same; or such deposition may be taken by a notary public of this or any other state, or of a foreign country, without a commission issuing from the court.

The proceedings in depositions in a civil action

before a justice of the peace shall be in all respects as if such action were in the superior court.

When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (Rev., s. 1646; Code, s. 1359; 1872-3, c. 33; 1947, c. 781; C. S. 1813.)

Editor's Note.—The 1947 amendment rewrote the former first sentence of this section to appear as the first two paragraphs above.

§ 8-76. Depositions before municipal authorities.

Editor's Note.—

In the 15th line of this section in the original the word "county" should be "country."

Art. 12. Inspection and Production of Writings.

§ 8-89. Inspection of writings.

Acquiring Information Necessary to Filing of Complaint.

—In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. *Nance v. Gilmore Clinic*, 230 N. C. 534, 53 S. E. (2d) 531, distinguishing *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. (2d) 225, in that the matter sought to be discovered in that case was not necessary as a basis for filing the complaint but related to a matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. The case distinguished does not hold that the statute is not available in seeking information to enable plaintiff to draft his complaint. Only in respect to the discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

Where Information to Be Used in Action against Third Party.—Though the point was not in issue, the court in *Flanner v. Saint Joseph Home*, 227 N. C. 342, 345, 42 S. E. (2d) 225, stated that plaintiff may not proceed under this section to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party.

The Affidavit Supporting an Order for Inspection, etc.—

In accord with 1st paragraph in original. See *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. (2d) 225.

Cited in *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445.

Chapter 9. Jurors.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

Art. 1. Jury List and Drawing of Original Panel.

§ 9-1. Jury list from taxpayers of good character.—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear

upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of

age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis. (Rev., s. 1957; Code, ss. 1722, 1723; 1806, c. 694; 1889, c. 559; 1899, c. 729; 1897, cc. 117, 539; 1899, c. 729; 1937, cc. 19, 200; 1941, c. 92; 1947, c. 1007, s. 1; C. S. 2312.)

Editor's Note.—

The 1947 amendment added the second paragraph and made other changes. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

Session Laws 1947, c. 217, provides that this chapter as amended shall govern the making up of the jury lists and the drawing of jurors in Columbus county.

Provisions Directory and Not Mandatory.—The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to this section, does not sustain defendant's contention that the list was not selected from the legally prescribed source, since the provisions of the statute are directory and not mandatory. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99.

Discrimination on Account of Race.—A defendant does not have the right to be tried by a jury of his own race, or to have a representative of any particular race on the jury, or to have any proportional representation of the races thereon, but he is entitled to be tried by a jury from which there has been neither inclusion nor exclusion because of race. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99.

As to discrimination against negroes in selection of jury, see 26 N. C. Law Rev. 185.

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to this section, does not tend to show racial discrimination in the selection of prospective jurors, and defendant's objection on this ground cannot be sustained in the absence of any evidence tending to show prejudice, bad faith, or the inclusion or exclusion of persons from the list because of race. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99.

Rejection of prospective jurors for want of good moral character and sufficient intelligence is available to the county commissioners as a general objection only when the jury list is being prepared, and not after the names are in the box. *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537.

As to right of women to serve on juries, see note in 25 N. C. Law Rev. 152, discussing case of *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858, denying such right.

§ 9-2. Names on list put in box.

Cross Reference.—See note to § 9-1.

§ 9-3. Manner of drawing panel for term from box.

Local Modification.—Guilford: 1949, c. 568.

Cross Reference.—See note to § 9-1.

§ 9-4. Local modifications as to drawing panel.

In Cabarrus county the board of county commissioners shall annually draw sixty jurors for the first week of the January term of superior court of each year and thirty-six jurors for each and every other week of superior court during the year.

In Iredell county, jurors shall be drawn as follows: Forty-eight jurors for the first week of January and August terms of court and thirty for the second week of January and August and each week of the March, May and November terms of court: Provided, that if it appears desirable for the dispatch of business, the board of county commissioners may draw fifty-four jurors for the first week of the January and August terms and thirty-six for the second week of said

terms and the March, May and November terms. (1951, c. 478; c. 1138.)

Local Modification.—Rowan: 1945, c. 907.

Editor's Note.—

Session Laws 1947, c. 272 repealed the sixth paragraph of this section which read as follows: "In Hertford county fifteen extra jurors shall be drawn and summoned for the second week."

The first 1951 amendment rewrote the paragraph relating to Iredell county, and the second 1951 amendment made changes in the paragraph relating to Cabarrus county. As the rest of the section was not affected by the amendments it is not set out.

§ 9-5. Fees of jurors.—All jurors in the superior court shall receive such amount per day as the board of commissioners of their respective counties shall fix, not less than (\$3.00) three dollars per day and not more than (\$8.00) eight dollars per day; provided, that the said commissioners of the respective counties may establish different rates of compensation for different classes of said superior court jurors within the limitations set out above.

In addition to the compensation above provided for, all jurors shall receive a travel allowance of five (5) cents per mile while coming to the countyseat and returning home, the distance to be computed by the usual route of public travel; provided, that this allowance shall be paid on the basis of one round trip per calendar week for each calendar week in which attendance is required. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; 1947, c. 1015; 1949, c. 915; 1951, c. 98; C. S. 3892.)

Local Modification.—Anson: 1947, c. 750; Bertie: 1949, c. 802; c. 914, s. 2; Chatham: 1947, c. 47; Columbus: 1947, c. 124; Cumberland: 1945, c. 316; Currituck: 1945, c. 269; 1947, c. 228; Davidson: 1949, c. 521; Duplin: 1949, c. 680; Gaston: 1947, c. 206; Hertford: 1947, c. 59; Johnston: 1945, c. 993; Jones: 1949, c. 1002; Macon: 1951, c. 34; Montgomery: 1951, c. 62; New Hanover: 1947, c. 619; Onslow: 1947, c. 205; Randolph: 1949, c. 854; Richmond: 1947, c. 235, s. 1; Rowan: 1945, c. 233; Swain: 1949, c. 234; Washington: 1945, c. 103.

Editor's Note.—The 1947 amendment rewrote this section, and the 1949 amendment rewrote the first paragraph.

The 1951 amendment increased the maximum compensation from six to eight dollars per day.

Session Laws 1945, c. 228, regulating the fees of jurors in Granville county was repealed by Session Laws 1949, c. 662, which provided that such fees shall be as provided in this section.

§ 9-7. Disqualified persons drawn.

Cited in *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

§ 9-11. Summons to talesmen; their disqualifications.

Local Modification.—Halifax: 1949, c. 635.

"Freeholders."—

An order for a special venire properly specifies that the veniremen are to be freeholders. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

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

Review.—The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. *State v. DeGraffenreid*, 224 N. C. 517, 31 S. E. (2d) 523; *State v. Davenport*, 227 N. C. 475, 492, 42 S. E. (2d) 686; *State v. Suddreth*, 230 N. C. 239, 52 S. E. (2d) 924.

A juror during homicide trial had sister of deceased as one of his passengers in a four mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not

reviewable. *State v. Suddreth*, 230 N. C. 239, 52 S. E. (2d) 924.

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, are conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presents no reviewable question of law. *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849.

§ 9-16. Causes of challenge to juror drawn from box.

Cited in *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205; *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.—When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court.

It shall be within the discretion of the presiding judge of the superior court, in the trial of any capital felony or other criminal case, to permit the jurors to be separated while the jury has under consideration such case. In the event the jury is composed of men and women, the court may, in its discretion, appoint more than one officer to have charge of the jury and one of such officers may be a man and the other officer a woman; and the court may, in its discretion, permit the members of the jury of opposite sexes to be provided separate rooming accommodations when not actually engaged in deliberations as jurors and pending the bringing in of a verdict in such cases. (Rev., s. 1978; Code, s. 1736; 1876-7, c. 173; 1889, c. 44; 1947, c. 1007, s. 2; C. S. 2327.)

Editor's Note.—The 1947 amendment added the second paragraph. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

§ 9-19. Exemptions from jury duty.—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county

from jury duty who shall apply to them for exemption.

The clerk of the superior court of each county is hereby empowered to excuse from jury duty any person or persons exempt under the first sentence of this section prior to the convening of the term of court for which such person or persons are required to serve as jurors.

When any woman is summoned to serve on any regular or tales jury, she or her husband may appear before the clerk of the superior court and certify that she desires to be excused from jury service for one of the following causes: (1) that she is ill and unable to serve; (2) that she is required to care for her children who may be under twelve years of age; (3) that some member of her family is ill which requires her presence and attention; whereupon the clerk in his discretion may excuse her from jury service and so notify the judge of the superior court upon convening the court. (Rev., s. 1980; Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1913, c. 103; 1915, cc. 217, 228, 260; 1917, c. 200, s. 89; 1931, c. 410; 1937, c. 151; 1937, c. 224, s. 2; 1943, c. 343; 1945, c. 290, s. 2; 1947, c. 1007, s. 3; 1951, c. 80; C. S. 2329, 6870.)

Local Modification.—Onslow: 1949, c. 696.

Editor's Note.—

The 1945 amendment inserted in the first paragraph the words "North Carolina state guard and members of the civil air patrol."

The 1947 amendment added the fourth paragraph and inserted in the first paragraph the words "registered or practical nurses in active practice and practicing attorneys at law." For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

The 1951 amendment struck out the former second sentence of the first paragraph.

§ 9-21. Extra or alternate juror or jurors; challenges; compensation and duties.—In the trial in the superior court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, in the discretion and upon the direction of the judge after the jury has been duly impaneled and sworn, one or more additional or alternate jurors shall be selected in the same manner as the regular jurors in said case were selected, but each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to such unused or unexpended challenges as each party may have left after the selection of the regular trial panel of jurors in the case; such additional or alternate juror or jurors shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury and, when the jurors are ordered kept together in any case, said alternate juror or jurors shall be kept with them. Such additional or alternate juror or jurors shall be liable to the same extent as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror or jurors become incapacitated or disqualified, or by reason of illness or death in the

family of such juror or jurors, or other sufficient reason in the opinion of the court, such juror or jurors may be discharged by the judge, in which case, or if a juror or jurors die, upon the order of the judge said additional or alternate juror or jurors shall become a part of the jury in the order in which said juror or jurors were selected and serve in all respects as those selected as an original juror. (1931, c. 103; 1939, c. 35; 1951, c. 82; c. 1043.)

Editor's Note.—

The 1951 amendments rewrote this section.

Applied in *State v. Stanley*, 227 N. C. 650, 44 S. E. (2d) 196.

Art. 4. Grand Jurors.

§ 9-25. **Grand juries in certain counties.**—At the first fall and spring terms of the criminal courts held for the counties of Craven, Gaston, Guilford, Mecklenburg, Moore, Pitt, Richmond, New Hanover, McDowell, Durham, Cumberland, Lenoir, Columbus, Nash, Johnston, Vance, Wayne, Iredell, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

A grand jury for Montgomery county shall be selected at each July term of the superior court in the usual manner, which said grand jury shall serve for a period of one year from the time of their selection. In the event a vacancy or vacancies shall occur in the grand jury of Montgomery county, the resident judge of the fifteenth judicial district or the judge holding the court of said county may, in his discretion, order a new juror or jurors drawn to take the oaths prescribed and to fill any vacancy or vacancies occurring thereon. The resident judge of the fifteenth judicial district or the presiding judge shall have the power, in his discretion, to appoint an assistant foreman of the grand jury in Montgomery county and said assistant foreman so appointed shall, in the case of death, absence, or disqualification for any reason of the foreman, discharge the duties of the foreman of said grand jury.

At the first term of court for the trial of criminal cases in Haywood county after January 1, 1951, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year, and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of July and January of each year there shall be chosen nine members of said grand jury to serve for a term of one year. (1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187; Ex. Sess. 1920, c. 39; 1921,

cc. 18, 55, 69, 72; Ex. Sess. 1921, c. 15; 1923, cc. 11, 15, 104, 115; Ex. Sess. 1924, c. 28; 1925, c. 24; 1927, c. 78; Pub. Loc. 1927, cc. 80, 162; 1929, c. 52, ss. 1, 2; 1929, cc. 122, 133; 1931, cc. 43, 97, 130, 131, 237; 1933, cc. 29, 92, 138; 1935, cc. 5, 41; 1937, cc. 21, 77, 78, 372; 1939, c. 26; 1943, cc. 50, 51, 613; 1945, c. 535; 1947, c. 119; 1951, c. 6; C. S. 2334.)

Local Modification.—Scotland: 1947, c. 641; Washington: 1947, c. 373.

Editor's Note.—The 1945 amendment inserted the words "or McDowell" in the second sentence of the first paragraph. The 1947 amendment added the second and third sentences of the eighteenth paragraph. The 1951 amendment added the last paragraph relating to Haywood county. As the other paragraphs were not affected by the amendments they are not set out.

§ 9-26. Exceptions for disqualifications.

As to arbitrary exclusion of Negroes from grand jury, see *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537.

§ 9-28. Grand jury to visit jail and county home.

—Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

It shall not be necessary for any grand jury in any county to make any inspections or submit any reports with respect to any county offices or agencies other than those required by the first paragraph of this section, nor for any judge of the superior court to charge the grand jury with respect thereto. (Rev., s. 1972; Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3; 1949, c. 203; C. S. 2337.)

Editor's Note.—The 1949 amendment added the second paragraph.

Art. 5. Special Venire.

§ 9-29. Special venire to sheriff in capital cases.

Discretion of Court.—A motion for a special venire, both as a matter of practice and under this section and § 9-30, is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion. *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469.

Freeholders.—An order for a special venire properly specifies that the veniremen are to be freeholders. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

Order Substantially a Special Writ of Venire Facias.—A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of venire facias. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

Cited in *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205.

§ 9-30. Drawn from jury box in court by judge's order.

Applied in *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469, treated under § 9-29.

Cited in *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205.

Chapter 10. Notaries.

Sec.

10-4. Powers of notaries public.

10-5. [Repealed.]

10-11. Acts of certain notaries prior to qualification validated.

10-12. Acts of notaries public in certain instances validated.

§ 10-4. Powers of notaries public.—(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may—

(1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing except a contract between a husband and wife governed by the provisions of G. S. 52-12;

(2) Take affidavits and depositions;

(3) Administer oaths and affirmations, including oaths of office, except when such power is expressly limited to some other public officer;

(4) Protest for nonacceptance, or nonpayment, notes, bills of exchange and other negotiable instruments; and

(5) Perform such acts as the law of any other jurisdiction may require of a notary public for the purposes of that jurisdiction.

(b) Any act within the scope of subsection (a) performed in another jurisdiction by a notary public of that jurisdiction has the same force and effect in this State as fully as if such act were performed in this State by a notary public commissioned under the laws of this State.

(c) A notary public who, individually or in any fiduciary capacity, is a party to any instrument, cannot take the proof or acknowledgment of himself in such fiduciary capacity or of any other person thereto.

(d) A notary public who is a stockholder, director, officer, or employee of a corporation is not disqualified to exercise any power, which he is authorized by this section to exercise, with respect to any instrument or other matter to which such corporation is a party or in which it is interested unless he is individually a party thereto. (Rev., s. 2350; Code, s. 3307; 1866, c. 30; 1879, c. 128; 1951, c. 1006, s. 1; C. S. 3175.)

Editor's Note.—The 1951 amendment rewrote this section.

Certificate Prima Facie Evidence.—The certificate of the notary establishes prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. *State v. Chaplin*, 229 N. C. 797, 48 S. E. (2d) 37.

§ 10-5: Repealed by Session Laws 1951, c. 1006, s. 3.

§ 10-7. Expiration of commission to be stated after signature.

Cited in *Crissman v. Palmer*, 225 N. C. 472, 35 S. E. (2d) 422.

§ 10-11. Acts of certain notaries prior to qualification validated.—All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby. (1945, c. 665.)

§ 10-12. Acts of notaries public in certain instances validated.—(a) The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public

(1) In taking any acknowledgment, or

(2) In notarizing any instrument, or

(3) In performing any act purportedly in the capacity of a notary public

are hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts.

(b) All instruments with respect to which any such person as is described in subsection (a) of this section has purported to act in the capacity of a notary public shall have the same legal effect as if such person acting as a notary public had in fact qualified as a notary public prior to performing any acts with respect to such instruments. (1947, c. 313; 1949, c. 1.)

Editor's Note.—The 1949 amendment re-enacted this section without change.

Chapter 11. Oaths.

Art. 2. Forms of Official and Other Oaths.

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

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them,

neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

(1947, c. 71.)

Editor's Note.—The 1947 amendment changed the form of oath provided for a jury officer. As the rest of the section was not affected by the amendment it is not set out.

Chapter 12. Statutory Construction.

§ 12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.

Cited in *Carroll v. North Carolina State Firemen's Ass'n*, 230 N. C. 436, 53 S. E. (2d) 524.

§ 12-3. Rules for construction of statutes.

VI. DEFINITIONS.

Juror.—A woman is incompetent to serve as a juror. *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858, discussed in note in 23 N. C. Law Rev. 152.

Chapter 14. Criminal Law.

Sec. Art. 4. Subversive Activities.

14-12.1. Certain subversive activities made unlawful.

Art. 16. Larceny.

14-72. Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.

14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.

14-78.1. Trading for corn without permission of owner of premises.

Art. 18. Embezzlement.

14-96.1. Report to commissioner.

Art. 19. False Pretenses and Cheats.

14-101. Obtaining signatures by false pretenses.

Art. 20. Frauds.

14-117.1. Use of words "army" or "navy" in name of mercantile establishment.

Art. 22. Trespasses to Land and Fixtures.

14-129.1. Selling or bartering venus fly trap.

Art. 26. Offenses Against Public Morality and Decency.

14-196.1. Using profane, vulgar or indecent language to female over telephone.

Art. 35. Offenses against the Public Peace.

14-275.1. Disorderly conduct at bus or railroad station or airport.

Art. 39. Protection of Minors.

14-319. Marrying females under sixteen years old.

Art. 40. Protection of the Family.

14-322. Abandonment by husband or parent.

Art. 44. Regulation of Sales.

14-346.1. Sale of bay rum.

Art. 45. Regulation of Employer and Employee.

14-357.1. Requiring payment for medical examination, etc., as condition of employment.

Art. 48. Animal Diseases.

14-364. [Repealed.]

Art. 51. Protection of Athletic Contests.

14-373. Bribery of players, referees, umpires or officials.

14-374. Acceptance of bribes by players, referees, umpires or officials.

14-377. Intentional losing of athletic contest or aiding therein.

14-380. [Repealed.]

Art. 52. Miscellaneous Police Regulations.

14-387. [Repealed.]

14-401.3. Inscription on gravestone or monument charging commission of crime.

14-401.4. Identifying marks on machines and apparatus; application to Department of Motor Vehicles for numbers.

Sec.

14-401.5. Practice of phrenology, palmistry, fortune telling or clairvoyance prohibited.

14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

Art. 54. Sale, etc., of Pyrotechnics.

14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.

14-411. Sale deemed made at site of delivery.

14-412. Possession prima facie evidence of violation.

14-413. Permits for use at public exhibitions.

14-414. Pyrotechnics defined; exceptions.

14-415. Violation made misdemeanor.

Art. 55. Handling of Poisonous Reptiles.

14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.

14-417. Regulation of ownership or use of poisonous reptiles.

14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.

14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.

14-420. Arrest of persons violating provisions of article.

14-421. Exemptions from provisions of article.

14-422. Violation made misdemeanor.

Art. 1. Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

An assault with intent to commit rape is a felony. State v. Gay, 224 N. C. 141, 143, 29 S. E. (2d) 458.

Applied in State v. Johnson, 227 N. C. 587, 42 S. E. (2d) 685.

Cited in State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140; State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

§ 14-2. Punishment of felonies.

Cited in State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, etc.

Infamous Offense.—A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

For lack of clear test as to what constitutes infamous offense, see 28 N. C. Law Rev. 103.

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the state prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

Excessive Punishment.—

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also that the assault was aggravated, shocking and outrageous, the accepted plea is for a misdemeanor under § 14-33, and judgment that defendant be confined to the State's Prison for not less than eight nor more than ten years, is a vio-

lation of N. C. Const., Art. I, sec. 14, and this section. State v. Tyson, 223 N. C. 492, 27 S. E. (2d) 113.

Applied in State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869.

Art. 2. Principals and Accessories.

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

One cannot become an accessory after the fact until the offense has become an accomplished fact. Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. State v. Williams, 229 N. C. 348, 49 S. E. (2d) 617.

Art. 4. Subversive Activities.

§ 14-12.1. Certain subversive activities made unlawful.—It shall be unlawful for any person to:

1. By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

2. Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means; or,

3. Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or investigation, shall be guilty of a felony and punishable by a fine or imprisonment, or both, in the discretion of the court.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the state of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau,

institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged. Evidence satisfactory to the head of such department, bureau, institution or agency of the state shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028.)

Editor's Note.—It seems that the word "investigation" in line eight of the third paragraph from the end of the section was inserted by inadvertence instead of "instigation", which was probably intended.

Art. 6. Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison. (Rev., s. 3631; 1893, cc. 85, 281; 1949, c. 299, s. 1; C. S. 4200.)

I. EDITOR'S NOTE.

The 1949 amendment rewrote this section and inserted the proviso to the first sentence. For brief comment on amendment, see 27 N. C. Law Rev. 449.

For a brief history of this section in connection with sufficiency of indictment for murder in the first degree, see State v. Kirksey, 227 N. C. 445, 42 S. E. (2d) 613.

II. MURDER IN GENERAL.

Applied in State v. Montgomery, 227 N. C. 100, 40 S. E. (2d) 614; State v. Lampkin, 227 N. C. 620, 44 S. E. (2d) 30; State v. Parrott, 228 N. C. 752, 46 S. E. (2d) 851.

Cited in State v. Gause, 227 N. C. 26, 40 S. E. (2d) 463; State v. Ewing, 227 N. C. 107, 40 S. E. (2d) 600; Fuquay v. Fuquay, 232 N. C. 692, 62 S. E. (2d) 83; State v. Hall, 233 N. C. 310, 63 S. E. (2d) 636.

III. MURDER IN THE FIRST DEGREE.

Definition.—

In accord with original. See State v. Chavis, 231 N. C. 307, 56 S. E. (2d) 678; State v. Lamm, 232 N. C. 402, 61 S. E. (2d) 188.

This section does not give any new definition of murder, but permits that to remain as it was at common law. The section simply selects out of all murders denounced by common law those deemed more heinous on account of the mode of their perpetration, classifies them as murder in the first degree, and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. State v. Streeton, 231 N. C. 301, 56 S. E. (2d) 649.

Death Sentence Is Mandatory.—Upon conviction of murder in the first degree the law commands the sentence of death. State v. Nash, 226 N. C. 608, 39 S. E. (2d) 596; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Unless Jury Recommends Life Imprisonment.—The 1949 amendment inserted the proviso relating to life imprisonment. See 27 N. C. Law Rev. 449.

Deliberation and Premeditation—Premeditation.—

In accord with original. See State v. Chavis, 231 N. C. 307, 56 S. E. (2d) 678; State v. Lamm, 232 N. C. 402, 61 S. E. (2d) 188.

Same—Deliberation.—

In accord with original. See State v. Chavis, 231 N. C. 307, 56 S. E. (2d) 678; State v. Lamm, 232 N. C. 402, 61 S. E. (2d) 188.

Same—Presumption and Burden of Proof.—

When a homicide is perpetrated by means of poison, lying

in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. *State v. Dunhean*, 224 N. C. 738, 32 S. E. (2d) 322.

Premeditation and deliberation necessary to constitute murder in the first degree are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678. See *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188.

Malice "Aforethought."—In criminal prosecution charging murder, failure of the court to use adjective "aforethought" in defining murder in the first degree, was not error. "Malice aforethought" was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in C. S., 4200, now this section, the term "premeditation and deliberation" is more comprehensive and embraces all that is meant by "aforethought," and more. Therefore, the use of "aforethought" is no longer required. *State v. Hightower*, 226 N. C. 62, 64, 36 S. E. (2d) 649.

A murder perpetrated by means of poison is murder in the first degree. *State v. Hendrick*, 232 N. C. 447, 61 S. E. (2d) 349.

In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent. *State v. Hendrick*, 232 N. C. 447, 61 S. E. (2d) 349.

Killing in Perpetration of Robbery.—

When the evidence offered in a criminal prosecution tends to show a homicide committed in the perpetration or attempt to perpetrate a robbery, the offense is murder in the first degree within the specific language of this section. *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352.

Or Other Felony.—A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, and in such instance the State is not put to proof of premeditation and deliberation. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678.

Killing in Perpetration of Rape.—Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494; *State v. King*, 226 N. C. 241, 37 S. E. (2d) 684.

Death Need Not Be Intended.—It is evident under this section a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not. *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649.

All Conspirators Are Guilty, etc.—

Where there is a conspiracy to rob and one of the conspirators kills in the attempt to perpetrate the robbery, each of the conspirators is guilty of murder. *State v. Bennett*, 226 N. C. 82, 36 S. E. (2d) 708; *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678.

IV. MURDER IN THE SECOND DEGREE.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678; *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188.

Same—Presumption.—

Where evidence establishes killing with deadly weapon, the presumption of malice goes no further than murder in the second degree, and if state seeks conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. *State v. Floyd*, 226 N. C. 571, 39 S. E. (2d) 598.

When Submission to Jury Not Required.—Where all the evidence tends to show murder committed in the perpetration of a robbery, the court is not required to submit the question of defendant's guilt of the lesser offense of murder in the second degree. *State v. Brown*, 231 N. C. 152, 56 S. E. (2d) 441.

Instruction held reversible error. *State v. Clark*, 225 N. C. 52, 33 S. E. (2d) 245.

V. PLEADING AND PRACTICE.

Form of Indictment.—

This section does not require an allegation or count to

be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. *State v. Smith*, 223 N. C. 457, 27 S. E. (2d) 114.

Evidence of Premeditation and Deliberation.—In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678; *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188.

Evidence of Killing in Perpetration of Rape.—In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. *State v. King*, 226 N. C. 241, 37 S. E. (2d) 684.

Sufficiency of Evidence for Submission to Jury.—

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in the first degree. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery, is sufficient to take the issue of their guilt of murder in the first degree to the jury. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678.

Where Jury May Be Instructed to Return First Degree Verdict, etc.—

Where there was abundant evidence tending to establish that homicide was committed in the perpetration of capital felony rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494.

Where evidence tends to show murder committed in the perpetration of robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limited the jury to verdicts of guilty of murder in the first degree or not guilty. *State v. Matthews*, 226 N. C. 639, 39 S. E. (2d) 819.

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom constitutes murder in the first degree and an instruction to this effect upon supporting evidence cannot be held for error. *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649.

Art. 7. Rape and Kindred Offenses.

§ 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. (Rev., s. 3637; Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2; 1917, c. 29; 1949, c. 299, s. 4; C. S. 4204.)

Cross References.—

The cross reference in the original to § 14-214 should be to § 15-169.

Editor's Note.—The 1949 amendment rewrote this section. Prior to the amendment a verdict of guilty of rape made punishment by death imperative. But now the jury may render a verdict of guilty of rape with a recommendation of life imprisonment. The clause "and the court shall so instruct the jury, merely directs the court to instruct the jury that such verdict may be returned. *State v. Shackelford*, 232 N. C. 299, 59 S. E. (2d) 825. For brief comment on amendment, see 27 N. C. Law Rev. 449. For propriety of arguing parole law in urging jury to withhold recommendation, see 28 N. C. Law Rev. 342.

The 1949 amendment makes no change in the elements of the crime or in the rules of evidence applicable in the trial on a charge of rape. *State v. Shackelford*, 232 N. C. 299, 59 S. E. (2d) 825.

Age of Consent.—

Carnally knowing any female of the age of twelve years or more by force and against her will is rape; and carnally knowing and abusing any female child under the age of twelve years is also rape. *State v. Johnson*, 226 N. C. 671, 40 S. E. (2d) 113.

Under the second clause of this section relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of this section presumed incapable of consenting. *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678, 679.

Necessary Allegations—"By Force and against Her Will."—An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. *State v. Benton*, 226 N. C. 745, 40 S. E. (2d) 617.

An indictment for rape of a female twelve years of age or more which charged that defendants did violently and feloniously ravish and carnally know but failed to charge that offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both elements be alleged and proven. *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678.

When indictment charging rape is insufficient for failure to allege that offense was committed "forcibly" and "against her will," the allowance of motion in arrest of judgment does not preclude subsequent trial of defendants upon proper bills. *Id.*

"Forcibly" Can Be Supplied by Any Equivalent Word.—The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678, 679.

Instructions.—

An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. *State v. Simmons*, 228 N. C. 258, 45 S. E. (2d) 121.

In a prosecution against two defendants for rape of prosecutrix, at different times on the same night, where the State's evidence tended to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there was reversible error in a charge that, if the intent to ravish and carnally know prosecutrix existed in the mind of one of defendants, or both of them, at any time during the assault, they would be guilty of an assault with intent to commit rape. *State v. Walsh*, 224 N. C. 218, 29 S. E. (2d) 743.

Sufficiency of Evidence.—In *State v. Farrell*, 223 N. C. 804, 809, 28 S. E. (2d) 560, it was held that all the evidence showed carnal knowledge and abuse of a female child under the age of twelve years.

In *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402, the court held that there was sufficient evidence to sustain the verdict of guilty of rape.

Applied in *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520.

Quoted in *State v. Speller*, 231 N. C. 549, 57 S. E. (2d) 759.

Cited in *State v. Swink*, 229 N. C. 123, 47 S. E. (2d) 852.

§ 14-22. Punishment for assault with intent to commit rape.**In General.—**

In accord with 3rd paragraph in original. See *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458; *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84; *State v. Overcash*, 226 N. C. 632, 39 S. E. (2d) 810.

Assault with intent to commit rape is not the same as an attempt to commit rape, but is an assault with the requisite felonious attempt. *State v. Randolph*, 232 N. C. 382, 61 S. E. (2d) 87.

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make. *State v. Walsh*, 224 N. C. 218, 29 S. E. (2d) 743.

Instruction that the mere touching of prosecutrix, without regard to her consent, would be an assault with intent to commit rape if the defendant at the time intended to ravish in the event it became necessary to do so to accomplish his purpose, was erroneous for disregarding the

essential element of unlawfulness, rudeness or violence which makes the taking hold of a female an assault. *State v. Overcash*, 226 N. C. 632, 39 S. E. (2d) 810, 811.

Instruction Held Reversible Error.—In a prosecution for an assault with intent to commit rape, a repeated instruction defining the offense as an assault with an intent to have sexual intercourse with prosecutrix "without her conscious express permission" must be held for reversible error notwithstanding that in other portions of the charge the jury was instructed that the intent must be to accomplish the act "forcibly and against her will," and notwithstanding that the question of consent or permission was not mooted. *State v. Randolph*, 232 N. C. 382, 61 S. E. (2d) 87.

Evidence Held Insufficient.—In *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84, the court held that the evidence was insufficient to sustain a verdict of assault with intent to commit rape.

Applied in *State v. Johnson*, 227 N. C. 587, 42 S. E. (2d) 685.

§ 14-23. Emission not necessary to constitute rape and buggery.

Cited in *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.

Editor's Note.—Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

This section is designed to protect chaste girls between the specified ages from predatory males who would rob them of their virtue. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

Essentials of Crime.—

In accord with original. See *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

"Carnal knowledge" and "sexual intercourse" are synonymous, and exist in a legal sense when there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

The state need not charge or prove that accused knew female child was under age of consent. One having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial. *State v. Wade*, 224 N. C. 760, 762, 32 S. E. (2d) 314.

Use of term "statutory rape" in the charge was not prejudicial error where charge contained correct definition, and properly placed burden of proof on the state, as to each essential element of the offense. *State v. Bullins*, 226 N. C. 142, 36 S. E. (2d) 915.

Failure to give a correct charge on the element of age is error in a prosecution under this section. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Or Chastity.—Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of § 1-180, and an exception thereto will be sustained. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Instruction Held Prejudicial.—In a prosecution under this section, where defendant offered evidence of the immoral character of the prosecutrix and her sister and aunt, a charge that such testimony was not competent upon the question of guilt or innocence, but that it was material as bearing upon the likelihood of defendant indulging in such conduct, was prejudicial error. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921.

Evidence of Improper Advances of Similar Nature.—In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. *State v. Edwards*, 224 N. C. 527, 31 S. E. (2d) 516.

Evidence held sufficient to support conviction in a prosecution under this section. *State v. Bryant*, 228 N. C. 641, 46 S. E. (2d) 847.

Testimony by prosecutrix that defendant had "intercourse" with her and "raped" her is sufficient evidence of carnal knowledge to be submitted to the jury in a prosecution under this section. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

Variance as to Time.—

Time is not of the essence of the offense denounced by this section, and on trial of an indictment for carnal knowledge of a female under 16 years of age a variance between allegation and proof as to the date is not material, the statute of limitations not being involved. *State v. Baxley*, 223 N. C. 210, 25 S. E. (2d) 621.

§ 14-27. Jurisdiction of court; offenders classed as delinquents.

Editor's Note.—Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

Art. 8. Assaults.**§ 14-29. Castration or other maiming without malice aforethought.**

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156, 157.

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. *Id.*

§ 14-31. Maliciously assaulting in a secret manner.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869; *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617.

§ 14-32. Assault with deadly weapon with intent to kill resulting in injury.

The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. *State v. Anderson*, 230 N. C. 54, 51 S. E. (2d) 895.

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132.

In an indictment charging an assault with intent to kill "and murder" the words "and murder" are surplusage and place no additional burden on the state. *State v. Plemmons*, 230 N. C. 56, 52 S. E. (2d) 10.

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132.

Injury Need Not Be Described in Indictment.—In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140.

Omission of "Assault with a Deadly Weapon" from Charge to Jury.—When accused is indicted, under this section, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738.

The term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. *State v. Plemmons*, 230 N. C. 56, 52 S. E. (2d) 10.

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132.

Admissibility of Evidence.—See *State v. Oxendine*, 224 N. C. 825, 32 S. E. (2d) 648.

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132.

Sufficiency of Evidence.—

In a prosecution under this section it was held that the evidence was amply sufficient to sustain a verdict of "guilty

of an assault with a deadly weapon." *State v. Cody*, 225 N. C. 38, 33 S. E. (2d) 71.

Applied in *State v. Jones*, 229 N. C. 276, 49 S. E. (2d) 463; *State v. Muse*, 229 N. C. 536, 50 S. E. (2d) 311; *State v. Way*, 231 N. C. 716, 58 S. E. (2d) 716.

Cited in *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 869; *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617; *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835; *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

§ 14-33. Punishment for assault.—(a) In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, subject to the provisions of subsection (b).

(b) Notwithstanding the provisions of subsection (a), the punishment in cases of assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars (\$50.00) or imprisonment for thirty days, when no deadly weapon has been used and no serious damage done except in cases of:

- (1) Assault with intent to kill, or
- (2) Assault with intent to commit rape, or
- (3) Assault or assault and battery by any man or boy over eighteen years old on any female person, or

(4) The person committing the assault, (excluding and excepting parents, school teachers, guardians or persons in loco parentis), is eighteen years old or over, and the person on whom the assault is committed is under the age of twelve years.

(c) In all cases of assault, assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted, and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (Rev., s. 3620; Code, s. 987; 1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; 1911, c. 193; 1933, c. 189; 1949, c. 298; C. S. 4215.)

Editor's Note.—The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon had been used and no serious damage done, the punishment may not exceed a fine of \$50 or imprisonment for 30 days, unless the assault is committed upon a female by a man or boy over 18 years of age. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the proviso or exception and they remain general misdemeanors. *State v. Jackson*, 226 N. C. 66, 67, 36 S. E. (2d) 706.

Punishment—Extent.—

Where in a trial of an indictment, under the preceding section, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there is error, as the offense described in the verdict is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by this section. *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140.

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of article I, section 14 of the constitution. *State v. Crandall*, 225 N. C. 148, 150, 33 S. E. (2d) 861.

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof

did not support judgment of imprisonment in the state's prison from two to five years. *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156.

Effect of Acquittal on Part of Verdict.—The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, does not entitle him to his discharge on his motion in arrest of judgment. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738.

Jurisdiction Where No Deadly Weapon Used and No Serious Injury Done.—Long prior to the enactment of the preceding section, the Legislature had dealt with the general subject of assault—including assault as known at the common law—and had attempted to lay down a schedule of punishments according to the aggravation of the offense, and at the same time, by the first proviso of this section, taken in connection with Art. IV, sec. 27, of the Constitution, carved out of the general jurisdiction of assaults given the courts an original and exclusive jurisdiction in the courts of the justice of the peace, where no deadly weapon had been used and no serious injury inflicted. *State v. Gregory*, 223 N. C. 415, 418, 27 S. E. (2d) 140.

Presumption That Accused Is over Eighteen.—Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. *State v. Lewis*, 224 N. C. 774, 32 S. E. (2d) 334, citing *State v. Lefler*, 202 N. C. 700, 163 S. E. 873; *State v. Jones*, 181 N. C. 546, 106 S. E. 817.

Jury to Determine Defendant's Age.—In order to support the sentence as for a general misdemeanor it is required that the jury determine in its verdict specifically or by reference to the charge, that defendant is a male and was over eighteen years of age at the time of the assault. *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394.

Where there is no finding by jury that defendant was a man or boy over eighteen years of age at the time of the assault, judgment is not supported by the verdict, and a venire de novo will be ordered. *Id.*

Evidence Sufficient under Section.—

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458.

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. *State v. Tyson*, 223 N. C. 492, 493, 27 S. E. (2d) 113.

In *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84, the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence Insufficient.—In *State v. Silver*, 227 N. C. 352, 42 S. E. (2d) 208, the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

Cited in *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 869; *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

§ 14-34. Assaulting by pointing gun.

Accidental Discharge of Gun, etc.—

In accord with 1st paragraph in original. See *State v. Boldin*, 227 N. C. 594, 595, 42 S. E. (2d) 897.

Cited in *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

Art. 10. Kidnapping and Abduction.

§ 14-39. Kidnapping.

Definition.—Under this section kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge to jury defining the offense as forcibly taking and carrying away of a human being is erroneous as be-

ing incomplete definition of the crime. *State v. Witherington*, 226 N. C. 211, 37 S. E. (2d) 497.

Taking and Carrying Away.—Under this section, regardless of the means used, by which the taking and carrying away of a human being is effected, there must be further finding that such taking and carrying away was unlawful or done without lawful authority, or effected by fraud. *State v. Witherington*, 226 N. C. 211, 213, 37 S. E. (2d) 497.

Cited in *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649.

§ 14-41. Abduction of children.

Definition.—

In accord with the original. See *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518.

This section is broad and comprehensive in its terms, and embraces all means by which the child may be abducted. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518.

Intent.—There is nothing in this section which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518.

Force Not Necessary.—In a prosecution under this section it is not necessary for the State to show that the child was carried away by force. *State v. Ashburn*, 230 N. C. 722, 55 S. E. (2d) 333.

Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. *State v. Ashburn*, 230 N. C. 722, 55 S. E. (2d) 333.

Use of Wrong Expression in Charge to Jury.—The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." *State v. Truelove*, 224 N. C. 147, 29 S. E. (2d) 460.

Art. 11. Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being primarily for the protection of the woman. *State v. Jordan*, 227 N. C. 579, 42 S. E. (2d) 674; *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285.

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. *State v. Jordan*, 227 N. C. 579, 42 S. E. (2d) 674; *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285.

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. *State v. Jordan*, 227 N. C. 579, 42 S. E. (2d) 674.

Joinder of Offenses.—

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered; and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. *State v. Dilliard*, 223 N. C. 446, 27 S. E. (2d) 85.

Nonsuit for Variance.—Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285.

Prejudicial Evidence.—In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions was held incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. *State v. Gavin*, 232 N. C. 323, 59 S. E. (2d) 823.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Cross Reference.—

See annotations under § 14-44.

Evidence.—In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. *State v. Mannings*, 225 N. C. 41, 33 S. E. (2d) 239; *State v. Choate*, 228 N. C. 491, 46 S. E. (2d) 476.

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. *State v. Choate*, 228 N. C. 491, 46 S. E. (2d) 476.

Cited in *State v. Gavin*, 232 N. C. 323, 59 S. E. (2d) 823.

Art. 13. Injuring Others by Use of High Explosives.

§ 14-49. Wilful injury a felony; punishment.—

Any person who shall wilfully and maliciously injure or attempt to injure any person, or any building, equipment, real or personal property of any kind or nature belonging to another person, firm or corporation, by the use of nitroglycerine, dynamite, gunpowder or other high explosive, shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State Prison for not less than five years and not more than thirty years. (1923, c. 80, s. 1; 1951, c. 1126, s. 1; C. S. 4231(a).)

Editor's Note.—The 1951 amendment rewrote this section.

§ 14-50. Conspiracy declared a felony; punishment.—If any two or more persons shall conspire to wilfully and maliciously injure any person, or any building, equipment, real or personal property of any kind or nature belonging to another person, firm or corporation, by the use of nitroglycerine, dynamite, gunpowder, or other high explosive, each and everyone so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State prison for not more than fifteen years. (1923, c. 80, s. 2; 1951, c. 1126, s. 1; C. S. 4231(b).)

Editor's Note.—The 1951 amendment rewrote this section.

Art. 14. Burglary and Other Housebreaking.

§ 14-51. First and second degree burglary.

In General.—

Burglary is a common law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. *State v. Mumford*, 227 N. C. 132, 41 S. E. (2d) 201.

The purpose of the statute is to protect the habitations of men, where they repose and sleep, from meditated harm. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

The sleeping apartment referred to in this section is one in which a person regularly sleeps. *State v. Foster*, 129 N. C. 704, 40 S. E. 209. And a room in a storehouse in which there is a cot occasionally occupied at night by a guard is not a sleeping apartment within the terms of the statute. *United States v. Brandenburg*, 144 F. (2d) 656.

Evidence held sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside.—Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was

guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111.

Cited in *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

§ 14-52. Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court. (Rev., s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222; 1941, c. 215, s. 1; 1949, c. 299, s. 2; C. S. 4233.)

Editor's Note.—The 1949 amendment rewrote this section. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, not excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

It is error for the court to fail to charge the jury in a prosecution for burglary in the first degree that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.—Taking §§ 14-52 and 15-171 together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

Formerly a verdict of guilty of burglary in the first degree made a death sentence mandatory. But since the enactment of the proviso in 1941, when the jury recommends imprisonment for life, the death penalty is thereby eliminated, and sentence of life imprisonment is mandatory. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

Applied in *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753.

Cited in *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111.

§ 14-54. Breaking into or entering houses otherwise than burglariously.

Intent Must Be Shown.—

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the "intent to steal." *State v. Friddle*, 223 N. C. 258, 260, 25 S. E. (2d) 751.

Proof of Breaking Not Essential.—Housebreaking or non-burglariously breaking is a statutory and not a common law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant, proof of a breaking is not essential to sustain conviction. *State v. Mumford*, 227 N. C. 132, 41 S. E. (2d) 201; *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612.

Where defendant was charged under this section with non-burglariously breaking and entering and the evidence showed that he sat in his car while a friend unlawfully entered the house of another, the defendant was a principal in the crime being committed and the fact that his friend did not enter by burglariously breaking is immaterial. *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612.

Indictment under This Section or § 14-51.—Where on appeal defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment

under this section. *State v. Locklear*, 226 N. C. 410, 38 S. E. (2d) 162.

Applied in *State v. Minton*, 228 N. C. 518, 46 S. E. (2d) 296.

Cited in *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753.

§ 14-55. Preparation to commit burglary or other housebreakings.

Under this section, the gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *State v. Boyd*, 223 N. C. 79, 83, 25 S. E. (2d) 456.

But the phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful, and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, such possession is not within the meaning of this section. *State v. Boyd*, 223 N. C. 79, 85, 25 S. E. (2d) 456.

Separate Offenses.—The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898.

Judicial Knowledge of Housebreaking Implements.—Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898.

Sufficiency of Evidence.—In *State v. Boyd*, 223 N. C. 79, 84, 25 S. E. (2d) 456, it was held that the evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section.

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898.

Cited in *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

§ 14-57. Burglary with explosives.

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in § 14-51. *United States v. Brandenburg*, 144 F. (2d) 656.

Applied in *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753.

Art. 15. Arson and Other Burnings.

§ 14-58. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. (Rev., s. 3335; Code, s. 985; R. C., c. 34, s. 2; 1870-1, c. 222; 1941, c. 215, s. 2; 1949, c. 299, s. 3; C. S. 4238.)

Editor's Note.—The 1949 amendment rewrote this section. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, not excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of *res gestae*. *State v. Smith*, 225 N. C. 78, 33 S. E. (2d) 472.

The death sentence is mandatory upon a verdict of guilty

of arson when there is no recommendation by the jury in respect to the punishment. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

§ 14-62. Setting fire to churches and certain other buildings.

Burden of Proof on Plea of Not Guilty.—Where a plea of not guilty is entered in a prosecution for common law arson or for the statutory felony of burning a building contrary to this section it is incumbent on the State to prove both the fire and the cause of the fire and the connection of the accused with the crime. *State v. Cuthrell*, 233 N. C. 274, 63 S. E. (2d) 549.

Opinion Evidence as to Origin of Fire.—In a prosecution under this section it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simple and readily understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony. *State v. Cuthrell*, 233 N. C. 274, 63 S. E. (2d) 549.

Art. 16. Larceny.

§ 14-71. Receiving stolen goods.—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2; 1949, c. 145, s. 1; C. S. 4250.)

Editor's Note.—The 1949 amendment substituted "criminal offense" for "misdemeanor" in line eight. For brief comment on amendment, see 27 N. C. Law Rev. 448.

As to elements of crime of receiving stolen goods, see 26 N. C. Law Rev. 192.

The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. *State v. Yow*, 227 N. C. 585, 587, 42 S. E. (2d) 661.

Test of Felonious Intent.—In a prosecution under this section, the test of felonious intent is whether the prisoners knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour. *State v. Oxendine*, 223 N. C. 659, 27 S. E. (2d) 814.

The Inference or Presumption, etc.—In accord with original. See *State v. Yow*, 227 N. C. 585, 587, 42 S. E. (2d) 661.

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. *State v. Larkin*, 229 N. C. 126, 47 S. E. (2d) 697.

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving.—Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. *State v. Holbrook*, 223 N. C. 622, 27 S. E. (2d) 725.

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. *State v. Larkin*, 229 N. C. 126, 47 S. E. (2d) 697.

Punishment.—Upon a plea of *nolo contendere* to a charge of receiving cigarettes of the value of \$75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by this section and §§ 14-1, 2 and 3, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious. *State v. Mounce*, 226 N. C. 159, 36 S. E. (2d) 918.

Applied in *State v. Law*, 228 N. C. 443, 45 S. E. (2d) 374; *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612.

Cited in *State v. Law*, 227 N. C. 103, 40 S. E. (2d) 699.

§ 14-72. Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application; Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1; 1941, c. 178, s. 1; 1949, c. 145, s. 2; C. S. 4251.)

Editor's Note.—The 1949 amendment substituted "one hundred" for "fifty" in the catchline of this section and also in the first sentence. For brief comment on amendment, see 27 N. C. Law Rev. 448.

Evidence.—In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than \$50 (now \$100) to establish a felony under this section. *State v. Weinstein*, 224 N. C. 645, 31 S. E. (2d) 920.

Cited in *State v. Jones*, 227 N. C. 47, 40 S. E. (2d) 458.

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than one hundred dollars. (1913, c. 118, s. 2; 1941, c. 178, s. 2; 1949, c. 145, s. 3; C. S. 4252.)

Editor's Note.—The 1949 amendment substituted "one hundred" for "fifty" near the end of the section. For brief comment on amendment, see 27 N. C. Law Rev. 448.

For subsequent law affecting this section, see § 14-73.1.

§ 14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.—The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by article 16, subchapter V, chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors, and jurisdiction to hear, try and finally dispose of such offenses committed within their respective territorial jurisdictions, is hereby vested in all courts established by a special act of the legislature or pursuant to the provisions of chapter 7 of the General Statutes which now possess jurisdiction of misdemeanors which are punishable in the discretion of the court. (1949, c. 145, s. 4.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 448.

§ 14-75. Larceny of choses in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of the money issued by or

drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a crime of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of the same value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of such value. (Rev., s. 3498; Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1; 1945, c. 635; C. S. 4254.)

Editor's Note.—The 1945 amendment substituted the word "crime" for the word "felony" in line seventeen and the words "the same value" for the words "any value" in line twenty-one. It also inserted the word "such" before the word "value" in the last line.

§ 14-78.1. Trading for corn without permission of owner of premises.—Any person engaged in traveling from house to house or from place to place, buying or trading for corn, without the permission of the landowner upon whose premises such buying or trading is conducted, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. This section shall apply only to the counties of Bertie, Columbus, Edgecombe, Halifax, Harnett, Hertford, Nash, Northampton, Wake and Warren. (1951, c. 30.)

Art. 17. Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. *State v. Jones*, 227 N. C. 402, 405, 42 S. E. (2d) 465. See *State v. Chase*, 231 N. C. 589, 58 S. E. (2d) 364.

The main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764.

It is not necessary to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764.

An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834. See §§ 15-169, 15-170, and notes.

Evidence.—Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764.

Art. 18. Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

The offense of embezzlement is exclusively statutory, and this section does not embrace a vendor in an executory contract of purchase and sale. *State v. Blair*, 227 N. C. 70, 40 S. E. (2d) 460.

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *State v. Gentry*, 228 N. C. 643, 46 S. E. (2d) 863.

Evidence Sufficient to Go to Jury.—The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executed by him, and advised the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. It was held that the evidence was sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. *State v. Gentry*, 228 N. C. 643, 46 S. E. (2d) 863.

§ 14-96.1. Report to commissioner.—Whenever any insurance company, its manager, general agent or other representative knows or has reasonable cause to believe that any agent, broker or other representative of such company is guilty under the preceding section, it shall be the duty of such company, its manager, general agent or other representative, within thirty days after acquiring such knowledge to file with the commissioner a complete statement of all the relevant facts and circumstances. All such reports shall be privileged communications, and when filed in good faith shall in nowise subject the company or individuals making the same to any liability whatsoever. The commissioner may suspend the license to do business in this state of any insurance company, its general manager, agent or other representative who willfully fails to comply with this section. (1945, c. 382.)

Art. 19. False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.

Elements of the Crime.—

In accord with 1st paragraph in original. See *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686.

The Indictment.—

Indictment held sufficient in *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686.

Evidence held insufficient to sustain conviction in prosecution under this section. *State v. Yancey*, 228 N. C. 313, 45 S. E. (2d) 348.

Applied in *State v. Stansbury*, 230 N. C. 589, 55 S. E. (2d) 185.

§ 14-101. Obtaining signatures by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (Rev., s. 3433; Code, s. 1026; 1871-2, c. 92; 1945, c. 635; C. S. 4278.)

Editor's Note.—Prior to the 1945 amendment this section also applied to obtaining property by false pretenses.

§ 14-104. Obtaining advances under promise to work and pay for same.

Warrant Must Allege Intent to Cheat.—A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, is fatally defective. *State v. Phillips*, 228 N. C. 446, 45 S. E. (2d) 535.

§ 14-106. Obtaining property in return for worthless check, draft or order.

Cited in *Melton v. Rickman*, 225 N. C. 700, 36 S. E. (2d) 276, 162 A. L. R. 793.

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. [If the amount due on such check is not over fifty dollars, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days.]

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. The part of this section in brackets shall only apply to the counties of Alamance, Alleghany, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Buncombe, Burke, Cabarrus, Caldwell, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Columbus, Cumberland, Currituck, Davidson, Davie, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, Mecklenburg, Mitchell, Moore, Nash, Northampton, Onslow, Orange, Pamlico, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Union, Vance, Wake, Washington, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356.)

Editor's Note.—The first 1949 amendment added Jones county and the second 1949 amendment added Beaufort

county to the list of counties set out in the last paragraph.

The 1951 amendment inserted the second paragraph.

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. State v. White, 230 N. C. 513, 53 S. E. (2d) 436.

Punishment.—A sentence to 18 months' labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. State v. White, 230 N. C. 513, 53 S. E. (2d) 436.

Art. 20. Frauds.

§ 14-117.1. Use of words "army" or "navy" in name of mercantile establishment.—It shall be unlawful for any person, firm, or corporation, to use the words "army" or "navy" or either, or both, in the name or as a part of the name of any mercantile establishment in this state which is not in fact operated by the United States government or a duly authorized agency thereof.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) for the first offense, and not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00) for each subsequent such offense. (1945, c. 879.)

Local Modification.—Beaufort: 1949, c. 857.

§ 14-118. Blackmailing.

Circumstantial evidence held to sustain conviction of blackmail. State v. Strickland, 229 N. C. 201, 49 S. E. (2d) 469.

Art. 21. Forgery.

§ 14-119. Forgery of bank-notes, checks and other securities.

Definition.—The common-law definition of forgery obtains in this State, the statute, not attempting to define it. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

Forgery, at common law, denotes a false making, a making *mallo animo*, of any written instrument for the purpose of fraud and deceit. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

Forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

Elements of Offense.—

The essentials to the completion of the offense of forgery are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy "apparently capable of effecting a fraud;" (b) the fraudulent intent. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

Real and Forged Signatures Need Not Be Identical.—An instrument is nonetheless a forgery because the signature is not identical with that of the person whose signature it is intended to simulate if they are sufficiently similar for the doctrine of *idem sonans* to apply, and the insertion of a middle initial not in the signature simulated is not a fatal variance. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdrawing from the bank the funds of such other per-

son, is guilty of forgery. Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

§ 14-120. Uttering forged paper.

Cited in Peoples Bank, etc., Co. v. Fidelity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996.

Art. 22. Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.

This section is designed to protect actual possession only, and it is no defense that the accused has title to the locus in quo if the prosecutor be in actual possession of it. State v. Baker, 231 N. C. 136, 56 S. E. (2d) 424.

§ 14-129. Taking, etc., of certain wild plants from land of another.—No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any venus fly trap (*Dionaea Muscipula*), trailing arbutus, American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent.

(1951, c. 367, s. 1.)

Editor's Note.—The 1951 amendment inserted in the first sentence the words "venus fly trap (*Dionaea Muscipula*)."
As the rest of the section was not affected by the amendment it is not set out.

§ 14-129.1. Selling or bartering venus fly trap.

—In order to prevent the extinction of the rapidly disappearing rare and unique plant known as the venus fly trap (*Dionaea Muscipula*), it shall be unlawful for any person, firm or corporation to sell or barter or to export for sale or barter, any venus fly trap plant or any part thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, this section shall not apply to the sale or exportation of the venus fly trap plant for the purposes of scientific experimentation or study when such sale or export for such purposes has been authorized in writing by the Department of Conservation and Development. (1951, c. 367, s. 2.)

§ 14-134. Trespass on land after being forbidden; license to look for estrays.

This section is designed to protect possession regardless whether it be actual or constructive. State v. Baker, 231 N. C. 136, 56 S. E. (2d) 424.

Essential Ingredients of Offense.—To constitute trespass on the land of another after notice or warning under this section, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N. C. 136, 56 S. E. (2d) 424.

Entry under Claim of Right.—

In a prosecution under this section, even though the State establish that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the locus in quo without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right, i. e., that he believed he had a right to enter, and that he had reasonable grounds for such belief. State v. Baker, 231 N. C. 136, 56 S. E. (2d) 424.

Evidence Not Establishing Prosecutor's Possession. —

Where, in a prosecution under this section the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, held, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of this section. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424.

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-135. Cutting, injuring or reviewing another's timber.

Cross Reference.—As to larceny of wood from land, see § 14-80.

Prosecutor's Ownership of Land Essential.—The crime of unlawfully cutting, injuring or removing another's timber as defined by this section is an offense against the freehold rather than the possession, and ownership of the property by the prosecutor is a sine qua non to conviction. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424.

§ 14-136. Setting fire to grass and brush lands and woodlands.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 346.

§ 14-140. Certain fires to be guarded by watchman.

Cited in *State v. Swanson*, 223 N. C. 442, 27 S. E. (2d) 122.

Art. 23. Trespasses to Personal Property.

§ 14-160. Malicious injury to personal property.

Proof of the destruction of a fence erected upon land was held to be insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there was a fatal variance between allegation of ownership of the realty and proof. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424.

Art. 26. Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

Cited in *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849.

§ 14-178. Incest between certain near relatives.

Evidence.—

In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. *State v. Edwards*, 224 N. C. 527, 31 S. E. (2d) 516.

§ 14-180. Seduction.

Three Elements of Offense.—

In accord with original. See *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619.

Requirement as to Innocence and Virtue.—Where there was evidence of the good reputation of prosecutrix before and at the time of the alleged illicit intercourse, it was held that this meets the requirement of this section on the element of innocence and virtue. *State v. Smith*, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Testimony of Woman Must Be Corroborated as to Each Element.—

To convict defendant of seduction as defined in this statute the testimony of prosecutrix alone is not sufficient. There must be independent supporting evidence of each essential element of the crime. *State v. Smith*, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Supporting Evidence Need Not Be Direct.—

Testimony supporting prosecutrix, on an indictment for seduction under this section, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619.

Cited in *State v. Hill*, 223 N. C. 711, 28 S. E. (2d) 100.

§ 14-183. Bigamy.

Constitutionality.—This section, making bigamous cohabitation in this State a felony is valid and offends neither the Federal nor State Constitutions. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Second Marriage Out of State.—

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the state must prove beyond a reasonable doubt, each of the essential elements of the offense. *State v. Setzer*, 220 N. C. 216, 37 S. E. (2d) 513.

Aiding and Abetting by Marrying Outside of State.—In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of the courts and requires dismissal. *State v. Jones*, 227 N. C. 94, 40 S. E. (2d) 700.

Foreign Divorces.—

In first paragraph in original the citation should be "175 N. C. 754."

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive; and, when challenged in a prosecution under this section, for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the State granting their divorces and that such divorces are valid. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

A man and a woman, domiciled in North Carolina, left their spouses in North Carolina, obtained decrees of divorce in Nevada, married and returned to North Carolina to live. Prosecuted in North Carolina for bigamous cohabitation, they pleaded the Nevada divorce decrees in defense but were convicted. The court held that, upon the record, the judgments of conviction were not invalid as denying the Nevada divorce decrees the full faith and credit required by Art. IV, § 1 of the Constitution. *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, aff. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744.

Prima Facie Case Made Out.—Upon issues of traverse on indictment for bigamous cohabitation, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a prima facie case is made out and a demurrer to the evidence was properly overruled. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Plea of Former Jeopardy Properly Overruled.—Where, in a criminal prosecution for bigamous cohabitation, there is a conviction and judgment chiefly on the grounds of insufficient service, which on appeal is affirmed by the Supreme Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Venue.—

The last line in this paragraph in original should be "87 L. Ed. 279."

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

§ 14-184. Fornication and adultery.

For history of section, see *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

Offense Is Statutory.—The offense of fornication and adultery is statutory. *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346.

"**Lewdly and lasciviously cohabit**" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction

between single or nonhabitual intercourse and the offense the statute means to denounce. *State v. Davenport*, 225 N. C. 13, 17, 33 S. E. (2d) 136; *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346.

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136.

The warrant or indictment must set forth the essential elements of the offense of fornication and adultery. *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346.

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant was arrested by the supreme court *ex mero motu*. *Id.*

Evidence.—

On a prosecution upon indictment charging fornication and adultery, where the state's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136.

Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the state's case. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

Circumstantial Evidence.—

The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136.

The proviso in this section relates to extra-judicial declarations, and does not prevent a woman jointly charged with the offense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of *nolo contendere* has been accepted by the state, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37, discussed in 27 N. C. Law Rev. 365.

Corroboration of Paramour.—Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

Proper Instruction.—In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, is without error. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37.

§ 14-196.1. **Using profane, vulgar or indecent language to female over telephone.**—It shall be unlawful for any person to use any lewd or profane language or words of any vulgarity or indecency over the telephone to any female person. Any person violating this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned in the discretion of the court. (1951, c. 127.)

§ 14-197. **Using profane or indecent language on public highways, counties exempt.**—If any per-

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son shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempt from the provisions of this section: Brunswick, Camden, Cleveland, Craven, Dare, Macon, Martin, Pasquotank, Pitt, Stanly, Swain, Tyrrell and Washington. (1913, c. 40; Pub. Loc. Ex. Sess. 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; C. S. 4352.)

Editor's Note.—

The 1945 amendment struck out Transylvania from the list of exempted counties, the 1947 amendments struck out Beaufort and Orange and the 1949 amendment struck out Watauga.

§ 14-199. **Obstructing way to places of public worship.**—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor. (Rev., s. 3776; Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241; 1945, c. 635; C. S. 4354.)

Editor's Note.—The 1945 amendment struck out the words "and shall be fined not more than fifty dollars or imprisoned not more than thirty days" formerly appearing at the end of this section.

§ 14-202. **Secretly peeping into room occupied by woman.**

Evidence in prosecution of defendant for peeping secretly into a room occupied by a woman, was held sufficient to be submitted to the jury where a witness for the state testified that the room was usually occupied by a woman and he saw someone in the room immediately after defendant left the window. *State v. Peterson*, 232 N. C. 332, 59 S. E. (2d) 635.

Art. 27. Prostitution.

§ 14-203. **Definition of terms.**

Cited in *State v. Harrill*, 224 N. C. 477, 31 S. E. (2d) 353.

§ 14-204. **Prostitution and various acts abetting prostitution unlawful.**

Sufficiency of Evidence.—In a criminal prosecution for permitting property to be used for prostitution where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. *State v. Herndon*, 223 N. C. 208, 25 S. E. (2d) 611.

§ 14-206. **Reputation and prior conviction admissible as evidence.**

Stated in *State v. Harrill*, 224 N. C. 477, 31 S. E. (2d) 353.

Art. 28. Perjury.

§ 14-209. **Punishment for perjury.**

Definition of Perjury.—Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348.

Essential Elements.—

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348.

False Statement Must Be Material to Issue.—A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove

or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348.

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. *Id.*

§ 14-210. Subornation of perjury.

The suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. *State v. Cannon*, 227 N. C. 338, 42 S. E. (2d) 344.

§ 14-214. False oath to procure benefit of insurance policy or certificate.

Cited in *Meekins v. Aetna Ins. Co.*, 231 N. C. 452, 57 S. E. (2d) 777, 15 A. L. R. (2d) 949.

Art. 31. Misconduct in Public Office.

§ 14-234. Director of public trust contracting for his own benefit.

Local Modification.—City of Greensboro: 1951, c. 707, s. 3.

§ 14-250. Publicly owned vehicle to be marked.

—It shall be the duty of the executive head of every department of the State Government, and of every county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State or to some county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the Seal of the State and the designation of the department or agency to which the vehicle belongs. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866.)

Editor's Note.—

The 1945 amendment added the last proviso.

Art. 33. Prison Breach and Prisoners.

§ 14-257. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any other criminal liability. (Rev., s. 3659; Code, s. 3450; 1881, c. 127, s. 2; 1947, c. 781; C. S. 4405.)

Editor's Note.—The 1947 amendment inserted the word "other" in the last line.

Art. 35. Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.—If anyone, except when on his own premises, shall wilfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. Upon conviction or submission, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered disposed of by the presiding judge at the trial in one of the following ways:

(a) If the deadly weapon with reference to which the defendant shall have been convicted is a pistol or gun, and the rightful owner of the same is a person other than the defendant, such rightful owner may, at the time of defendant's conviction or submission, file a petition with the judge presiding at the trial for the recovery of such weapon and the same shall be returned to said owner upon a finding by the court (1) that he is now entitled to possession of same, and (2) that he was unlawfully deprived of possession without his consent or acquiescence.

(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the clerk of the superior court of the county in which the trial is held by the judge presiding at the trial. Under the direction of said clerk of the superior court the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go to the general fund of the county in which the weapon or weapons were confiscated and sold. The clerk of the superior court shall keep a record and inventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant.

This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city, or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties. (Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; C. S. 4410.)

Editor's Note.—Prior to the 1947 amendment the confiscation and destruction of a weapon carried by a person convicted under this section was mandatory in all cases, even though the weapon may have been stolen by the convicted person from one who had a right to possess it. See 25 N. C. Law Rev. 402.

The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

§ 14-271. Engaging in and betting on prize fights.

Local Modification.—Carteret: 1947, c. 174.

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.—Any person shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars (\$50.00) or imprisonment for not more than thirty days, in the discretion of the court, if such person while at, or upon the premises of, (1) any bus station, depot or terminal, or (2) any railroad passenger station, depot or terminal, or (3) any airport or air terminal used by any common carrier, or (4) any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the state, or privately owned airport shall (a) engage in disorderly conduct, or (b) use vulgar, obscene or profane language, or (c) on any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310.)

Editor's Note.—The title of the act inserting this section refers only to airports and airport terminals.

Art. 36. Offenses against the Public Safety.

§ 14-278. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.

Evidence tending to show that defendant was the owner of a car covered by a chattel mortgage, that he was delinquent in a payment, that the car was struck at a grade crossing at night by a railroad train, that no one was in the car at the time of the collision, and that defendant filed a claim for the damage on a policy of insurance on the car was held insufficient to be submitted to the jury in a prosecution of defendant for placing the car on the track with intent to destroy it and with presenting a false sworn statement in support of the claim for insurance. Quære whether the indictment was sufficient to charge an offense under this section? *State v. Freeman*, 230 N. C. 725, 55 S. E. (2d) 500.

Art. 37. Lotteries and Gaming.

§ 14-290. Dealing in lotteries.

In General.—

This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while G. S., 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. *State v. Robinson*, 224 N. C. 412, 414, 30 S. E. (2d) 320.

Admissibility of Evidence.—In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. *State v. Bryant*, 231 N. C. 106, 55 S. E. (2d) 922.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. *State v. Heglar*, 225 N. C. 220, 34 S. E. (2d) 76.

Applied in *State v. King*, 224 N. C. 329, 30 S. E. (2d) 230.

§ 14-291. Selling lottery tickets and acting as agent for lotteries.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. *State v. Heglar*, 225 N. C. 220, 34 S. E. (2d) 76.

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

See annotations under § 14-290.

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. *State v. Bryant*, 231 N. C. 106, 55 S. E. (2d) 922.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. *State v. Heglar*, 225 N. C. 220, 34 S. E. (2d) 76.

Punishment.—A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under § 14-299 is in rem and is no part of the personal judgment against the accused. *State v. Richardson*, 228 N. C. 426, 45 S. E. (2d) 536. See note to § 14-299.

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-291.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating § 14-291.1, and at the same time prosecute an appeal from an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. *State v. Richardson*, 228 N. C. 426, 45 S. E. (2d) 536.

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-303. Violation of two preceding sections a misdemeanor.

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-304. Manufacture, sale, etc., of slot machines and devices.

Testimony.—In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. *State v. Davis*, 229 N. C. 552, 50 S. E. (2d) 668.

§ 14-306. Slot machine or device defined.

Evidence.—Where it was admitted that the machines in question were owned by one defendant and rented by him to the other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, did not amount to a failure of the state's evidence upon the critical issue. *State v. Davis*, 229 N. C. 552, 50 S. E. (2d) 668.

Art. 39. Protection of Minors.

§ 14-319. Marrying females under sixteen years old.—If any person shall marry a female under the age of sixteen years, he shall be guilty of a misdemeanor. (Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2; 1947, c. 383, s. 1; C. S. 4444.)

The 1947 amendment raised the minimum marriage age of females from fourteen to sixteen.

§ 14-320. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state

for such purpose, without the written consent of either the county superintendent of public welfare of the county in which the mother resides, or of the county in which the child was born, or of a private child-placing agency duly licensed by the state board of public welfare; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected and licensed by the state board of public welfare. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars (\$500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; 1939, c. 56; 1945, c. 669; 1949, c. 491; C. S. 4445.)

Editor's Note.—The 1949 amendment rewrote this section.

Art. 40. Protection of the Family.

§ 14-322. Abandonment by husband or parent.

—If any husband shall willfully abandon his wife without providing her with adequate support, or if any father or mother shall willfully abandon his or her child or children, whether natural or adopted, without providing adequate support for such child or children, he or she shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father or mother shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years. (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290; 1949, c. 810; C. S. 4447.)

Editor's Note.—The 1949 amendment rewrote this section and made it applicable to abandonment by mother. It also made the offense of abandoning a child apply to both natural and adopted children. See 27 N. C. Law Rev. 451.

The Purpose of This Section.—

In accord with original. See *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721.

Section Must Be Strictly Construed.—*State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721.

It relates only to legitimate children. An illegitimate child is not protected thereby. *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. (2d) 18, citing *State v. Gardner*, 219 N. C. 331, 13 S. E. (2d) 529.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414.

If the mother is guilty of nonsupport, this section provides a remedy and this remedy is exclusive. *Hensen v. Thomas*, 231 N. C. 173, 56 S. E. (2d) 432, 12 A. L. R. (2d) 1171.

Abandonment Must Be Willful.—

In accord with original. See *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721.

Continuing Offense.—Due to continuing nature of the crime under this section, a person, arrested in Georgia and sought to be extradited to North Carolina, who temporarily came into the state after the commission of the crime, although for an innocent purpose, was a fugitive from justice when he again departed from the state. *Daugherty v. Hornsby*, 151 F. (2d) 799, 800.

Both Abandonment and Non-Support Must Be Proved.—

The husband's act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, intentionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721, citing *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

Institution of bastardy proceedings prior to birth of child

is insufficient to establish such abandonment as is contemplated by this section. In re *Adoption of Doe*, 231 N. C. 1, 56 S. E. (2d) 8.

Presence in State When Crime Committed.—In habeas corpus proceeding, in which petitioner, charged with a violation of this section was held under warrant of governor of Georgia, evidence did not carry petitioner's burden of showing that he was not in North Carolina when the crime was committed. *Daugherty v. Hornsby*, 151 F. (2d) 799, 800.

An instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty is reversible error. *State v. Gilbert*, 230 N. C. 64, 51 S. E. (2d) 887.

Cited in *State v. McDay*, 232 N. C. 388, 61 S. E. (2d) 86; *State v. Campo*, 233 N. C. 79, 62 S. E. (2d) 500.

§ 14-324. Order to support from husband's property or earnings.

Suspension of Judgment.—Upon conviction of abandonment, the suspension of judgment upon conditions for the support and maintenance of the minor child is expressly authorized by this section. *State v. Johnson*, 230 N. C. 743, 55 S. E. (2d) 690.

§ 14-325. Failure of husband to provide adequate support for family.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414.

Sufficiency of Warrant.—A warrant charging defendant with willfully neglecting to provide adequate support for his wife and two children is sufficient to express the charge against defendant and to apprise him of its nature, and defendant's motion in arrest of judgment on the ground that it omitted to charge that he had begotten the children, is properly denied, the question of paternity having been raised and submitted to the jury upon the conflicting evidence. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675.

Amendment of Warrant.—The trial court has authority to permit the solicitor to amend a warrant charging the defendant with willful neglect to support his wife and two children by inserting the words "while living with his wife" to conform to the language of this section. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675.

Submission of Issues.—Where, in a prosecution for willfully neglecting to provide adequate support for wife and children, defendant sets up the defense of the adultery of the wife and non-paternity of the youngest child, the submission of written issues by the court as to the paternity of the child, the adultery of the wife, and the guilt or innocence of defendant of offense charged, will not be held for error on defendant's appeal, the jury being instructed that the burden is on the State to prove defendant's guilt beyond a reasonable doubt as to each of the essential elements of the offense. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675.

§ 14-326. Abandonment of child by mother.

Cited in *In re Adoption of Doe*, 231 N. C. 1, 56 S. E. (2d) 8.

Art. 42. Public Drunkenness.

§ 14-335. Local: Public drunkenness.—

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Alamance, Ashe, Brunswick, Burke, Cherokee, Clay, Cleveland, Dare, Davidson, Davie, Duplin, Franklin, Gaston, Graham, Granville, Greene, Harnett, Haywood, Henderson, Hyde, Johnston, Lincoln, Madison, McDowell, Mitchell, Moore, Northampton, Orange, Perquimans, Pitt, Richmond, Rutherford, Scotland, Stanly, Union, Vance, Warren, Washington, Wayne, Wilkes and Yadkin, and at Pungo in Beauford county. (1907, cc. 305, 785, 900, 976; 1908, c. 113; 1909, c. 815; Pub. Loc. 1915, c. 790; Pub. Loc. 1917, cc. 447, 475; Pub. Loc. 1919, cc. 148, 200; Ex. Sess. 1924, c. 5; 1929, c. 135; 1931, c. 219; 1935, c. 49, s. 1; 1935, c. 208; 1937, cc. 46, 96, 286, 329, 443; 1941, cc. 334, 336; 1945, cc. 215, 254;

1947, c. 12, s. 1; c. 109; 1949, cc. 215, 217, 1193; 1951, cc. 20, 255, 731; C. S. 4458.)

5. By fine of not more than fifty dollars (\$50.00) or imprisonment for not more than thirty days, in Wake county. (1907, c. 908; 1949, c. 246; C. S. 4458.)

8. By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King high school district, Stokes county. (1933, c. 287; 1949, c. 215; 1951, c. 731.)

10. In Caldwell, Catawba, Mecklenburg, Montgomery, Nash, Pender, and Wilson counties, by a fine for the first offense of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense is to be declared a misdemeanor, punishable within the discretion of the court. (1935, cc. 284, 350; 1943, c. 268, ss. 1-3; 1945, cc. 215, 254; 1949, c. 1154.)

12. In Edgecombe and Lenoir counties, by a fine for the first offense, of not more than fifty dollars (\$50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars (\$100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court. (1937, c. 95; 1949, c. 217.)

15. It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in Avery county, and any person convicted of a violation hereof shall be guilty of a misdemeanor and fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense, or be imprisoned not exceeding thirty days, at the discretion of the court. (1947, c. 12, s. 2; c. 445; 1949, c. 891.)

Editor's Note.—The first 1945 amendment transferred Catawba County from subsection 1 to subsection 10. The second 1945 amendment transferred Harnett County from subsection 10 to subsection 1. The 1947 amendments struck out "Avery" from the list of counties in subsection 1, inserted "Lenoir" therein and added subsection 15.

The 1949 amendments inserted "Davidson" in the list of counties in subsection 1; transferred Graham County from subsection 1 to subsection 8; transferred Lenoir County from subsection 1 to subsection 12; increased the maximum punishment in Wake County; made "Caldwell" subject to subsection 10; and changed the law relating to Avery County. Chapter 1193 of Session Laws 1949 superseded chapter 49, which provided for the insertion of Davidson County in subsection 11.

The first 1951 amendment inserted Perquimans in the list of counties in subsection 1, and the second 1951 amendment added Granville to the list. The third 1951 amendment repealed Session Laws 1949, c. 215, which had transferred Graham county from subsection 1 to subsection 8, reinserted Graham in subsection 1 and struck out the reference thereto in subsection 8.

Only the subsections affected by the amendments are set out.

Public-Local Laws 1929, c. 1, and Public-Local Laws 1931, c. 32, changed the punishment for conviction of public drunkenness in Macon County, as provided in subsection 13 of this section, to a fine of not less than ten dollars, nor more than fifty dollars, or imprisonment for 30 days.

Art. 43. Vagrants and Tramps.

§ 14-336. Persons classed as vagrants.

Insufficient Warrant.—A warrant charging defendant with living in the county without visible means of support and without working is insufficient to charge defendant with vagrancy. *State v. Harris*, 229 N. C. 413, 50 S. E. (2d) 1.

Sufficiency of Evidence.—Evidence in a prosecution under this section held insufficient to support a conviction. *State v. Oldham*, 224 N. C. 415, 30 S. E. (2d) 318.

Art. 44. Regulation of Sales.

§ 14-346.1. Sale of bay rum.—It shall be unlawful for any person, firm or corporation to sell or offer for sale any bay rum in the State of North Carolina, or to cause any delivery of bay rum to be made in the State of North Carolina pursuant to any sale thereof, except.

(1) When such sale is made to a pharmacy or drug store, supervised by a person licensed as a pharmacist or assistant pharmacist as described in G. S. 90-71;

(2) When such sale is made pursuant to a prescription of some duly licensed physician, or

(3) When such sale is made to a duly licensed barber for use in the course of treatments given or services performed in a barber shop, and not for resale.

Any person who violates any provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

The provisions of this section shall not apply to the following counties: Alamance, Anson, Beaufort, Brunswick, Burke, Camden, Caswell, Cleveland, Columbus, Craven, Currituck, Duplin, Edgecombe, Forsyth, Franklin, Gates, Greene, Halifax, Harnett, Hoke, Hyde, Johnston, Lenoir, Lincoln, Martin, Moore, Nash, New Hanover, Onslow, Pasquotank, Pender, Perquimans, Pitt, Randolph, Robeson, Rutherford, Stanly, Tyrrell, Wayne and Wilson. (1951, c. 1096.)

Art. 45. Regulation of Employer and Employee.

§ 14-357.1. Requiring payment for medical examination, etc., as condition of employment.—(1) It shall be unlawful for any employer, as defined in subsection (2) of this section, to require any applicant for employment, as defined in subsection (3), to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of the initial act of hiring.

(2) The term "employer" as used in this section shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company, doing business in or operating within the State.

Provided that this section shall not apply to any employer as defined in this subsection who employs less than twenty-five (25) employees.

(3) The term "applicant for employment" shall mean and include any person who seeks to be permitted, required or directed by any employer, as defined in subsection (2) hereof, in consideration of direct or indirect gain or profit, to engage in employment.

(4) Any employer who violates the provisions of this section shall be liable to a fine of not more than one hundred dollars (\$100.00) for each and

every violation. It shall be the duty of the Commissioner of Labor to enforce this section. (1951, c. 1094.)

Art. 46. Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne and Wilson. (Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; C. S. 4480.)

Editor's Note.—

The 1945 amendment inserted the words "with intent to defraud the landlord" in line six, and the words "with intent to defraud the tenant" following the word "agreement" in line eleven. It also rearranged the names of the various counties in the section so as to appear in alphabetical order.

Yadkin County was added to the list of counties contained in this section by Public-Local Laws, 1915, c. 18.

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to de-

fraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Caswell, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person, Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; 1931, c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; 1951, c. 615; C. S. 4481.)

Editor's Note.—

The 1945 amendment inserted provisions relating to intent to defraud, and rearranged the names of the various counties in the section so as to appear in alphabetical order. The 1949 amendment made this section applicable to Hoke county, and the 1951 amendment made it applicable to Caswell county.

Art. 48. Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

Art. 51. Protection of Athletic Contests.

§ 14-373. Bribery of players, referees, umpires or officials.—If any person shall bribe, or offer to bribe, any player in any athletic contest with intent to influence his play, action, or conduct in any athletic contest, or if any person shall bribe, or offer to bribe, any referee, umpire, or other official of any athletic contest, with intent to influence his decision or bias his opinion or judgment, in relation to any athletic contest, or if any person shall bribe, or offer to bribe, any manager, or other official of an athletic club, league, association, or institution, by whatever name called, conducting said athletic contest, such person shall be guilty of a felony, and, upon conviction shall be punished by imprisonment in the State penitentiary for not less than one nor more than five years. (1921, c. 23, s. 1; 1951, c. 364, s. 1; C. S. 4499(a).)

Editor's Note.—The 1951 amendment changed this article which formerly related to the protection of the game of baseball so as to make it applicable to any athletic contest.

§ 14-374. Acceptance of bribes by players, referees, umpires or officials.—If any player in any athletic contest shall accept, or agree to accept, a bribe offered for the purpose of influencing his play, action, or conduct in any athletic contest, or if any referee, umpire, or other official of an athletic contest shall accept, or agree to accept, a bribe offered for the purpose of influencing his decision or biasing his opinions, rulings, or judgment, or if any manager or other official of an athletic club, league, association, or institution shall accept, or agree to accept, any bribe offered for the purpose of inducing him to lose or cause to be lost any athletic contest, as set out in § 14-373

of this article, such player, manager, official, referee, or umpire shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the State penitentiary for not less than one nor more than five years. (1921, c. 23, s. 2; 1951, c. 364, s. 2; C. S. 4499(b).)

§ 14-375. **Completion of offenses set out in §§ 14-373 and 14-374.**—To complete the offenses mentioned in §§ 14-373 and 14-374, it shall not be necessary that the player, manager, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, or other official actually play or participate in an athletic contest concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; 1951, c. 364, s. 3; C. S. 4499(c).)

§ 14-376. **Bribe defined.**—By a "bribe", as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or in the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which athletic contest any player, manager, umpire, referee, or other official is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner defined to cover the true intention of the parties. (1921, c. 23, s. 4; 1951, c. 364, s. 4; C. S. 4499(d).)

§ 14-377. **Intentional losing of athletic contest or aiding therein.**—If any player, manager, referee, umpire, club or league official shall commit any willful act of omission or commission in playing or directing the playing of an athletic contest with intent to cause the club, league, association, or institution with which he is affiliated to lose an athletic contest; or if any referee, umpire, or other official in an athletic contest shall commit any willful act connected with his official duties for the purpose and with the intent to cause an athletic club, league, association, or institution to win or lose an athletic contest which it would not otherwise have won or lost under the rules governing the playing of such contest, he or they shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the State penitentiary for not less than one nor more than five years. (1921, c. 23, s. 5; 1951, c. 364, s. 5; C. S. 4499(e).)

§ 14-378. **Venue.**—In all prosecutions under this article, the venue may be laid in any county where the bribe herein referred to was given, offered, or accepted, or in which the athletic contest was carried on in relation to which the bribe was offered, given, or accepted, or the acts referred to

in § 14-377 were committed. (1921, c. 23, s. 6; 1951, c. 364, s. 6; C. S. 4606(c).)

§ 14-379. **Bonus or extra compensation.**—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or other official by any person to encourage such manager, player, or other official to a higher degree of skill, ability, or diligence in the performance of his duties. (1921, c. 23, s. 7; 1951, c. 364, s. 7; C. S. 4499(f).)

§ 14-380: Repealed by Session Laws 1951, c. 364, s. 8.

Art. 52. Miscellaneous Police Regulations.

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-394. **Anonymous or threatening letters, mailing or transmitting.**

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and overrule defendant's motion for judgment as of nonsuit. *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469.

§ 14-399. **Placing trash, refuse, et cetera, within one hundred and fifty yards of hard-surfaced highway.**

This section shall not apply to the Counties of Alleghany, Ashe, Avery, Bertie, Brunswick, Buncombe, Cabarrus, Caswell, Columbus, Davidson, Duplin, Forsyth, Franklin, Gates, Granville, Guilford, Halifax, Hyde, Jackson, Lenoir, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Moore, Person, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Vance, Watauga, Wilson, and Yancey. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1.)

Editor's Note.—

The 1951 amendment struck out "Warren" from the list of excepted counties. As only the last paragraph was affected by the amendment, the rest of the section is not set out.

§ 14-401.3. **Inscription on gravestone or monument charging commission of crime.**—It shall be illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1949, c. 1075.)

§ 14-401.4. **Identifying marks on machines and apparatus; application to Department of Motor Vehicles for number.**—(a) No person, firm or corporation shall willfully remove, deface, destroy, alter or cover over the manufacturer's serial or engine number or any other manufacturer's number or other distinguishing number or identification mark upon any machine or other apparatus, including but not limited to farm equipment, machinery and apparatus, but excluding electric storage batteries, nor shall any person, firm or corporation place or stamp any serial, engine, or other number

or mark upon such machinery, apparatus or equipment except as provided for in this section, nor shall any person, firm or corporation purchase or take into possession or sell, trade, transfer, devise, give away or in any manner dispose of such machinery, apparatus or equipment except by intestate succession or as junk or scrap after the manufacturer's serial or engine number or mark has been wilfully removed, defaced, destroyed, altered or covered up unless a new number or mark has been added as provided in this section.

(b) Each seller of farm machinery, farm equipment or farm apparatus covered by this section shall give the purchaser a bill of sale for such machinery, equipment or apparatus and shall include in the bill of sale the manufacturer's serial number or distinguishing number or identification mark, which the seller warrants to be true and correct according to his invoice or bill of sale as received from his manufacturer, supplier, or distributor or dealer.

(c) Each user of farm machinery, farm equipment or farm apparatus whose manufacturer's serial number, distinguishing number or identification mark has been obliterated or is now unrecognizable, may obtain a valid identification number for any such machinery, equipment or apparatus upon application for such number to the Department of Motor Vehicles on or before July 1, 1951, accompanied by satisfactory proof of ownership and a subsequent certification to the Department by a member of the North Carolina Highway Patrol that said applicant has placed the number on the proper machinery, equipment or apparatus. The Department of Motor Vehicles is hereby authorized and empowered to issue appropriate identification marks or distinguishing numbers for machinery, equipment or apparatus upon application as provided in this section and the Department is further authorized and empowered to designate the place or places on the machinery, equipment or apparatus at which the identification marks or distinguishing numbers shall be placed. The Department is also authorized to designate the method to be used in placing the identification marks or distinguishing numbers on the machinery, equipment or apparatus.

(d) Any person, firm or corporation who shall violate any part of this section shall be guilty of a misdemeanor and upon plea of guilty or conviction shall be punished in the discretion of the court. (1949, c. 928; 1951, c. 1110, s. 1.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 14-401.5. Practice of phrenology, palmistry, fortune telling or clairvoyance prohibited.—It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than one year or both such fine and imprisonment in the discretion of the court.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune telling or clairvoyance in connection with school or church

socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the counties of Ashe, Bertie, Bladen, Camden, Carteret, Clay, Craven, Cumberland, Dare, Davidson, Duplin, Durham, Graham, Granville, Guilford, Halifax, Harnett, Haywood, Hertford, Hoke, Lee, Madison, Martin, Northampton, Onslow, Orange, Person, Polk, Richmond, Rockingham, Scotland, Vance, Wake and Warren. (1951, c. 314.)

Local Modification.—Durham: 1951, c. 1189.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.—It shall be unlawful for any person, firm, corporation or association to possess, use, store, sell or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas", or any container or device for holding or releasing the same; provided, the provisions of this section shall not apply to the possession, use, storage, sale or transportation of such gas by or for any of the armed services of the United States or of this State, or by or for any governmental agency, or municipal and State peace officers of this State or for bona fide scientific, educational or industrial purposes, or for use in safes, vaults and depositories as a means of protection against robbery.

Any person, firm, corporation or association violating any provision of this section shall be guilty of a misdemeanor and punishable by fine or imprisonment in the discretion of the court. (1951, c. 592.)

Art. 53. Sale of Weapons.

§ 14-402. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this state to sell, give away, or dispose of, or to purchase or receive, at any place within the state from any other place within or without the state, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger, slung-shot, blackjack or metallic knucks. (1947, c. 781.)

Editor's Note.—

The 1947 amendment inserted "slung-shot" and "black-jack" in the list of weapons in the first paragraph. As the second paragraph was not affected by the amendment it is not set out.

Art. 54. Sale, etc., of Pyrotechnics.

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.—It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the state of North Carolina: Provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: Provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all de-

scriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged: Provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. (1947, c. 210, s. 1.)

§ 14-411. Sale deemed made at site of delivery.—In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. Possession prima facie evidence of violation.—Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. Permits for use at public exhibitions.—For the purpose of enforcing the provisions of this article, the board of county commissioners of any county are hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. (1947, c. 210, s. 4.)

§ 14-414. Pyrotechnics defined; exceptions.—For the proper construction of the provisions of this article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: Provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. (1947, c. 210, s. 5.)

§ 14-415. Violation made misdemeanor.—Any person violating any of the provisions of this article, except as otherwise specified in said article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1947, c. 210, s. 6.)

Art. 55. Handling of Poisonous Reptiles.

§ 14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.—The intentional exposure of human beings to contact with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence in and inducement to such exposure is hereby declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this article. (1949, c. 1084, s. 1.)

§ 14-417. Regulation of ownership or use of

poisonous reptiles.—It shall be unlawful for any person to own, possess, use, or traffic in any reptile of a poisonous nature whose venom is not removed, unless such reptile is at all times kept securely in a box, cage, or other safe container in which there are no openings of sufficient size to permit the escape of such reptile, or through which such reptile can bite or inject its venom into any human being. (1949, c. 1084, s. 2.)

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.—It shall be unlawful for any person to intentionally handle any reptile of a poisonous nature whose venom is not removed, by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be. It shall also be unlawful for any person to intentionally suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself to any such poisonous reptile in any manner defined in this article. (1949, c. 1084, s. 3.)

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.—In any case in which any law enforcement officer has reasonable grounds to believe that any of the provisions of this article have been or are about to be violated, it shall be the duty of such officer and he is hereby authorized, empowered, and directed to immediately investigate such violation or impending violation and to forthwith seize the reptile or reptiles involved, and all such officers are hereby authorized and directed to deliver such reptiles to the respective county health authorities for examination and tests of such reptiles by such authorities or other qualified authorities to which the county health authorities may refer the same, for the purpose of ascertaining whether said reptiles contain venom and are poisonous. If such health authorities, or other qualified authorities designated by them to make such examinations and tests, find that said reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, and they are hereby authorized and directed to forthwith destroy such reptiles; but if said health authorities, or other qualified authorities by them designated to make such examination and tests, find that the reptiles are not dangerously poisonous, and are not and cannot be harmful to human life, safety, health or welfare, then it shall be the duty of such officers to return the said reptiles to the person from whom they were seized. (1949, c. 1084, s. 4.)

§ 14-420. Arrest of persons violating provisions of article.—If the examination and tests made by the county health or other qualified authorities as provided herein show that such reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, in addition to destroying such reptiles, also to arrest all persons violating any of the provisions of this article. (1949, c. 1084, s. 5.)

§ 14-421. Exemptions from provisions of article.—This article shall not apply to the possession,

exhibition, or handling of reptiles by employees or agents of duly constituted museums, laboratories, educational or scientific institutions in the course of their educational or scientific work. (1949, c. 1084, s. 6.)

§ 14-422. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1949, c. 1084, s. 7.)

Chapter 15. Criminal Procedure.

Sec. Art. 1. General Provisions.

- 15-4.1. Appointment of counsel for indigent defendants in capital cases; continuance where appointment delayed.
- 15-10.1. Detainer; purpose; manner of use.

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- 15-140. Waiver of indictment in misdemeanor cases.
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Art. 18. Appeal.

- 15-177.1. Appeal from justice of the peace or inferior court; trial anew or de novo.
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- 15-200.1. Appeal from invocation of suspended sentence in court inferior to superior court.

Art. 21. Segregation of Youthful Offenders.

- 15-210. Purpose of article.
- 15-211. Definition of "youthful offender."
- 15-212. Sentence of youthful offender.
- 15-213. Duty of state highway and public works commission as to segregation of youthful offenders.
- 15-214. Extension to persons sentenced prior to July 1st, 1947.
- 15-215. Termination of segregation.
- 15-216. Persons to whom article not applicable.

Art. 22. Review of the Constitutionality of Criminal Trials.

- 15-217. Institution of proceeding; service of petition upon solicitor.
- 15-218. Contents of petition; waiver of claims not alleged.
- 15-219. Petitioner unable to pay costs or procure counsel.
- 15-220. Answer of the State; withdrawal of petition; amendments.
- 15-221. Evidence to be received upon hearing.
- 15-222. Review by application for certiorari.

Art. 1. General Provisions.

§ 15-4. Accused entitled to counsel.

Right Is a Mandate in Capital Felony Cases.—The right to have counsel as well as the right of confrontation is guaranteed. Art. I, sec. 11, N. C. Const. Where the crime charged is a capital felony this right becomes a mandate. *State v. Farrell*, 223 N. C. 321, 327, 26 S. E. (2d) 322; *State*

v. Hedgebeth, 228 N. C. 259, 45 S. E. (2d) 563; *In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749; *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857. See note to § 15-5. As to right made statutory, see § 15-4.1.

And Discretionary in Cases Less than Capital.—The appointment of counsel for a defendant charged with felonies less than capital is within the discretion of the trial court. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857.

A defendant has the constitutional right to be represented by counsel, and to have counsel assigned if requested where the circumstances are such as to show apparent necessity of counsel to protect his rights, but in the absence of request the propriety of providing counsel for a person accused of an offense less than a capital felony rests in the sound discretion of the trial judge. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563.

Petition for Writ of Coram Nobis Granted for Failure to Appoint Counsel.—Where verified petition for leave to apply to the superior court for writ of error coram nobis, the record in the cases in which petitioner was convicted, and habeas corpus proceedings instituted by him, make it appear that petitioner was confronted with indictments for capital offenses and indictments for felonies less than capital, and that the trial court failed to appoint counsel to represent him notwithstanding his alleged inability to employ counsel and his request for counsel, the petition will be allowed in respect of the capital felonies and denied in respect of the felonies less than capital upon such prima facie showing. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857.

Counsel Allowed Reasonable Time to Prepare Case.—The two—the right to counsel and the right of confrontation—are closely interrelated and, together, form an integral part of a fair trial. Hence, this requirement as incorporated in this section, was not intended to be a mere formality. It does not contemplate that counsel shall "be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense." *State v. Farrell*, 223 N. C. 321, 327, 26 S. E. (2d) 322. See note to Art. I, § 11, N. C. Const.

§ 15-4.1. Appointment of counsel for indigent defendants in capital cases; continuance where appointment delayed.—When any person is bound over to the superior court to await trial for an offense for which the punishment may be death, the clerk of the superior court in the county shall, if he believes that the accused may be unable to employ counsel, within five days notify the resident judge of the district or any superior court judge holding the courts of the district and request the immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel, he shall appoint counsel to represent the accused as soon as may be practicable. He may appoint counsel at any time regardless of whether notified by the clerk and before preliminary examination.

In any capital case where the appointment of counsel is delayed until the term of court at which the accused is arraigned, on motion of counsel for the accused the case shall be continued until the next ensuing term of criminal court. (1949, c. 112.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 422.

§ 15-5. Fees allowed counsel assigned to defend in capital case.

Local Modification.—Session Laws 1951, c. 58, repealed Public Acts 1941, c. 206, cited as Local Modification under this section in original.

Counsel in Capital Cases Mandatory.—This section indicates that in capital felonies the provisions of § 11, Article I of the Constitution and G. S., § 15-4 relative to counsel are regarded as not merely permissive but mandatory. *State v. Hedgebeth*, 228 N. C. 259, 45 S. E. (2d) 563.

§ 15-10.1. Detainer; purpose; manner of use.—Any person confined in the state prison of North Carolina, subject to the authority and control of the state highway and public works commission, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any state agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303.)

Art. 3. Warrants.

§ 15-18. Who may issue warrant.

Local Modification.—City of Concord: 1945, c. 82.

§ 15-19. Complainant examined on oath.

Stated in Carson v. Doggett, 231 N. C. 629, 58 S. E. (2d) 609.

§ 15-20. Warrant issued; contents.

Identification of Accused.—A warrant must sufficiently identify the person accused. *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609.

Officer Protected When Warrant Defective.

See *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

§ 15-21. Where warrant may be executed.

Editor's Note.—For statute affecting this section as to warrants issued by a justice of the peace or by the chief officer of a city or town, see § 15-22 as amended by Session Laws 1949, c. 168.

§ 15-22. Warrant indorsed or certified and served in another county.

Whenever a justice of the peace or the chief officer of a city or town shall attach to his warrant a certificate under the hand and seal of the clerk of the superior court of his county certifying that he is a justice of the peace of the county or the chief officer of a city or town in the county and that the warrant bears his genuine signature, the warrant may be executed in any part of the state in like manner as warrants issued by justices of the supreme court, judges of the superior court, or judges of criminal courts without any indorsement of any justice of the peace or magistrate of the county in which it may be served. (Rev., s. 3160; Code, s. 1136; 1917, c. 30; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5; 1949, c. 168; C. S. 4526.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out. See 27 N. C. Law Rev. 451.

Art. 4. Search Warrants.

§ 15-25. In what cases issued, and where executed.—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of

any city, or chief magistrate of any incorporated town, or the clerk of any court inferior to the superior court, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, and for the clerk of any court inferior to the superior court to grant a warrant, to be executed within the territorial jurisdiction of such court, all such warrants to be directed to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38; 1941, c. 53; 1949, c. 1179; C. S. 4529.)

Editor's Note.—The 1949 amendment authorized the issuance of search warrants by clerks of courts inferior to the superior court.

Ordinarily officers of the law may not invade one's home except under authority of a search warrant issued in accord with pertinent statutory provisions. In *re Walters*, 229 N. C. 111, 47 S. E. (2d) 709.

Respondent refused to permit officers to enter his home for the purpose of serving civil process on a third person. There was no evidence that the person sought was actually in respondent's home at the time. It was held that respondent was within his rights in refusing admittance to the officers, and his act in so doing cannot be held for contempt of court on the ground that it tended to obstruct or embarrass the administration of justice. *Id.*

§ 15-27. Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be

competent as evidence in the trial of any action. (1937, c. 339, s. 1½; 1951, c. 644.)

Editor's Note.—

The 1951 amendment added the proviso.

The warrant need not aver that an examination of the complainant was had, and what it revealed. Nothing else appearing, there is a presumption that the requirements of this section have been preserved. *State v. Gross*, 230 N. C. 734, 55 S. E. (2d) 517.

Where a warrant was signed by complainant in the name of a deputy sheriff and contained the statement that it was made on oath the warrant was held to be valid. *State v. Gross*, 230 N. C. 734, 55 S. E. (2d) 517.

Art. 6. Arrest.

§ 15-39. Persons present may arrest for breach of peace.

Authority Strictly Limited.—

Arrests for misdemeanors without a warrant are limited strictly to certain misdemeanors committed in the presence of the party making the arrest and unless expressly authorized by law, such arrests can only be made for a breach of the peace as defined in this section. *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

Cited in *State v. Phillips*, 229 N. C. 538, 50 S. E. (2d) 306.

§ 15-40. Arrest for felony, without warrant.

Quoted in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

§ 15-41. When officer may arrest without warrant.

Quoted in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

Applied in *State v. Hooper*, 227 N. C. 633, 44 S. E. (2d) 42.

§ 15-42. Sheriffs and deputies granted power to arrest felons anywhere in state.

Quoted in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

§ 15-46. Procedure on arrest without warrant.

Duty of City Police Officer.—A police officer within the limits of his city may summarily and without warrant arrest a person for a misdemeanor committed in his presence. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. *Perry v. Hurdle*, 229 N. C. 216, 49 S. E. (2d) 400.

§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.

Where accused persons were informed of the charge against them as required by this section and none of them made a request to be allowed to communicate with relatives or friends or to obtain counsel, objection to the failure of officers to inform them of the charge against them and their right to have counsel, cannot be sustained. *State v. Thompson*, 224 N. C. 661, 32 S. E. (2d) 24.

Art. 8. Extradition.

§ 15-55. Definitions.

Cross Reference.—

The cross reference in original to Appendix VI should be to Appendix IV.

§ 15-78. Costs and expenses.

Where defendant paid expenses of sheriff in returning him to state without extradition, it was held error to order the state to pay such expenses of the sheriff under this section. *State v. Patterson*, 224 N. C. 471, 31 S. E. (2d) 380.

§ 15-79. Immunity from service of process in certain civil actions.

A nonresident defendant is not exempt from service of civil process while his presence in the state is in compliance with the conditions of a bail bond. *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840.

A nonresident defendant in a criminal proceeding pending in the state is immune from personal service of process in

a civil action arising out of the same facts as the criminal proceeding only when he is brought into the state by, or after waiver of extradition proceeding. By the same token, if such defendant be immune from personal service of such process only under those circumstances, his property within the state would be immune from attachment and garnishment only when so brought into the state by defendant. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-82. No right of asylum; no immunity from other criminal prosecution while in this state.

Quoted in *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840.

Cited in *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

Art. 9. Preliminary Examination.

§ 15-89. Prisoner examined; advised of rights.

Application of Section.—The provisions of this section are applicable only to preliminary judicial examinations. *State v. Grass*, 223 N. C. 31, 32, 25 S. E. (2d) 193.

Distinction between Examination under This Section and That under § 8-54.—There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under this section, and his testimony given under § 8-54, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him at the trial. On the latter, accused, at his own request, but not otherwise, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution. *State v. Farrell*, 223 N. C. 804, 23 S. E. (2d) 560.

Confession Admissible Though Defendant Not Advised of His Rights.—In a prosecution for murder, where defendant confessed shortly after the homicide to officers, one of whom was the coroner, such confession is not inadmissible because defendant was not advised of his rights under this section. *State v. Grass*, 223 N. C. 31, 25 S. E. (2d) 193.

§ 15-91. Answers in writing, read to prisoner, signed by magistrate.

Cross Reference.—As to testimony being used as evidence, see § 15-100 and notes.

§ 15-100. Proceedings certified to court; used as evidence.

In General.—

The effect of this section and §§ 15-88 and 15-91 is to extend the common-law principle, and their purpose was to make these preliminary examinations, when properly taken, certified and filed, in the nature of an official record, to be read in evidence on mere identification, and they do not and were not intended to restrict or trench upon the common-law principle that evidence of this kind, when repeated by a witness under proper oath, and who can and does swear that his statements contain the substance of the testimony as given by the dead or absent witness, shall be received in evidence on the second trial. And well considered authority is to the effect that stenographers' notes, when the stenographer who took them goes on the stand and swears that they are accurate and correctly portray the evidence as given by the witness, come well within the principle. *State v. Ham*, 224 N. C. 123, 131, 29 S. E. (2d) 449.

Art. 10. Bail.

§ 15-102. Officers authorized to take bail, before imprisonment.—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

1. Any justice of the supreme court, or a judge of a superior court, in all cases.

2. Any clerk of the superior court, any justice of the peace, or any chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital. (Rev., s. 3209; Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37; 1951, c. 85; C. S. 4574.)

Editor's Note.—

The 1951 amendatory act, which made subsection 2 appli-

cable to superior court clerks, provided that "this act shall not apply to the counties of Guilford, Durham, Rowan, Lee and Alamance."

Accused May Deposit Cash in Lieu of Bond.—The law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the supreme court has held that the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499, citing *State v. Mitchell*, 151 N. C. 716, 66 S. E. 202.

Cash deposited by accused as security for his appearance remains his property subject to the conditions of a recognizance, the justice of the peace becoming the custodian of the cash for the benefit of the state only in so far as the debt of accused to the state is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he perform the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

And Is Liable to Attachment.—A defendant in a criminal prosecution in a justice of the peace court of the state of North Carolina, who is a nonresident of the state, and who voluntarily deposits with the justice of the peace cash in lieu of bond for his appearance before the justice of the peace for a preliminary hearing, has such property right and interest in the deposit as is liable to attachment and garnishment at the instance of his creditor pending such preliminary hearing. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-105. Bail allowed on preliminary examination.

Recognizance Explained.

A recognizance in a criminal proceeding is an acknowledgment by the defendant that he is indebted to the state in an amount fixed by the court, conditioned upon his personal appearance at a time and place specified by the court to answer the charge against him, to stand and abide the judgment of the court and not to depart without leave of the court. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-107. Sheriff or deputy may take bail.

Local Modification.—Haywood: 1945, c. 875.

Art. 11. Forfeiture of Bail.

§ 15-116. Judges may remit forfeited recognizances.

Trial Judge Has Discretion.

In accord with 2nd paragraph in original. See *State v. Clarke*, 222 N. C. 744, 24 S. E. (2d) 619; *State v. Wiggins*, 228 N. C. 76, 44 S. E. (2d) 471.

Art. 13. Venue.

§ 15-134. Improper venue met by plea in abatement; procedure.

Crime Where Alleged.

Where there is no challenge to the indictment prior to a plea of guilty, under this section the offense is deemed to have been committed in the county alleged in the indictment. *State v. McKeon*, 223 N. C. 404, 26 S. E. (2d) 914.

Art. 15. Indictment.

§ 15-140. Waiver of indictment in misdemeanor cases.—In any criminal action in the superior courts where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court.

The provisions of this section shall not apply to any case heard in the superior court on an appeal from an inferior court. (1907, c. 71; 1951, c. 726, s. 1; C. S. 4610.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 15-140.1. Waiver of indictment in noncapital felony cases.—In any criminal action in the superior courts where the offense charged is a felony, but not one for which the punishment may be death, the defendant may waive the finding and return into court of a bill of indictment when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment. Where the finding and return into court of a bill of indictment charging the commission of a felony is waived by the defendant, the prosecution shall be on an information signed by the solicitor. The information shall contain as full and complete a statement of the accusation as would be required in an indictment. The written waiver by the defendant and his counsel shall appear on the face of the information. Such counsel shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court. (1951, c. 726, s. 2.)

§ 15-140.2. Withdrawal of waiver of indictment.—Waiver of indictment may not be withdrawn except with the approval of the presiding judge. (1951, c. 726, s. 3.)

§ 15-143. Bill of particulars.

Granting Order Is within Court's Discretion.

The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *State v. Lippard*, 223 N. C. 167, 25 S. E. (2d) 594.

§ 15-144. Essentials of bill for homicide.

What Is Sufficient under Section.

An indictment of murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by this section being sufficient. *State v. Kirksey*, 227 N. C. 445, 446, 42 S. E. (2d) 613.

Statements Not Necessary.

A bill of indictment, drawn in the statutory form as required by this section, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. *State v. Smith*, 223 N. C. 457, 27 S. E. (2d) 114.

Variance between Allegata and Probata.—Where indictment charged capital felony of murder in the language of this section and contained every necessary averment, proof that murder was committed in the perpetration of felony constituted no variance between allegata and probata. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494.

§ 15-152. Separate counts; consolidation.

When Order of Consolidation Made in Capital Cases.—An order of consolidation in capital cases will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. *State v. Harris*, 223 N. C. 697, 28 S. E. (2d) 232.

Motion to Consolidate Is Not an Assent to a Mistrial.—A motion to consolidate three capital cases in medias res pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. *State v. Harris*, 223 N. C. 697, 28 S. E. (2d) 232.

Consolidation Is within Discretionary Power of Trial Court.—

Upon the consolidation and trial together over defendants' objection of two indictments the first against all three of defendants for abduction of a fourteen-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation feckless, the right

to consolidate was in the sound discretion of the trial court. *State v. Truelove*, 224 N. C. 147, 29 S. E. (2d) 460.

Entering Judgment on Each Offense upon General Verdict of Guilty.—

Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial, as authorized by this section, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. *State v. Braxton*, 230 N. C. 312, 52 S. E. (2d) 895.

§ 15-153. Bill or warrant not quashed for informality.

II. GENERAL EFFECT.

Liberal Construction.—

This section provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for non-essential or minor defects. *State v. Davenport*, 227 N. C. 475, 491, 42 S. E. (2d) 686.

Plain, Intelligible and Explicit Charge Sufficient.—

If a warrant is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment it meets the requirements of this section. *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84.

Where the Indictment Contains Sufficient Matter, etc.—

In accord with original. See *State v. Davenport*, 227 N. C. 475, 491, 42 S. E. (2d) 686.

Applied in *State v. Blanton*, 227 N. C. 517, 42 S. E. (2d) 663.

Cited in *State v. Miller*, 231 N. C. 419, 57 S. E. (2d) 392.

III. DEFECTS CURED.

A. In General.

Stripping Nonessential Words from Warrant.—A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, is sufficient to survive a motion to quash. *State v. Camel*, 230 N. C. 426, 53 S. E. (2d) 313.

B. Omissions and Mistakes.

Wrong County in Caption.—

In accord with original. See *State v. Davis*, 225 N. C. 117, 33 S. E. (2d) 623.

The omission of the caption of a bill of indictment does not constitute ground for arrest of judgment. *State v. Davis*, 225 N. C. 117, 33 S. E. (2d) 623.

§ 15-155. Defects which do not vitiate.

When Time Need Not Be Charged.—

While an appeal from conviction in a recorder's court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the Superior Court, that court had jurisdiction to try defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623.

Art. 17. Trial in Superior Court.

§ 15-165. Challenge to special venire same as to tales jurors.

Cited in *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205; *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1.

§ 15-169. Conviction of assault, when included in charge.

Cross Reference.—As to arbitrary right of jury to convict defendant of lesser degree of the crime charged, see § 15-170 and note thereto.

When Section Applicable.—

In accord with original. See *State v. Sawyer*, 224 N. C. 61, 29 S. E. (2d) 34.

Same—Assault with Intent to Rape.—

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458.

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove the intent necessary for a conviction of this offense, defendant is entitled to nonsuit on the offense charged, but is not entitled to his

discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84.

Where Jury's Verdict Is for an Offense of Lesser Degree.—Where all the evidence points to a graver crime and the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to accused. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738.

Applied in *State v. Johnson*, 227 N. C. 587, 42 S. E. (2d) 685; *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410, treated in note under § 15-170; *State v. Matthews*, 231 N. C. 617, 58 S. E. (2d) 625.

Cited in *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140; *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560; *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834, treated under § 15-170; *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835.

§ 15-170. Conviction for a less degree or an attempt.

Indictment for Attempt or Complete Offense.—

In accord with original. See *State v. Parker*, 224 N. C. 524, 31 S. E. (2d) 531.

Defendant Entitled to Complete Charge.—

In accord with 2nd paragraph in original. See *State v. DeGraffenreid*, 223 N. C. 461, 27 S. E. (2d) 130.

And Conviction of Offense Charged Does Not Cure Error.—

A verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733.

The general rule of practice is, that when it is permissible under the indictment to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. *State v. Childress*, 228 N. C. 208, 45 S. E. (2d) 42.

Evidence Must Justify Conviction in Lesser Degree.—

In accord with 3rd paragraph in original. See *State v. Sawyer*, 224 N. C. 61, 29 S. E. (2d) 34.

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111, 112; *State v. Locklear*, 226 N. C. 410, 38 S. E. (2d) 162, 163.

Where the evidence was sufficient to carry the case to the jury upon the charge of assault with intent to commit rape but the jury returned a verdict of guilty of an assault upon a female, the defendant being a male person over 18 years of age, such verdict was authorized by this section. *State v. Morgan*, 225 N. C. 549, 35 S. E. (2d) 621.

Where the evidence justified such action, the court properly charged the jury that defendant might be acquitted of felonious assault and battery with intent to kill charged in the indictment, and convicted of an assault of lower degree, namely, an assault with a deadly weapon. *State v. Anderson*, 230 N. C. 54, 51 S. E. (2d) 895.

Uncontradicted Evidence Showing Defendant Guilty of More Serious Offense.—

This and the preceding section were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment. *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402.

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting court in submitting the question of defendants' guilt of less degrees of the crime. *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834.

It would be without precedent to try defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111, 112.

Error Not Prejudicial.—Error committed by the court in

submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. *State v. Chase*, 231 N. C. 589, 58 S. E. (2d) 364.

Instruction Limiting Verdict to Less Degree.—

In accord with original. See *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458.

In a prosecution for murder, where the evidence raises a question as to whether or not the killing was intentional, this section requires that the question of the defendant's guilt of manslaughter be submitted to the jury with proper instructions. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733.

Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter, this section requires that the "less degree of the same crime" be submitted to the jury with proper instructions. *State v. Childress*, 228 N. C. 208, 45 S. E. (2d) 42.

In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

In Prosecution for Robbery.—Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410.

Applied in *State v. Jones*, 227 N. C. 402, 42 S. E. (2d) 465; *State v. Jones*, 229 N. C. 276, 49 S. E. (2d) 463; *State v. Matthews*, 231 N. C. 617, 58 S. E. (2d) 625; *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

Cited in *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140; *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560; *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394; *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410; *State v. Fowler*, 230 N. C. 470, 53 S. E. (2d) 853.

§ 15-171. Burglary in the first degree charged, verdict for second degree.

This section relates to indictments for burglary in the first degree only, and has no bearing on an appeal from a verdict of guilty of rape. *State v. Brown*, 227 N. C. 383, 385, 42 S. E. (2d) 402.

Instruction as to Second Degree Burglary Mandatory.—

This section gives the jury the right to render a verdict of guilty of burglary in the second degree, not only where the evidence tends to show certain facts, but, "upon the findings of facts sufficient to constitute burglary in the first degree as defined by the statute—if they deem it proper so to do." This instruction is mandatory. *State v. Brown*, 227 N. C. 383, 385, 42 S. E. (2d) 402; *State v. Hooper*, 227 N. C. 633, 635, 44 S. E. (2d) 42.

Thus, the right of the jury under this section is not dependent upon the finding of certain facts as set forth in a charge on burglary in the second degree. *State v. Hooper*, 227 N. C. 633, 635, 44 S. E. (2d) 42.

Conviction in Second Degree Authorized.—Under this section as amended a defendant is entitled, as a matter of right, to have the jury instructed that they may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. *State v. McLean*, 224 N. C. 704, 32 S. E. (2d) 227.

Conviction of Attempt to Commit Burglary in Second Degree.—In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880.

Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.—Taking §§ 14-52 and this section together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666.

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside.—See this catchline in note to § 14-51.

Cited in *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111.

§ 15-172. Verdict for murder in first or second degree.

Sufficiency of Indictment.—For a brief history of this section in connection with sufficiency of indictment for first degree murder, see *State v. Kirksey*, 227 N. C. 445, 42 S. E. (2d) 613.

Evidence.—

In accord with original. See *State v. Gause*, 227 N. C. 26, 40 S. E. (2d) 463.

§ 15-173. Demurrer to the evidence.—When on the trial of any criminal action in the superior court or in any criminal court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused and the defendant does not choose to introduce evidence, the case shall be submitted to the jury as in other cases, and the defendant may on appeal urge as ground for reversal, the trial court's denial of his motion without the necessity of the defendant's having taken exception to such denial.

If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. The defendant, however, may make such motion at the conclusion of all the evidence in the case, irrespective of whether or not he made a motion for dismissal or judgment as in case of nonsuit theretofore. If the motion is allowed, or shall be sustained on appeal, it shall in all cases have the force and effect of a verdict of "not guilty". If the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence without the necessity of the defendant's having taken exception to such denial. (1913, c. 73; Ex. Sess. 1913, c. 32; 1951, c. 1086, s. 1; C. S. 4643.)

Editor's Note.—The 1951 amendment rewrote this section. Section 3 of the amendatory act, ratified April 14, 1951, provided: "This act shall be in full force and effect from and after its ratification and shall apply to all criminal actions instituted after the ratification of this act and to all pending criminal actions in which the State shall not have rested its case at the time of the ratification of this act."

Compared with Section 1-183.—

In accord with original. See *State v. Hill*, 225 N. C. 74, 33 S. E. (2d) 470.

Ascertaining Whether Any Competent Evidence.—When the court is to rule upon a demurrer to the evidence in a criminal case, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the state. *State v. Murdock*, 225 N. C. 224, 34 S. E. (2d) 69.

A trial judge, in passing upon a motion for a judgment as of nonsuit, under the provisions of this section is not bound by the measure or quantum of proof by which the state must prove a defendant's guilt before the jury can convict him. *State v. Davenport*, 227 N. C. 475, 493, 42 S. E. (2d) 686.

Sufficiency of Evidence May Be Challenged if Motion Timely Made.—

A motion for judgment as of nonsuit, in a criminal case under this section must be made at the close of the state's evidence and, if denied, renewed at the close of all the evi-

dence, otherwise the benefit of the exception to the court's refusal to grant the motion is lost. *State v. Hill*, 225 N. C. 74, 33 S. E. (2d) 470.

To present the question of the sufficiency of the evidence upon appeal, a motion to nonsuit should be made at the close of the state's evidence, and exception noted upon its denial, and if defendant introduces evidence the motion should be renewed at the close of all the evidence, and if again overruled another exception should be noted, in which event the assignment of error should be based upon the second exception. *State v. Perry*, 226 N. C. 530, 39 S. E. (2d) 460; *State v. Weaver*, 228 N. C. 39, 40, 44 S. E. (2d) 360.

Motion Must Be Renewed—Waiver.—

When defendants in a criminal prosecution, at the close of the State's evidence, move to dismiss and for nonsuit, and, after these motions are overruled, introduce evidence but fail to renew such motions at the close of all evidence, the exceptions to the refusal of such motions at the close of the State's evidence are waived. *State v. Epps*, 223 N. C. 740, 28 S. E. (2d) 219. See also, *State v. Jackson*, 226 N. C. 760, 40 S. E. (2d) 417.

Only Incriminating Evidence Need Be Considered, etc.—

On a demurrer to the evidence only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. *State v. Oldham*, 224 N. C. 415, 416, 30 S. E. (2d) 318.

When Motion Denied.—

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tended to establish a defense is properly denied. *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835.

A motion for judgment of nonsuit must be denied, if there be any substantial evidence—more than a scintilla—to prove the allegations of the indictment. *State v. Weinstein*, 224 N. C. 645, 31 S. E. (2d) 920.

On trial upon an indictment for assault with a deadly weapon with intent to kill, motion for judgment of nonsuit was properly denied. *State v. Oxendine*, 224 N. C. 825, 32 S. E. (2d) 648.

When an intentional killing with a deadly weapon has been established, the law implies malice, and the state cannot be nonsuited. *State v. Brooks*, 228 N. C. 68, 71, 44 S. E. (2d) 482.

Where the evidence was substantially similar to that introduced at a former trial, decision of the supreme court on the former appeal that evidence was sufficient to be submitted to the jury is res judicata on question of nonsuit or sufficiency of evidence. *State v. Stone*, 226 N. C. 97, 36 S. E. (2d) 704.

Where the indictments contain two separate charges and the state takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, under this section, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898.

Where a complete defense is established by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under this section. *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456; *State v. Watts*, 224 N. C. 771, 32 S. E. (2d) 348.

The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. *State v. Rising*, 223 N. C. 747, 28 S. E. (2d) 221.

Sufficiency of Evidence.—

In accord with 1st paragraph in original. See *State v. Johnson*, 226 N. C. 671, 40 S. E. (2d) 113.

Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107.

On appeal in criminal cases supreme court cannot pass upon the weight of the evidence but only whether there is sufficient evidence to support conviction. *State v. Shoup*, 226 N. C. 69, 36 S. E. (2d) 697.

On a motion for judgment as of nonsuit in a criminal case the evidence must be considered in the light most favorable to the State. *State v. Herndon*, 223 N. C. 208, 25 S. E. (2d) 511. See *State v. McMahan*, 224 N. C. 476, 31 S. E. (2d) 357; *State v. Fulk*, 232 N. C. 118, 59 S. E. (2d) 617; *State v. Hendrick*, 232 N. C. 447, 61 S. E. (2d) 349.

In a criminal prosecution, under §§ 14-290, 14-291, and 14-291.1, the court erred in the refusal of defendants' motion of nonsuit. *State v. Heglar*, 225 N. C. 220, 34 S. E. (2d) 76.

On a motion for judgment of nonsuit the evidence must be considered in the light most favorable for the state, and if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. *State v. Scoggins*, 225 N. C. 71, 33 S. E. (2d) 473.

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. *State v. Ham*, 224 N. C. 128, 29 S. E. (2d) 449.

Evidence tended to show that upon the arrival of police officers at the scene of a break-in in response to a telephone call, they saw the three defendants running up the street, that defendants got into a car and drove quickly away and were not stopped by the officers until after a ten mile chase, and that appealing defendant denied any knowledge of the break-in. It was held that the evidence was insufficient to be submitted to the jury, and judgment of nonsuit was allowed in the Supreme Court on appeal. *State v. Cranford*, 231 N. C. 211, 56 S. E. (2d) 423.

Same—Prosecution for Homicide.—In a prosecution for felonious slaying evidence held sufficient to go to the jury. *State v. Stone*, 224 N. C. 848, 32 S. E. (2d) 651.

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide. *State v. Robinson*, 226 N. C. 95, 36 S. E. (2d) 655.

Where defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit, was properly overruled. *State v. Matheson*, 225 N. C. 109, 33 S. E. (2d) 590.

In a prosecution of two persons for murder, where the state's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, whereupon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendant's motion for judgment as of nonsuit was properly denied. *State v. Williams*, 225 N. C. 182, 33 S. E. (2d) 880.

Same—Murder in Perpetration of Robbery.—Where two witnesses saw two of defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying same defendants as the perpetrators of another hold-up just before their arrest, there was sufficient identification and evidence of murder for the jury and motion for nonsuit was properly denied. *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352.

Same—Assault with Intent to Kill.—

In a prosecution for assault with a deadly weapon with intent to kill, resulting in injury, it was held that there was ample evidence to sustain conviction and motion to dismiss under this section was properly denied. *State v. Cody*, 225 N. C. 38, 33 S. E. (2d) 71.

In a criminal prosecution for a felonious assault with intent to kill, where the state's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range, inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied. *State v. Murdock*, 225 N. C. 224, 34 S. E. (2d) 69.

Same—Seduction.—In a prosecution for seduction it was held that where facts and circumstances tended to support prosecutrix's statements a motion for nonsuit should be denied. *State v. Smith*, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Same—Rape.—

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant and nonsuit under this section was held properly denied. *State v. Vicks*, 223 N. C. 384, 26 S. E. (2d) 873.

Evidence of defendant's guilt of rape held sufficient to overrule his motion to nonsuit. *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294.

Same—Receiving Stolen Goods.—In a prosecution for larceny and receiving, where the state's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen property, knowing it to have been stolen, and motion of nonsuit was properly refused. *State v. Parker*, 224 N. C. 524, 31 S. E. (2d) 531.

Same—Recent Possession of Stolen Goods.—

Where three defendants bought goods, paying full value, about 2 a. m. from two strangers, who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces, and one defendant promptly admitted all the facts to the officers while the other two first denied and then admitted the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of scienter is wanting and demurrer should have been sustained. *State v. Oxendine*, 223 N. C. 659, 27 S. E. (2d) 814.

Same—Evidence Raising Suspicion Only.—

Upon a motion for nonsuit under this section, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment, the motion should be allowed. *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456; *State v. Kirkman*, 224 N. C. 778, 32 S. E. (2d) 328; *State v. Murphy*, 225 N. C. 115, 33 S. E. (2d) 588.

Where the evidence, taken in the light most favorable to the state, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed. *State v. Hegler*, 225 N. C. 220, 34 S. E. (2d) 76.

Same—Assault with Intent to Rape.—

In accord with original. See *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458; *State v. Johnson*, 227 N. C. 587, 42 S. E. (2d) 685.

Same—Refusal to Support Child.—In proceeding on indictment instituted more than 13 years after the birth of an illegitimate child, charging defendant with wilful neglect and refusal to support the child, whose paternity had been established in bastardy proceeding instituted under C. S., 265-279, the action was held barred under § 49-4 and motion for judgment of nonsuit was sustained. *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145.

Same—Unlawful Sale of Intoxicating Liquors.—In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also found in the store, motion of defendant for judgment of nonsuit should have been sustained. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623.

In a prosecution for possession of intoxicating liquor for purpose of sale, where the evidence tended to show only that there was found in the yard of defendant's house an automobile containing 42 gallons of liquor, upon which no tax had been paid, defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, the refusal of defendant's motion for judgment of non-

suit was error. *State v. Kirkman*, 224 N. C. 778, 32 S. E. (2d) 328.

Where defendant at time of arrest said illicit whiskey belonged to him but at trial denied any knowledge of the liquor or its ownership, an issue of fact was presented for jury and motion to dismiss under this section was properly overruled. *State v. Stutts*, 225 N. C. 647, 35 S. E. (2d) 881.

Same—Operation of Motor Vehicle after License Suspended.—In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the state's evidence tended to show that defendant was tried and convicted in recorder's court, for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, but the records show no license issued to James Stewart that show one to James Tyree Stewart of the same county as defendant, who admitted that his name was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction and motion for nonsuit was properly refused. *State v. Stewart*, 224 N. C. 528, 31 S. E. (2d) 534.

Same—Violation of Hit and Run Drivers' Law.—In a prosecution under G. S., § 20-166, the state introduced testimony of a statement by defendant that he had just driven the highway in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. The statement was held binding upon the state, and defendant's motion for judgment of nonsuit was sustained in the supreme court for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person. *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494.

Conflicting Evidence.—

In a criminal prosecution for larceny and receiving a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked truck, and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. *State v. Cameron*, 223 N. C. 449, 27 S. E. (2d) 81.

Testimony by state witness that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the state. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898.

Variance.—

Where it was alleged that defendant committed larceny of money and valuable papers, and the evidence tended to show, at most, an attempt to commit larceny of two suitcases or baggage, it was held that there was a fatal variance between the allegata and the probata, of which defect defendant could take advantage under his exception to the disallowance of his motion for judgment as of nonsuit. *State v. Nunley*, 224 N. C. 96, 97, 29 S. E. (2d) 17.

Demurrer to the Evidence Properly Sustained.—

See *State v. Harvey*, 228 N. C. 62, 44 S. E. (2d) 472, wherein the identity of the accused was not established; *State v. Coffey*, 228 N. C. 119, 44 S. E. (2d) 886, wherein it was held that taking all the state's evidence to be true did not exclude a reasonable hypothesis of defendant's innocence.

Demurrer to the Evidence Properly Denied.—

See *State v. Dillard*, 223 N. C. 446, 27 S. E. (2d) 85, evidence showing guilt in abortion; *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43, wherein evidence showed possession of liquor with intent to sell same unlawfully; *State v. King*, 224 N. C. 329, 30 S. E. (2d) 230, wherein evidence sustained conviction of operating a lottery; *State v. Rivers*, 224 N. C. 419, 30 S. E. (2d) 322, wherein evidence tended to show that prisoner killed deceased, while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault; *State v. Peterson*, 225 N. C. 540, 35 S. E. (2d) 645, wherein evidence offered held sufficient to repel the motion to dismiss under this section.

An instruction that the court grants a nonsuit on the offense charged in the indictment, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment. *State v. Matthews*, 231 N. C. 617, 58 S. E. (2d) 625.

Applied in *State v. Edwards*, 224 N. C. 577, 31 S. E. (2d) 762; *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591; *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156; *State v. Little*, 228 N. C. 417, 45 S. E. (2d) 542; *State v. Minton*, 228 N. C. 518, 46 S. E. (2d) 296; *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868; as to motion for nonsuit sustained on appeal, in *State v. Palmer*, 230 N. C. 205, 52 S. E. (2d) 908; *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424; *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532.

Cited in *State v. Hunt*, 223 N. C. 173, 25 S. E. (2d) 598; *State v. Graham*, 224 N. C. 351, 30 S. E. (2d) 154; *State v. Ogle*, 224 N. C. 468, 31 S. E. (2d) 444; *State v. Curling*, 225 N. C. 769, 35 S. E. (2d) 179; *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617; *State v. Tilley*, 231 N. C. 734, 58 S. E. (2d) 720; *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188; *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608.

Art. 18. Appeal.

§ 15-177. Appeal from justice, trial de novo.

Cited in *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861.

§ 15-177.1. Appeal from justice of the peace or inferior court; trial anew or de novo.—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. (1947, c. 482.)

§ 15-179. When state may appeal.—An appeal to the supreme or superior court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.
5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
6. Upon declaring a statute unconstitutional. (Rev., s. 3276; Code, s. 1237; 1945, c. 701; C. S. 4649.)

Editor's Note.—

The 1945 amendment inserted the words "or superior" in line two and added subdivisions 5 and 6.

As to appeals by the state, see 23 N. C. Law Rev. 338. **Judgment Bases on Unconstitutionality of Statute.**—Where the court enters judgment of not guilty, after a purported special verdict, on the conclusion that the statute on which the criminal prosecution was based is unconstitutional, the state has no right of appeal under this section. *State v. Mitchell*, 225 N. C. 42, 33 S. E. (2d) 134.

An appeal by the state from a judgment granting a new trial on the ground of newly discovered evidence falls within the expression "and no other," as used in this section, albeit the state seeks to present only a question of law. *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313.

Applied in *State v. Lovelace*, 228 N. C. 185, 45 S. E. (2d) 48; *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860.

§ 15-180. Appeal by defendant to supreme court.

Appeals in Criminal Cases, etc.—

The statute does not provide for an appeal in criminal cases except from a final judgment. Hence, upon the indictment of members of the armed forces of the United States by state authorities, an appeal from an adverse ruling on objection to jurisdiction is premature. *State v. Inman*, 224 N. C. 531, 31 S. E. (2d) 641.

Quoted in *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377.

Applied in *State v. Cannon*, 227 N. C. 336, 42 S. E. (2d) 343.

§ 15-181. Defendant may appeal without security for costs.—In all cases of conviction in the superior courts, the defendant shall have the right to

appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith. Where the judge of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Supreme Court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission.

(1951, c. 81.)

Editor's Note.—

The 1951 amendment added the second sentence of the first paragraph. As the second and third paragraphs were not affected by the amendment they are not set out.

Applied in *State v. Lampkin*, 227 N. C. 620, 44 S. E. (2d) 30; *State v. Parrott*, 228 N. C. 752, 46 S. E. (2d) 851.

Cited in *State v. Brooks*, 224 N. C. 627, 31 S. E. (2d) 754.

§ 15-182. Appeal granted; bail for appearance.

The affidavit for appeal in forma pauperis must be made during the trial term or within ten days after the adjournment thereof in order for the supreme court to acquire jurisdiction of the appeal, but in a capital case the supreme court will nevertheless examine the exception or exceptions defendant undertakes to have considered on the appeal. *State v. Harrell*, 226 N. C. 743, 40 S. E. (2d) 205.

§ 15-83.1. When copy of evidence and charge furnished solicitor; taxed as costs.—When an appeal in a criminal action is taken to the Supreme Court, and the defendant's attorney has ordered from the court reporter a transcript of the evidence and charge of the court or a transcript of the evidence alone, the court reporter shall furnish to the State solicitor a copy of the evidence of the case and the charge of the court. The county commissioners shall pay the court reporter for said transcript of the evidence and charge of the court, and the same shall be taxed as costs in said criminal action. Whenever there has been a change of venue, the bill for said copy of the evidence and charge of the court shall be paid by the county commissioners of the county in which the criminal action originated. (1951, c. 1080.)

§ 15-186. Procedure upon receipt of certificate of supreme court.

This section applies to final judgments where nothing further is required to be done by the court, and not to orders suspending the execution of sentences on compliance with conditions imposed. *State v. Bowser*, 232 N. C. 414, 61 S. E. (2d) 98.

Where defendant appealed from a conviction of willful failure to support his illegitimate child notwithstanding the suspension of execution of judgment, neither the clerk nor his deputy had authority to issue a mittimus upon receipt of certificate of opinion of the Supreme Court affirming the judgment. *State v. Bowser*, 232 N. C. 414, 61 S. E. (2d) 98.

Art. 19. Execution.

§ 15-187. Death by administration of lethal gas.

Cited in *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35; *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520; *State v. Hall*, 233 N. C. 310, 63 S. E. (2d) 636.

§ 15-188. Manner and place of execution.

Cited in *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-189. Sentence of death; prisoner taken to penitentiary.—Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by

death, it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person. The clerk of the superior court in which such death sentence is pronounced shall prepare a certified copy of said judgment or sentence of death, including therewith a copy of any notice or entries of appeal made in such case; if no entries or notice of appeal have been made or given in such case, a statement to the effect shall be included in the certificate of the clerk; it shall also be the duty of the solicitor, assistant solicitor, or attorney prosecuting in behalf of the State in the absence of the solicitor, to prepare and sign a certificate stating in substance that he prosecuted said case in behalf of the State and that notice or entries of appeal have or have not been made or given in said case, and further that he has examined a copy of said judgment or sentence of death certified by the clerk, including the copy of the notice or entries of appeal or statement to the effect that no appeal has been given, and to the best of his knowledge the same is correct; the certificate of said solicitor, or other prosecuting officer above named, shall be attached to the certified copy of said sentence of death, as prepared and certified by the clerk, and both certificates shall be transmitted by the clerk of the superior court in which said sentence of death is pronounced to the warden of the State penitentiary at Raleigh, North Carolina; at the same time and in the same manner, a duplicate original of said certificates shall be prepared by the clerk of the superior court and the solicitor, or other prosecuting officer above named, and the said duplicate original or said certificates shall be transmitted to the Attorney General of North Carolina. If notice of appeal is given or entries of appeal are made after the expiration of the term of superior court in which said sentence of death is pronounced, said certificates shall be prepared by the clerk of the superior court in which said sentence is pronounced and by the solicitor, or other prosecuting officer above named, prosecuting in behalf of the State, in the same manner and shall be transmitted as soon as possible to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina. The above certificates so prepared by the clerk of the superior court in which such sentence of death is pronounced and by the solicitor, or other prosecuting officer above named, shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina, not more than twenty (20) or less than ten (10) days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal, said sentence of death shall not be carried out by the warden of the State penitentiary or by any of his deputies or agents until said certificates so prepared and transmitted by the clerk of the superior court in which said sentence of death is pronounced, and by the solicitor, or the prosecuting officer above named, have been received in the office of the warden of the State penitentiary at Raleigh, North Carolina. In all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the

crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary, at Raleigh, North Carolina, such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary. (1909, c. 443, s. 3; 1951, c. 899, s. 1; C. S. 4659.)

Editor's Note.—The 1951 amendment rewrote this section. **Judgment Must Show Degree of Murder.**—Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the state penitentiary. *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.

Cited in *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-194. Judgment sustained on appeal, reprieve, time for execution.—In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, or in case the certificates of the clerk of the superior court and of the solicitor, or other prosecuting officer as set forth in G. S. 15-189, showing that no appeal has been entered, have not been transmitted to the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out the sentence of death on the date fixed by the court in said judgment or sentence of death, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; or in case certificates of the clerk of the superior court and of the solicitor, or other prosecuting officer provided for in G. S. 15-189, showing that no notice of appeal has been given, are not received in the office of the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out sentence of death upon the date provided for in said judgment or sentence of death, then said convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the date of the receipt of said certificates of the clerk and solicitor, or other prosecuting officer, showing that no notice of appeal has been given or entered; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; 1925, c. 55; 1951, c. 244, ss. 1, 2; C. S. 4663.)

Editor's Note.—The 1951 amendment inserted the two provisions beginning "or in case the certificates of the clerk, etc."

Upon appeal from sentence of death, it is necessary that the supreme court find that there was no error in the trial before the sentence can be carried out. *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35.

Art. 20. Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.

An order suspending the imposition or execution of sentence on condition is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. He is relegated to his right to contest imposition of judgment or execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. *State v. Miller*, 225 N. C. 213, 34 S. E. (2d) 143.

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by certiorari or recordari. *Id.*

Cited in *State v. Graham*, 225 N. C. 217, 219, 34 S. E. (2d) 146; *State v. Jackson*, 226 N. C. 66, 36 S. E. (2d) 706.

§ 15-200.1. Appeal from invocation of suspended sentence in court inferior to superior court.—In all cases where a suspended sentence theretofore entered in a court inferior to the superior court is invoked by the court inferior to the superior court, the defendant shall have the right to appeal therefrom to the superior court, and, upon such appeal, the matter shall be heard de novo, but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence: Provided nothing herein shall apply to a person under the supervision of the Probation Commission. (1951, c. 1038.)

Art. 21. Segregation of Youthful Offenders.

§ 15-210. Purpose of article.—It is the purpose of this article to improve the chances of rehabilitation of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals. (1947, c. 262, s. 1.)

Editor's Note.—For brief comment on article, see 25 N. C. Law Rev. 404. As to prison camp for youthful and first term offenders, see §§ 148-49.1 to 148-49.5.

§ 15-211. Definition of "youthful offender."—As used in this article a "youthful offender" is a person

(1) Who, at the time of imposition of sentence, is less than twenty-one years of age, and

(2) Who has not previously served a term or terms or parts thereof totaling more than six months in jail or other prison. (1947, c. 262, s. 1.)

§ 15-212. Sentence of youthful offender.—Any judge of any court who sentences a youthful offender to imprisonment in the state prison or to jail to be assigned to work under the state highway and public works commission, if in his opinion such person will be benefited by being kept

separate, while performing his sentence, from prisoners other than youthful offenders, shall, as a part of the sentence of such person, provide that he shall be segregated as a youthful offender. (1947, c. 262, s. 1.)

§ 15-213. Duty of state highway and public works commission as to segregation of youthful offenders.—The state highway and public works commission shall segregate all youthful offenders whose sentences provide for such segregation and shall neither quarter nor work such prisoners, except in cases of emergency or when temporarily necessary, with other prisoners not coming within that classification.

The state highway and public works commission shall, in so far as is possible, provide personnel specially qualified by training, experience and personality to operate units that may be set up to effect the segregation provided in this article. (1947, c. 262, s. 1.)

§ 15-214. Extension to persons sentenced prior to July 1st, 1947.—(a) The benefits of this article, as far as practicable, shall also be extended to:

(1) All persons who on July 1st, 1947, shall be serving sentences in the state prison or sentences to jail with assignment to work under the state highway and public works commission, and

(2) All persons who shall be so sentenced prior to July 1st, 1947, even though they begin to serve such sentences after that date,

Provided such persons at the time of imposition of sentence came within the meaning of the term "youthful offender" as used in this article.

(b) The state highway and public works commission shall determine which of the prisoners coming within the provisions of subsection (a) of this section will probably be benefited by being segregated as provided in § 15-213, and such prisoners shall thereafter be so segregated as if their sentences so provided. (1947, c. 262, s. 1.)

§ 15-215. Termination of segregation.—The state highway and public works commission shall have authority to terminate the segregation as a youthful offender of any prisoner who, in the opinion of the commission, exercises a bad influence upon his fellow prisoners, or fails to take proper advantage of the opportunities offered by such segregation. (1947, c. 262, s. 1.)

§ 15-216. Persons to whom article not applicable.—(a) Since offenders who may be sentenced to terms of less than six months, but who come within the meaning of the term "youthful offender" as used in this article, may be placed upon probation if the judge imposing sentence is of the opinion that they may be rehabilitated, this article shall not apply to any person sentenced for a term of less than six months.

(b) Since special provision has already been made for suitable quarters for women prisoners, and since judges may specifically assign women convicted of offenses to such quarters, this article shall not apply to women. (1947, c. 262, s. 1.)

Art. 22. Review of the Constitutionality of Criminal Trials.

§ 15-217. Institution of proceeding; service of petition upon solicitor.—Any person imprisoned in the penitentiary, Central Prison, common jail of

any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction may institute a proceeding under this article. The proceeding shall be commenced by filing with the clerk of the superior court of Wake County, or in any county in which the conviction took place, a petition with a copy thereof, verified by affidavit. The petitioner shall serve another copy upon the solicitor of the solicitorial district who prosecutes the criminal docket of the superior court of the county in which said petition is filed, and said service of petition shall be by any of the methods provided by law for the service of process or by mailing said petition to the home address of said solicitor by registered mail, with return receipt requested. If said copy of petition is served by registered mail, the return receipt shall be filed with the clerk of the superior court of the county in which said petition is filed. The clerk shall place upon the criminal docket the petition upon his receipt thereof, and after service of the petition upon the solicitor of the district as above provided. No proceeding under this article shall be commenced more than five years after rendition of final judgment resulting from said conviction, or more than three years after the effective date of this article, whichever is later, unless the petitioner alleges facts showing that the delay was not due to laches or negligence on his part. (1951, c. 1083, s. 1.)

§ 15-218. Contents of petition; waiver of claims not alleged.—The petition shall identify the proceeding or trial in which the petitioner was convicted, give the date of the rendition of the final judgment claimed of, and shall clearly set forth the respects with which petitioner's constitutional rights were violated, and that the constitutional questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussions of authorities shall be omitted from the petition. Any claim of substantial denial of constitutional rights not raised or set forth in the original or any amended petition is waived. (1951, c. 1083, s. 1.)

Editor's Note.—It seems that the word "claimed" in line four was inadvertently inserted in place of "complained", which was probably the word the legislature intended to use.

15-219. Petitioner unable to pay costs or procure counsel.—If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to pro-

ceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred. (1951, c. 1083, s. 1.)

§ 15-220. Answer of the State; withdrawal of petition; amendments.—Within 30 days after the date of the service of the petition upon the solicitor of the district, or within such further time as the court may fix, the solicitor shall answer or move to dismiss on behalf of the State. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may, in its discretion, grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may, in its discretion, make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time for filing any pleading other than the original petition, as shall seem to the court appropriate, just and reasonable. (1951, c. 1083, s. 1.)

§ 15-221. Evidence to be received upon hearing.—The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and the court shall pass upon all issues or questions of fact arising in the proceeding without the aid of a jury. In its discretion, the court may order the petitioner brought before the court for the hearing. When said hearing is completed, the court shall make appropriate findings of fact, conclusions of law thereon and shall enter judgment upon said hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted, and such supplementary orders as to re-arraignment, retrial, custody, bail or discharge as may be necessary and proper. Such proceeding may be heard by any resident judge of the district or by any regular or special judge holding the courts of the district, and such proceeding may be heard at term, in chambers, or in vacation, or at any regular or special term of court. If said proceeding is set for hearing at any time other than a regular term of the court of the county in which the petition is filed, then notice of time and place of hearing shall be served upon the solicitor of the district. (1951, c. 1083, s. 1.)

§ 15-222. Review by application for certiorari.—Any final judgment entered upon such a petition and proceeding may be reviewed by the Supreme Court of North Carolina upon application for a writ of certiorari brought within 60 days from the entry of the judgment in such proceeding. The law of this State governing the application, granting and disposition of writs of certiorari shall be applicable to any application for writ of certiorari brought under the provisions of this article for the purpose of seeking a review of such judgment or proceeding. (1951, c. 1083, s. 1.)

Chapter 16. Gaming Contracts and Futures.

Art. 2. Contracts for "Futures."

§ 16-3. Certain contracts as to "futures" void.

Lawful Agreement.—The 1931 amendment to this section made entirely lawful an "arrangement and agreement"

between the plaintiffs and the defendant whereby the plaintiffs were to negotiate certain contracts for the sale of cotton on the New York Cotton Exchange for the defendant's account. *Marx v. Maddrey*, 94 F. Supp. 784.

Chapter 17. Habeas Corpus.

Art. 2. Application.

§ 17-3. Who may prosecute writ.

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family are not proceedings under this section, to set the infant free but is a proceeding to fix and determine the right of custody. In *re Thompson*, 228 N. C. 74, 44 S. E. (2d) 475.

§ 17-4. When application denied.

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by this section. In *re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases.

§ 17-39. Custody as between parents in certain cases; modification of order.

When Section Applies.—Habeas corpus to determine the right to the custody of a child applies only when the issue arises between husband and wife who are living in a state of separation without being divorced. *Robbins v. Robbins*, 229 N. C. 430, 50 S. E. (2d) 183. Such jurisdiction is ousted immediately upon the filing of the complaint in an action for divorce between the parties. *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906.

Proceeding Is Equitable.—A proceeding under this section, involving custody of children, is, notwithstanding the fact that it is statutory, equitable, in view of the wide latitude given the court, the definite personal nature of the orders, and the fact that the welfare and rights of infants are involved. In *re Biggers*, 226 N. C. 647, 39 S. E. (2d) 805, 806.

A decree awarding custody under this section does not oust the jurisdiction of the court under § 50-13 to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. *Robbins v. Robbins*, 229 N. C. 430, 50 S. E. (2d) 183.

Jurisdiction of Juvenile Court.—

Original jurisdiction has been conferred upon the juvenile court, under § 110-21, to find a child delinquent or neglected, but this statute does not repeal this section, and is not inconsistent therewith. The Superior Court as such has exclusive jurisdiction, by writ of habeas corpus, to hear and determine the custody of children of parents separated but not divorced. In *re Prevatt*, 223 N. C. 833, 28 S. E. (2d) 564.

Controversy between Father and Maternal Grandparents.—See In *re McGraw*, 228 N. C. 46, 44 S. E. (2d) 349.

Same—Jurisdiction of Juvenile Court.—It has been held

that habeas corpus is not an appropriate writ to determine the custody of a child in a controversy between the father and the parents of his deceased wife, but that jurisdiction of such a case is vested exclusively in the juvenile court by § 110-21(3). *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906. But see next following paragraph.

Same—Effect of 1949 Amendment to § 50-13.—It seems that the 1949 amendment to § 50-13 was intended to overrule *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906, in so far as it held that original jurisdiction was in the juvenile court under § 110-21(3) to determine custody of a child as between the father and the child's maternal grandparents, when the mother had secured custody in the divorce action but subsequently died. The amendment provides that controversies not provided for in this section or elsewhere in § 50-13 may be determined in a special proceeding instituted by either of the parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the petitioner, or the respondent or the child is a resident at the time of filing the petition. 27 N. C. Law Rev. 452.

Under the 1949 amendment to § 50-13 either parent may institute a special proceeding to obtain custody of his or her child in cases not theretofore provided for by this section or § 50-13 and this amendment authorizes a special proceeding by the mother of an illegitimate child to obtain its custody from her aunt, with whom she had entrusted the child, and thus restricts the jurisdiction of the juvenile court in such instances. In *re Cranford*, 231 N. C. 91, 56 S. E. (2d) 35.

Modification of Earlier Order.—In a proceeding under this section the contention that entry of an earlier order was res judicata and therefore court had no authority to modify order at subsequent term without allegations or affidavits showing conditions had changed was without merit where earlier order specified that for change in conditions question of custody could be further heard and modification was based on finding of fact that there had been substantial change in circumstances of parties. *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617.

Judgment Based on Consent of Parties.—When the jurisdiction of court is invoked, a judgment based on consent of parties is not a mere affirmation of a civil contract, but an order which carries with it the sanctions of the jurisdiction invoked, and one of those sanctions is imprisonment for contempt of court. In *re Biggers*, 226 N. C. 647, 39 S. E. (2d) 805, 806.

Effect of Failure to Give Notice.—In a proceeding under this section, the failure to give statutory notice of the hearing, when a full hearing was had, was held not to invalidate an order with respect to care and custody. *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617.

No Action by Father of Illegitimate Child.—Habeas corpus will not lie at the instance of the father of an illegitimate child to obtain its custody and control from its mother. In *re McGraw*, 228 N. C. 46, 44 S. E. (2d) 349.

Applied in In *re Barwick*, 228 N. C. 113, 44 S. E. (2d) 599; In *re Biggers*, 228 N. C. 743, 47 S. E. (2d) 32.

Chapter 18. Regulation of Intoxicating Liquors.

Sec. Art. 1. The Turlington Act.

18-6.1. Officers to refer to state courts cases involving vehicles seized and arrests made for unlawful transportation.

Art. 2. Miscellaneous Regulations.

18-85.1. Unlawful to obtain, possess, etc., federal license to manufacture, purchase or handle intoxicating liquor.

Art. 3. Alcoholic Beverage Control Act of 1937.

Sec.

18-49.1. Regulating transportation in excess of one gallon for delivery to federal reservation or to another state; conditions to be complied with.

18-49.2. Transportation in excess of one gallon prohibited, exceptions; regulations of A. B. C. board.

Sec.

- 18-49.3. Violation of section 18-49.1 or 18-49.2 a misdemeanor; seizure and disposition of vehicle and alcoholic beverages.
 18-49.4. Exceptions to the application of sections 18-49.1 to 18-49.3.

Art. 4. Beverage Control Act of 1939.

- 18-69.1. Prohibition against exclusive outlets.
 18-78. Revocation or suspension of license; rule making power of state board of alcoholic control.
 18-78.1. Prohibited acts under license for sale for consumption on premises.
 18-81.1. Use of funds allocated to counties and municipalities.
 18-83.1. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.
 18-85. Tax on spirituous liquors; sale of fortified wines in A. B. C. stores.
 18-85.1. Tax on fortified wines.
 18-88.1. Wine for sacramental purpose exempt from tax.
 18-90.2. Revocation of license upon revocation of permit.
 18-91.1. Persons, firms, and corporations engaged in more than one business to pay on each.

Art. 7. Beer and Wine; Hours of Sale.

- 18-108.1. "Beer" defined.

Art. 8. Establishment of Standards for Lawful Wine; Permits, etc.

- 18-109. Powers of state board of alcoholic control.
 18-110. Duties of persons possessing wine or offering the same for sale.
 18-111. Statement of analysis to be furnished.
 18-112. Manufacturers, bottlers, wholesalers, et cetera, to obtain permit for sale from board.
 18-113. Violation misdemeanor; permit revoked.
 18-113.1. Misdemeanor for retailer to sell unapproved wines.
 18-113.2. Types of wine included under provisions of article.
 18-114. Funds for administration of article.
 18-115. Definition of "person."
 18-116. Effective date; disposition of wines on hand.
 18-116.1. Additional power of local governing body to suspend or revoke retail wine license.
 18-116.2. Authority of local A. B. C. boards to revoke or suspend permit or limit sales to A. B. C. stores.
 18-116.3. Effect of revocation of license or permit by local authority.
 18-116.4. Authority of local boards to restrict days and hours of sale of wine.
 18-116.5. Investigation of licensed premises; examination of books, etc.; refusal to admit inspector; powers and authority of inspectors; use of A. B. C. officers as inspectors.

Art. 9. Substandard, Imitation and Synthetic Wines.

- 18-117. Possession or sale prohibited
 18-118. Violation a misdemeanor.

Art. 10. Regulation or Prohibition of Sale of Wine.

Sec.

- 18-119. Certain counties authorized to regulate or prohibit sale of wine.
 18-120. Municipalities in certain counties authorized to regulate or prohibit sale of wine.
 18-121. Rules and regulations.
 18-122. Effective date of resolution prohibiting sale.
 18-123. Violation a misdemeanor.

Art. 11. Elections on Question of Sale of Wine and Beer.

- 18-124. Provision for elections in counties or municipalities.
 18-125. Form of ballots.
 18-126. Effect of vote for or against sale of beer or wine.
 18-127. Elections in certain municipalities after majority vote in county against sale of wine or beer.
 18-128. Wine for sacramental purposes not prohibited.
 18-128.1. Certain wholesalers excepted.

Art. 12. Additional Powers of State Board over Malt Beverages.

- 18-129. Power of state board of alcoholic control to regulate distribution and sale of malt beverages; determination of qualifications of applicant for permit, etc.
 18-130. Application for permit; contents.
 18-131. Application to be verified; refusal or revocation of permit; penalty for false statement; independent investigation of applicant.
 18-132. Permit revoked if federal special tax liquor stamp procured.
 18-133. Notice of intent to apply for permit; posting or publication of notice; objections to issuance of permit and hearing thereon.
 18-134. Status of persons holding license at time of ratification of article.
 18-135. Certification to department of revenue of permits issued; issuance of license; revocation of permit or license.
 18-136. Suspension or revocation of permit upon personal disqualification, etc.
 18-137. Hearing upon suspension or revocation of permit.
 18-138. Rules and regulations for enforcement of article.
 18-139. Effect of article on existing local regulations as to sale of beer.
 18-140. Chief of malt beverage division and assistants; inspectors.
 18-141. Sale and consumption of beer during certain hours prohibited.
 18-142. Keeping places of business clean, etc.
 18-143. Appropriation for malt beverage division.
 18-144. Application of article.

Art. 13. Wholesale Malt Beverage Salesman's Permit.

- 18-145. Permit required; renewal.
 18-146. Qualifications of applicant.
 18-147. Salesmen licensed at time of ratification of article.

Sec.

- 18-148. License invalid until permit obtained.
 18-149. Suspension and revocation; acting without permit a misdemeanor.
 18-150. Salesman responsible for acts of helper.
 18-151. Hearing.
 18-152. Employing salesman who has no permit.

Art. 1. The Turlington Act.

§ 18-1. Definitions; application of article.

The Turlington Act remains in full force and effect except as modified by the Alcoholic Beverage Control Act of 1937, codified as article 3 of this chapter, and as thus modified is the primary law in territory which has not elected to come under the A. B. C. Act. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904; State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

The Two Acts Must Be Read Together.—To ascertain the status of the law regulating the possession, transportation, and sale or possession for the purpose of sale, of intoxicating beverages in nonconforming territory—territory where A. B. C. stores have not been established—the Turlington Act and the Alcoholic Beverage Control Act of 1937 must be read together. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

"Intoxicating liquors" as defined in this section includes the more restrictive term "alcoholic beverages" as defined in § 18-60, and the terms are not synonymous. State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

Sloe Gin Is Intoxicating Liquor.—Testimony that defendant had in his possession sloe gin is evidence of possession of intoxicating liquor. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

Cited in McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-2. Manufacture, sale, etc., forbidden; construction of law; non-beverage liquor.

State's Regulations in Relation to Interstate Commerce Clause.—Both by the Constitution of the United States (Amendment XXI) and this chapter liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted federal powers and congressional action thereunder. State v. Hall, 224 N. C. 314, 30 S. E. (2d) 158.

A person is guilty of unlawfully transporting intoxicating liquor in violation of this section, as modified by the Alcoholic Beverages Control Act of 1937, if he knowingly transports intoxicating liquor for any purpose other than those specified in the Alcoholic Beverage Control Act, or in a quantity in excess of the gallon, unless such liquor is in actual course of delivery to an alcoholic beverage control board established in a county coming under the provisions of the Alcoholic Beverage Control Act. State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

The exemption from criminal liability for the transportation of liquor into or through a county not within the provisions of article 3 of this chapter applies to liquor being transported from a county which is under the provisions of § 18-49, or from without the state as provided in § 18-58. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842. See State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

This section prohibiting the transportation of intoxicating liquor has been modified by §§ 18-49 and 18-58 so that it is not unlawful to transport through a county which has not elected to come under the provisions of the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any alcoholic beverage control board, or for a person to transport into such county not in excess of one gallon of alcoholic beverages lawfully purchased outside the State or in counties of the State which have elected to come under the Alcoholic Beverage Control Act, provided the liquor is for personal use and the seals of the containers have not been broken. State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

Guilty Knowledge.—This section relating to alcoholic liq-

uors must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. State v. Welch, 232 N. C. 77, 59 S. E. (2d) 199.

The possession of nontax-paid liquor in any quantity anywhere in the state is, without exception, unlawful. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Possession of One Gallon of Tax-Paid Liquor for Personal Use.—A person living in a county which has not elected to come under the Alcoholic Beverage Control Act may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor; but subject to this exception, possession within such territory of any quantity of liquor is prima facie evidence that its possession is in violation of this section. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

A person living in nonconforming territory may lawfully transport, in sealed containers, to his own private dwelling for family uses, not in excess of one gallon of tax-paid liquor at any one time, provided it is acquired from an A. B. C. store in this state or legally purchased in another state (§§ 18-49 and 18-58), and he may there keep and possess the same for family use. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Burden of Showing Right to Possess.—The Turlington Act contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43. See also notes to §§ 18-49 and 18-58.

Purchase or Sale in Mecklenburg County.—The Alcoholic Beverage Control Acts have not modified this section in such a manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, which has not authorized the establishment of A. B. C. stores. State v. Gray, 223 N. C. 120, 25 S. E. (2d) 434.

Evidence That Liquor Is Not Tax-Paid Admissible.—In a prosecution under this section, evidence tending to show that the liquor in defendant's possession was not tax-paid is competent. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Testimony by officers searching without a warrant that they found a quantity of nontax-paid liquor in defendant's car was held competent. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Sufficiency of Evidence.—Evidence that officers found two full bottles of nontax-paid whiskey in defendant's car immediately after arresting him for driving the car recklessly and at excessive speed is sufficient to support his conviction of illegal transportation of intoxicating liquor. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Same—To Deny Nonsuit.—

The state's evidence tending to show that officers found in defendant's car, which defendant was driving, four fifth-gallon bottles of intoxicating liquor intact and four broken bottles from which some of the contents had leaked out, all of which contained or had contained sloe gin, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section for transportation and possession of intoxicating liquor in a county which has not elected to come under article 3 of this chapter. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

The charge in a prosecution for the unlawful transportation of intoxicating liquor was held to be in substantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Separate Punishment for Different Counts.—Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting. State v. Chavis, 232 N. C. 83, 59 S. E. (2d) 348.

Cited in State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623.

§ 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.

Cited in State v. Beasley, 226 N. C. 577, 39 S. E. (2d) 605.

§ 18-6. Seizure of liquor or conveyance; arrests; sale of property.

—When any officer of

the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days from conviction or default of appearance of such person be destroyed: Provided that any taxpaid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the state of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. Unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deduct-

ing the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage.

When any vehicle confiscated under the provisions of this section is found to be specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition. However, if the court should find that such equipment and modifications are so extensive that it would be impractical to restore said vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk: Provided, that nothing herein contained shall affect the rights of lien holders and other claimants to said vehicles as set out in this section. (1923, c. 1, s. 6; 1945, c. 635; 1951, c. 850; C. S. 3411(f).)

Editor's Note.—

The 1945 amendment inserted the provisions as to returning seized liquor to the owner, turning it over to hospitals or selling it.

The 1951 amendment, effective April 12, 1951, which added the second paragraph, provides that it shall apply to all vehicles now in the custody of the law under the provisions of this section which have not been finally disposed of.

This section does not provide for seizure of all intoxicating liquor found in vehicle, but for seizure of any and all intoxicating liquor found therein being transported contrary to law. *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414.

Confiscation and Forfeiture Are Mandatory.—Where one, who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto, pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of this section are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. *State v. Hall*, 224 N. C. 314, 30 S. E. (2d) 158.

Jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. *State v. Reavis*, 228 N. C. 18, 44 S. E. (2d) 354.

Order Confiscating Car. — Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with the statute. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Order for Forfeiture Nunc Pro Tunc.—Where defendant has been convicted of illegal transportation of nontax-paid liquor, the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such transportation. *State v. Maynor*, 226 N. C. 645, 39 S. E. (2d) 833.

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. *State v. Law*, 227 N. C. 103, 40 S. E. (2d) 699.

Stated in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470.

Cited in *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43.

§ 18-6.1. Officers to refer to state courts cases involving vehicles seized and arrests made for unlawful transportation.—All members of the state highway patrol and other state and local law enforcing officers shall, whenever seizing any vehicle on account of the unlawful transportation of intoxicating beverages, or making arrests of persons on account of same, refer the cases to the state court having jurisdiction thereof, to be determined by such state court in accordance with the law of this state. Any such officer who shall, in violation of this section, refer such cases to courts of another jurisdiction, shall be guilty of misfeasance in office and subject to a fine of one hundred dollars (\$100.00). (1945, c. 779.)

Local Modification.—Mecklenburg: 1951, c. 1061, s. 1.

§ 18-8. Witnesses; self crimination; immunity.

Only a witness required to testify under compulsion is granted immunity from prosecution by this section. Hence an officer, who purchased liquor in order to obtain evidence against a suspect and voluntarily testified for the prosecution, could not claim the immunity afforded by this section, and it was error to instruct the jury to the contrary. *State v. Love*, 229 N. C. 99, 47 S. E. (2d) 712.

§ 18-11. Possession prima facie evidence of keeping for sale.

Section Does Not Apply in Prosecution under § 18-50.—The statutory presumption from the fact of possession does not arise in a prosecution under § 18-50 for possessing nontax-paid liquor for the purpose of sale. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629

Where a warrant charged generally that defendant had in his possession non-tax-paid whiskey for the purpose of sale it was held that upon the facts of the case the word non-tax-paid was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of § 18-50 and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804.

The possession in one's dwelling of not more than one gallon of liquor upon which the tax has been paid raises no presumption that the possession is unlawful. This applies even though the dwelling is in dry territory. And in order to convict the state must establish by independent evidence, unaided by any presumption, that the possession is unlawful. In such case, in the absence of evidence of possession of nontax-paid liquor or more than one gallon of tax-paid intoxicating beverage, prima facie evidence of the violation of the statute is wanting. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904.

The presence of four bottles containing less than a gallon of whiskey in a cabin near his filling station which was occupied by defendant would not be sufficient to constitute prima facie evidence that the liquor was being kept for the purpose of sale. *State v. Watts*, 224 N. C. 771, 32 S. E. (2d) 348.

Where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized by § 18-36 et seq., nothing else appearing, such possession is not now prima facie evidence that such intoxicants are so possessed for the purpose of sale under this section. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623.

Proof of the possession of more than one gallon of intoxicating liquor, even though it is found in the private dwelling of defendant and the tax thereon has been paid, is prima facie evidence that such liquor is unlawfully possessed and is being kept for the purpose of sale. Defendant is protected against the presumption of illegality or the rule of evidence created by this section only so long as he does not possess more than one gallon. Where he possesses more than one gallon he has the burden to rebut the prima facie evidence by showing that such possession not only comes within the exceptive provisions of this section, but also that it was legally acquired and transported to his dwelling and kept there for family uses

only. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904. See §§ 18-49, 18-58.

Evidence tending to show that more than one gallon of intoxicating liquor upon which the tax had not been paid was found in a house owned by defendant in dry territory justifies an instruction to the effect that it is unlawful to possess at any one time more than one gallon of intoxicating liquor even in the possessor's home when defendant offers no evidence tending to show that the liquor was acquired from an A. B. C. store in this state or was purchased in another state and legally transported to his residence in quantities of not more than one gallon at any one time. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904.

Burden of Proving Proper Purposes.—

The provision of this section making it lawful to possess liquor in a private dwelling for family purposes is an exception to the general rule, and the burden of proof in respect thereto is on defendant. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449.

Testimony that defendant frequently sleeps in a house is insufficient to show that it is his private dwelling within the meaning of this section. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904.

Instruction Using Language of This Section Proper.—In a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the court may properly charge the law in the language of this section and § 18-13, since the law therein stated constitutes a material part of the law of the case. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449.

Prima Facie Case for Jury.—In a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of non-tax-paid whiskey and left with it, is sufficient to make out a prima facie case for the jury. *State v. Graham*, 224 N. C. 347, 30 S. E. (2d) 151.

Where, in a prosecution under § 18-2 for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the state offers evidence that defendant had in his possession approximately 17½ gallons of liquor, and there is no evidence that defendant's possession was for the use of himself, his family and bona fide guests, defendant's motion to nonsuit is properly denied, since this section applies. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449.

Evidence tending to show that defendant was driving his automobile on a highway, that when officers attempted to stop him he attempted to elude them, threw a carton containing three gallons of non-tax-paid whiskey from the car, and drove in a reckless manner until struck from the rear by the officers' car and run off the road, was held sufficient to overrule nonsuit upon each of the charges of illegal possession of whiskey for the purpose of sale and unlawful transportation of same. *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804.

Stated in *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591.

§ 18-13. Search warrants; disposal of liquor seized.

Legislative Intent.—Our statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor permitted. However, the processes of our courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. *State v. Hall*, 224 N. C. 314, 30 S. E. (2d) 158.

Hearing Contemplated.—While § 18-6 provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, because thereunder the liquor itself is to be destroyed, this section clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant. This remedy appears adequate and is approved. *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414.

Cited in *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43.

§ 18-25. Rewards for seizure of still.

Local Modification.—Montgomery: 1949, c. 68, s. 1.

§ 18-26. Same—In certain counties.

This section shall apply to the following coun-

ties only: Alleghany, Ashe, Avery, Bladen, Buncome, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Beaufort, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Scotland, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1927, c. 42; Pub. Loc. 1933, c. 160; 1947, c. 207.)

Local Modification.—Scotland: 1951, c. 193.

Editor's Note.—The 1947 amendment inserted "Scotland" in the list of counties in the second paragraph. As the first paragraph was not affected by the amendment it is not set out.

§ 18-28. Distilling or manufacturing liquor; first offense misdemeanor.

Cited in *State v. Graham*, 224 N. C. 351, 30 S. E. (2d) 154.

§ 18-29. Misdemeanor; punishment; effect of previous punishment by federal court.

Cited in *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Art. 2. Miscellaneous Regulations.

§ 18-31. Unlawful sale through agents.

Local Modification.—Polk: 1951, c. 750.

§ 18-32. Keeping liquor for sale; evidence.

3. The possession of more than one gallon of wine at any one time, whether in one or more places; or

(1949, c. 1251, s. 2.)

Local Modification.—Polk: 1951, c. 750.

Editor's Note.—The 1949 amendment substituted in subsection 3 the words "one gallon of wine" for the words "three gallons of vinous liquors." As the rest of the section was not affected by the amendment it is not set out. Section 1 of the amendatory act provides that the types of wine included under the provisions of this act shall include all types of wine as defined in subsection (b) of § 18-64 and article 5 of this chapter. And section 4½ of the amendatory act provides that it shall apply only to the counties and cities that have or may establish alcoholic beverage control stores.

Section Harmonizes with § 18-11.—The provisions of § 18-11 are subjective in character, and harmonize with the prima facie rule of evidence as to possession of more than one gallon of spirituous liquors as contained in this section. *State v. Suddreth*, 223 N. C. 610, 615, 27 S. E. (2d) 623.

Instructions.—Where an instruction, that "the possession of more than one gallon of liquor constitutes prima facie evidence of unlawful possession for the purpose of sale in violation of G. S., 18-32," is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on two other counts of unlawful possession, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43.

Evidence.—

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the state's evidence showed the presence of four tax-paid, unbroken bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon in another cabin near-by on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence was insufficient to make out a prima facie case. *State v. Watts*, 224 N. C. 771, 32 S. E. (2d) 348.

Evidence Sufficient to Support Adverse Verdict.—Evidence in *State v. Gordon*, 224 N. C. 304, 307, 30 S. E. (2d) 43, held amply sufficient to support an adverse verdict without resort to any statutory presumption, as provided in this section.

Stated in *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591.

Cited in *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804.

§ 18-33. Unlawful to handle draft connected with receipt for liquor.

Local Modification.—Polk: 1951, c. 750.

§ 18-34. Allowing distillery to be operated on land.

Local Modification.—Polk: 1951, c. 750.

§ 18-35. Federal license as evidence.

Local Modification.—Polk: 1951, c. 750.

§ 18-35.1. Unlawful to obtain, possess, etc., federal license to manufacture, purchase or handle intoxicating liquor.—It is unlawful for any person, firm, partnership, or corporation to procure, obtain, possess, purchase, permit to be issued, or to have issued to any person a license, permit stamp or other authorization from the government of the United States to manufacture, sell, possess, transport, handle or purchase intoxicating liquors in the State of North Carolina; and upon conviction or confession any such person, firm, partnership, or corporation shall be guilty of a misdemeanor punishable in the discretion of the court: Provided, this section shall not apply to the Department of Defense and agencies of the armed services operating thereunder, nor to any agency, department, official or agent of the State of North Carolina or any other person or persons engaged in any activity or transactions authorized under the Beverage Control Act of 1939 as amended or alcoholic beverage control laws of this State. (1951, c. 1025.)

Art. 3. Alcoholic Beverage Control Act of 1937.

§ 18-36. Purposes of article.

The Alcoholic Beverage Control Act is of statewide operation but does not repeal the Turlington Act, which remains in full force except as modified by the A. B. C. Act. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904. See note to § 18-1.

Prima Facie Evidence of Possession for Purpose of Sale. Where a person has in his possession so-called tax-paid intoxicating liquors in quantity not in excess of one gallon in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized under and by virtue of the Alcoholic Beverage Control Act, nothing else appearing, such possession is not now prima facie evidence that such intoxicating liquors are possessed by such person for the purpose of being sold, and such prima facie rule of evidence, prescribed by § 18-11, is in irreconcilable conflict with the provisions of this article, and to such extent is repealed thereby. *State v. Suddreth*, 223 N. C. 610, 613, 27 S. E. (2d) 623.

Cited in *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384; *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842.

§ 18-39. Powers and authority of board.

(n) To permit the establishment of warehouses for the storage of alcoholic beverages within the state, the storage of alcoholic beverages in warehouses already established, and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailment of alcoholic beverages as may be made hereunder shall be for the convenience of delivery to alcoholic boards of control and others authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the state board of control relating thereto. (1937, c. 49, s. 4, cc. 237, 411; 1945, c. 954.)

Editor's Note.—

The 1945 amendment inserted the words "and others" after the word "control" in line nine of subsection (n). As the rest of the section was not affected by the amendment it is not set out.

Cited in *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384.

§ 18-45. Powers and duties of county boards.

Local Modification.—Nash: 1951, c. 738.

Stated in *Jordan v. Harris*, 225 N. C. 763, 36 S. E. (2d) 270.

Cited in *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384.

§ 18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.

Possession Unlawful without Exception.—The possession of nontax-paid liquor in any quantity anywhere in the state is, without exception, unlawful. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904.

This section and § 18-50 are on an equal footing, and neither prescribes nor includes a lesser offense or an offense of lesser degree. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629.

Sufficiency of Warrant.—A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, is sufficient to survive a motion to quash. *State v. Camel*, 230 N. C. 426, 53 S. E. (2d) 313.

Sufficiency of Evidence.—In a prosecution under this section on a warrant charging possession of nontax-paid liquor, evidence by the state that six gallons of liquor and a jar of "white liquor" were found on defendant's premises, without evidence that the containers did not bear a revenue stamp of the federal government or a stamp of any of the county A. B. C. boards, is insufficient to sustain conviction. The court will not take judicial notice that "white liquor" means nontax-paid liquor. *State v. Wolf*, 230 N. C. 267, 52 S. E. (2d) 920.

Evidence of defendant's illegal possession of a considerable quantity of nontax-paid whiskey was held sufficient to carry the case to the jury and his motion to nonsuit was properly denied. *State v. Camel*, 230 N. C. 426, 53 S. E. (2d) 313.

Confiscation of Car.—Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Cited in *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43; *State v. Gordon*, 225 N. C. 241, 244, 34 S. E. (2d) 414; *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591; *State v. Maynor*, 226 N. C. 645, 39 S. E. (2d) 833.

§ 18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.

Editor's Note.—For comment on this section, see 29 N. C. Law Rev. 55.

Section Modifies § 18-2.—Section 18-2 prohibiting the transportation of intoxicating liquor has been modified by this section so that it is not unlawful to transport through a county which has not elected to come under the provisions of the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any alcoholic beverage control board. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Culpy Knowledge.—This section must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Where Transporter Accompanied by Others.—This section cannot be construed to permit the driver of an automobile to carry or convey more than one gallon of alcoholic beverages in his automobile even though he is accompanied by others. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Instance of Violation.—Where the evidence showed that defendant's automobile contained two gallons of alcoholic beverages with his knowledge, and that with such knowledge he conveyed such quantity of alcoholic beverages from one place to another in his automobile for some purpose other than that of delivering the same to an alcoholic beverage control board in a county coming under the provisions of the Alcoholic Beverage Control Act, the charge preferred against him of unlawfully transporting intoxicating liquor in a quantity in excess of one gallon was properly affirmed. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Exemption Is Matter of Defense.—This section, permitting

the transportation of alcoholic beverages not in excess of one gallon from a county which has elected to come under this article to another county not coming under the provisions of the article, is a matter of defense, and it is incumbent upon the defendant to bring his case within the exemption either from the state's evidence or from his own. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842.

Stated in *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591.

Cited in *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623; *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904; *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804.

§ 18-49.1. Regulating transportation in excess of one gallon for delivery to federal reservation or to another state; conditions to be complied with.—

Before any person shall transport over the roads and highways of this state any alcoholic beverages in excess of one gallon within, into or through the state of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this state to another state, such person shall post with the state board of alcoholic beverage control a bond with surety approved by the said board, payable to the state of North Carolina in the penal sum of one thousand dollars (\$1,000.00), running in the name of the state of North Carolina, conditioned that such person will not unlawfully transport or deliver any alcoholic beverages within, into or through the state of North Carolina, the forfeiture to be in case of conviction paid to the school fund of the county in which the seizure is made and any such county shall have the right to sue for the same. When such alcoholic beverages are desired to be transported within, into or through the state of North Carolina, such transportation shall be engaged in only under the following conditions:

(1) **Statement as to Bond and Bill of Lading Required.**—There shall accompany such alcoholic beverages a statement signed by the chairman or secretary of the state board of alcoholic beverage control showing that the bond hereinbefore required has been furnished and approved. There shall accompany such alcoholic beverages at all times during transportation a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle while in the state of North Carolina, and such route must be substantially the most direct route, from the consignor's place of business to the place of business of the consignee.

(2) **Route Stated in Bill of Lading to Be Followed.**—Vehicles transporting alcoholic beverages shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.

(3) **Names of True Consignor and Consignee Must Appear.**—The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who had previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive

such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment.

(4) Officers May Require Driver to Exhibit Papers.—The driver or any person in charge of any vehicle so transporting such alcoholic beverages shall, when required by any sheriff, deputy sheriff or other police officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment. (1945, c. 457, s. 1.)

Editor's Note.—The act inserting this and the following three sections became effective July 1, 1945.

For comment on the act inserting this and the following three sections, see 23 N. C. Law Rev. 352.

§ 18-49.2. Transportation in excess of one gallon prohibited, exceptions; regulations of A. B. C. board.—The wilful transportation of alcoholic beverages within, into or through the state of North Carolina in quantities in excess of one gallon is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the state of North Carolina, or in transporting it through this state to another state in accordance with the provisions of § 18-49.1 and such regulations as may be adopted by the state board of alcoholic beverage control pursuant to this section. The state board of alcoholic beverage control may adopt further regulations governing the transportation of alcoholic beverages within, into and through the state of North Carolina in quantities in excess of one gallon, for delivery to federal reservations or in transit through this state to another state, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. (1945, c. 457, s. 2.)

§ 18-49.3. Violation of section 18-49.1 or 18-49.2 a misdemeanor; seizure and disposition of vehicle and alcoholic beverages.—Any person who shall wilfully transport alcoholic beverages in excess of one gallon within, into or through the state of North Carolina in violation of the provisions of § 18-49.1, or such regulations as may be adopted by the state board of alcoholic beverage control as authorized by § 18-49.2, shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. Any vehicle so illegally transporting such alcoholic beverages and the alcoholic beverages being so illegally transported shall be taken in possession by the officer upon arrest of the person engaged in such illegal transportation and, upon conviction of such person or upon forfeiture of bond and failure of such person to appear for trial, such vehicle shall be disposed of as is provided in § 18-6 and any alcoholic beverages so seized shall be disposed of as is provided in § 18-13. (1945, c. 457, s. 3.)

§ 18-49.4. Exceptions to the application of sections 18-49.1 to 18-49.3.—The provisions of §§ 18-49.1 to 18-49.3 shall not apply to those beverages defined in § 18-64 purchased from a person licensed to sell the same in this state, and those light wines which may be transported as authorized by article six of this chapter, and the wines defined in article five of this chapter. Nothing in said §§ 18-49.1 to 18-49.3 shall be construed to prevent the transportation of alcoholic beverages

to be sold under the Alcoholic Beverage Control Act of one thousand nine hundred and thirty-seven, and amendments thereto, or to prevent the transportation of alcoholic beverages not in excess of one gallon, as authorized by law prior to the passage of said sections; nothing contained in the said sections shall be construed to prohibit the transportation in this state of alcoholic beverages legally acquired for one's own personal use and transported as now authorized by the laws of this state; and nothing contained in the said sections shall affect sleeping car companies or railroads in the lawful operations of their business. (1945, c. 457, ss. 3, 4.)

§ 18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.

No Presumption of Intent to Sell Arises from Possession.—In a prosecution under this section no presumption of intent to sell arises from the unlawful possession of illicit liquor, and the state must prove not only unlawful possession of illicit liquor but also the intent to sell, unaided by any presumption or rule of evidence. *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591; *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449.

One Charged with Violation of This Section Cannot Be Convicted under § 18-48.—Where defendant was charged with violation of this section and there was no other count or charge in the warrant she could not be convicted under § 18-48, as these two statutes defining misdemeanors are on equal footing and neither prescribes nor includes a lesser offense or offense of lesser degree. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629.

A conviction on insufficient evidence on a warrant charging unlawful possession of illicit liquor for the purpose of sale under this section, cannot be sustained on the ground that the evidence might be sufficient to sustain a conviction of possession of a quantity of nontax-paid liquor under § 18-48. *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591.

Where a warrant charged generally that defendant had in his possession "non-tax-paid" whiskey for the purpose of sale it was held that upon the facts of the case the word "non-tax-paid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of this section and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804.

Evidence Insufficient to Carry Case to Jury.—In prosecution under this section evidence tending to show that officers of the law were reluctantly admitted in defendant's house, that the officers heard whispering within the house before they were admitted, that in the kitchen there were defendant, his wife, and a man with whiskey on his breath, and in the front room a man and a woman, that they found in the kitchen a half-gallon jar, with a few drops of whiskey in it, and two glasses and a five-gallon bucket of slops, nearly full, smelling of liquor, and that there was fifty cents in change on the stove, was insufficient to overrule motion for judgment as of nonsuit. *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591.

In prosecution under this section where only evidence offered by the state was through its officers, including police officer's uncontradicted testimony that defendant said nontax-paid liquor found in the room was for sick child, such evidence negated possession for the purpose of sale, and was insufficient to carry case to jury. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629.

Stated in *State v. Sawyer*, 233 N. C. 76, 62 S. E. (2d) 515.

§ 18-57. Net profits to be paid into general fund of the various counties.

Local Modification.—Edgecombe: 1951, c. 711; Nash: 1951, c. 738.

§ 18-58. Transportation into state; and purchases, other than from stores, prohibited.

Section Modifies § 18-2.—See note under § 18-2.

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regard-

less of whether the liquor belongs to him or is in his custody. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Guilty Knowledge.—This section relating to alcoholic liquors must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Even though the driver of an automobile is accompanied by others, this section cannot be construed to permit him to carry or convey more than one gallon of alcoholic beverages in his automobile. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

One-Gallon Exemption Is Matter of Defense.—The exemption from criminal liability for bringing into the state not more than one gallon of liquor is a matter of defense, and the defendant must bring his case within the exemption, either from the state's evidence or from his own. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842.

Evidence held to support charge of unlawfully transporting intoxicating liquor in a quantity in excess of one gallon. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

Cited in *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623; *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904.

§ 18-60. Definition of "alcoholic beverage."

"Intoxicating liquors" in § 18-1 includes the more restrictive term "alcoholic beverages" as defined in this section, and the terms are not synonymous. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199.

§ 18-61. County elections as to liquor control stores; application of Turlington Act; time of elections.

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act, as modified by the later statute, is in full force and effect. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449.

Quoted in *Hancock v. Bulla*, 232 N. C. 620, 61 S. E. (2d) 601.

Art. 4. Beverage Control Act of 1939.

§ 18-63. Title.

Editor's Note.—As to manufacture and possession of wine in Polk county, see Session Laws 1951, c. 750.

Provisions in Pari Materia.—The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are *pari materia* and must be read together as one connected whole. *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149.

Sale of Beer.—Generally speaking, it is unlawful to sell beer in North Carolina. But the sale thereof is not unlawful, provided the seller is duly licensed under, and makes sale in accord with the provisions of this article. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663. And see §§ 18-126, 18-129 et seq.

§ 18-64. Definitions.

(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per centum (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume, which wine has been approved as to identity, quality and purity by the state board of alcoholic control as provided in this chapter.

(1945, c. 903, s. 3.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, added that part of paragraph (b) appearing after the word "volume" in line eight. As the rest of the section was not affected by the amendment it is not set out.

For subsequent law exempting from its application beverages defined in this section, see § 18-49.4.

§ 18-67. Manufacture.

The license specified in this section shall not be issued for the manufacture of the beverages described in § 18-64 (b) unless the applicant for license exhibits a valid permit from the state board

of alcoholic control to engage in the business of selling such beverages for resale, as provided in this chapter.

(1945, c. 903, s. 4.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, directed that the above sentence be inserted as the second sentence of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 18-68. Bottler's license.—Any person who shall engage in the business of receiving shipments of the beverages enumerated in § 18-64, subsection (a) in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars (\$250.00); and any person who shall engage in the business of bottling the beverages described in § 18-64, subsection (b), shall pay an annual license tax of two hundred fifty dollars (\$250.00): Provided, however, that any person engaged in the business of bottling the beverages described in § 18-64, subsection (a) and also the beverages described in § 18-64, subsection (b), or either, shall pay an annual license tax of four hundred dollars (\$400.00); provided further, the license provided by this section for the bottling of the beverages described in § 18-64 (b) shall not be issued to any person who does not have a permit to engage in the business of bottling the beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter. No other license tax shall be levied upon the businesses taxed in this section, but licenses under this section shall be liable for the payment of the taxes imposed by § 18-81 in the manner therein set forth. (1939, c. 158, s. 505; 1941, c. 339, s. 4; 1945, c. 903, s. 5.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, inserted the second proviso.

§ 18-69. Wholesaler's license.

Licensed to sell at wholesale the beverages described in section 18-64, subsection (b) shall pay an annual license tax of one hundred fifty dollars (\$150.00): Provided, that a licensee to sell at wholesale the beverages described in § 18-64, subsection (a) and the beverages described in § 18-64, subsection (b) shall pay an annual license tax of two hundred fifty dollars (\$250.00); provided further, the license provided by this paragraph shall not be issued to any person who does not have a permit to engage in the business of selling at wholesale the beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter.

(1945, c. 903, s. 6.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, added the proviso at the end of the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 18-69.1. Prohibition against exclusive outlets.

—It shall be unlawful for any person, firm or corporation engaged in business under this article as a manufacturer, or wholesaler, or bottler of wine or malt beverages directly or indirectly or through an affiliate:

1. To require, by agreement or otherwise, that any retailer engaged in the sale of wine or malt beverages, purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt beverages sold or

offered for sale by other persons, firms or corporations in North Carolina, if the direct effect of such requirement as to prevent, deter, hinder, or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer; or

2. To induce through any of the following means any retailer, engaged in the sale of wine or malt beverages, to purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt beverages sold or offered for sale by other persons, firms, or corporations in North Carolina, if the direct effect of such inducement is to prevent, deter, hinder or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer: (1) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; (2) by furnishing, giving free goods or deals, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, subject to such exceptions as the commissioner of revenue shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection. (1945, c. 708, s. 6.)

§ 18-71. Salesman's license.

The license provided by this section shall not be issued to any person for offering for sale or soliciting orders for the beverages described in § 18-64 (b) who does not have a permit to engage in the business of offering for sale or soliciting orders for beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter. (1939, c. 158, s. 508; 1945, c. 903, s. 7.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 18-72. Character of license.

Local Modification.—Swain: 1945, c. 961.

Compulsory Issuance.—An "on premises" license to sell beer is not available, as a matter of right, to any citizen who may qualify under the provisions of § 18-75. Compulsory issuance thereof is in any event limited to the businesses enumerated in this section. *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149.

Cited in *State v. Alverson*, 225 N. C. 29, 33 S. E. (2d) 135.

§ 18-73. Retail license issued for sale of wines.

1. "On premises" licenses shall be issued only to bona fide hotels, cafeterias, cafes and restaurants which shall have a Grade A rating from the state department of health, and shall authorize the licensees to sell at retail for consumption on the premises designated in the license; provided, no such license shall be issued except to such hotels, cafeterias, cafes and restaurants where prepared food is customarily sold and only to such as are licensed under the provisions of § 105-62; provided further, no such license shall be issued to persons or places which are licensed only under subsection (a) of § 105-62.

(1945, c. 903, s. 8.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, rewrote sub-

division 1 of this section. As the rest of the section was not affected by the amendment it is not set out.

Cited in *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-74. Amount of retail license tax.—The license tax to sell at retail under § 18-64, subsection (a) for municipalities shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, five dollars (\$5.00).

The license tax to sell at retail under section 18-64, subsection (b), shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, ten dollars (\$10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1939, c. 158, s. 510; 1943, c. 400, s. 6; 1945, c. 708, s. 6.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, struck out the words "or both" formerly appearing after (b) in line nine.

§ 18-75. Who may sell at retail.—Every person making application for license to sell at retail or wholesale the beverages enumerated in § 18-64, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) Name and residence of the applicant and the length of his residence within the state of North Carolina.

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) A statement that the applicant is a citizen and resident of North Carolina and not less than twenty-one years of age; that he has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the last two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal.

The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of a felony or other crime involving moral turpitude, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the prohibition laws, such license shall not be granted. If it appears that any false statement is knowingly

made in any part of the application and license is received thereon, the license shall be revoked and the applicant subjected to the penalty provided by law for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subsections (1), (2), (3), (4), and (5) of this section are true.

Neither the state nor any county or city shall issue a license under this article to any person, or firm, or corporation who has not been a bona fide resident of North Carolina and a citizen of the United States for one year. No resident of the state shall obtain a license under this article and employ or receive aid from a non-resident for the purpose of defeating this requirement. No license shall be issued to a pool room or billiard parlor or any person, firm or corporation operating same for the sale of wine as defined in G. S. § 18-64, subsection (b). Any person violating this paragraph shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not more than thirty days or fined not more than two hundred dollars (\$200.00). (1939, c. 158, s. 511; 1945, c. 708, s. 6; 1947, c. 1098, s. 1.)

Editor's Note.—The 1945 amendment inserted in lines two and three of the introductory paragraph the words "or wholesale the." It also inserted in lines four and five of the last paragraph the words "and a citizen of the United States." The 1947 amendment inserted the third sentence of the last paragraph.

See § 18-72 and note thereto.

Cited in *Martin v. Holly Springs*, 230 N. C. 388, 53 S. E. (2d) 161.

§ 18-76. County license to sell at retail.

Local Modification.—Avery: 1945, c. 794; Guilford: 1949, c. 1140; Madison: 1945, c. 794; Swain: 1945, c. 961.

§ 18-77. Issuance of license mandatory; sales during religious services.—Except as herein provided it shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article: Provided, the governing board of any county or city which has reason to believe that any applicant for license has, during the preceding license year, committed any act or permitted any condition for which his license was, or might have been revoked under § 18-78 or 18-78.1, said governing board shall be authorized to hold a hearing concerning the issuance of license to said applicant at a designated time and place, of which the applicant shall be given ten days notice; at said hearing the applicant may appear, offer evidence, and be heard, and said governing body shall make findings of fact based on the evidence at said hearing and shall enter said findings in its minutes; if from said evidence the governing body shall find as a fact that during the preceding license year the applicant committed any act or permitted any condition for which his license was, or might have been, revoked under §§ 18-78 and 18-78.1, the governing body may refuse to issue license to said applicant. Provided further, that the applicant may and shall have the right to appeal from an adverse decision to the superior court of said county where and when the matter shall be heard, as by law now provided for the trial of civil actions; that said notice of appeal may be given at the time of the hearing or within ten days thereafter, and said cause upon appeal shall

be docketed at the next ensuing term of civil superior court in said county. Provided, further, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within three hundred feet of a church building outside the incorporate limits of a city or town while church services are in progress: And provided further that this section shall not apply in any territory where the sale of wine and/or beer prohibited by special legislative act. And provided further, that such governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, City of Greensboro in Guilford County, Granville, Vance, Macon and the Town of Aulander, or any municipality therein shall be authorized in their discretion to decline to issue the "on premises" licenses provided for in subsection one of § 18-73. The governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville, Bertie and the town of Aulander or municipalities therein, shall be authorized to prohibit the sale of beer and/or wine between the hours of 12:01 A. M. on Sundays and midnight Sunday night. (1939, c. 158, s. 513; 1939, c. 405; 1945, c. 708, s. 6; cc. 934, 935, 1037; 1947, c. 932.)

Local Modification.—Avery: 1945, c. 794; Bertie: 1949, c. 1059; Madison: 1945, c. 794.

Cross Reference.—For other restrictions on the sale of wine and beer, see §§ 18-105 to 18-107.

Editor's Note.—The first 1945 amendment, effective May 1, 1945, inserted at the beginning of this section the words "Except as herein provided." It also inserted the first two provisos. The second 1945 amendment made a portion of the section applicable to the city of Greensboro. The third and fourth 1945 amendments inserted "Vance" and "Macon" respectively, in the first list of counties appearing in this section.

The 1947 amendment inserted "Bertie" in the list of counties in the last sentence.

For act purporting to extend the provisions of this section to Burke county, see Session Laws 1945, c. 1031.

Cited in *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-78. Revocation or suspension of license; rule making power of state board of alcoholic control.—If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners after the licensee has been given an opportunity to be heard in his defense. Whenever any person, being duly licensed under this article, shall

be convicted of the violation of any of the prohibition laws or of any of the provisions of this article or of any rule or regulation of the state board of alcoholic control on the premises herein licensed, it shall be the duty of the court to revoke said license. Whenever any license which has been issued by any municipality, any board of county commissioners, or by the commissioner of revenue has been revoked, it shall be unlawful to reissue said license for said premises to any person for a term of six months after the revocation of said license.

The state board of alcoholic control shall have the power to adopt, repeal and amend rules and regulations to carry out the provisions of this article and to revoke or suspend the state permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by said board. Whenever there shall be filed with the state board of alcoholic control a certified copy of a judgment of a court convicting a licensee of a violation of the prohibition laws, of any provision of this article or of any rule or regulation issued by said board, said board shall forthwith revoke the permit of such licensee. The revocation or suspension of a permit issued by the state board of alcoholic control shall automatically revoke or suspend any and all state, county and municipal licenses issued to such licensee under the authority of this article, and the revocation or suspension of either a state, county or municipal license shall automatically revoke or suspend any other licenses issued to the licensee under the authority of this article. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14.)

Editor's Note.—The 1949 amendment substituted "state board of alcoholic control" for "commissioner of revenue," and rewrote the second paragraph. Section 17 of the amendatory act provides that it shall apply to all licenses issued for the license year 1949-1950 and thereafter. For brief comment on amendment, see 27 N. C. Law Rev. 463.

As to dismissal of certiorari to review revocation of license by town authorities for violation of this section, see Harney v. Mayor and Board of Com'rs, 229 N. C. 71, 47 S. E. (2d) 535.

§ 18-78.1. Prohibited acts under license for sale for consumption on premises.—No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

(1) Knowingly sell such beverages to any person under eighteen (18) years of age.

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition.

(3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law.

(4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices.

(5) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license. (1943, c. 400, s. 6; 1945, c. 708, s. 6; 1949, c. 974, s. 15.)

Editor's Note.—The 1949 amendment struck out provisions 15 to revocation and suspension of licenses. Section 17

of the amendatory act provides that it shall apply to all licenses issued for the license year 1949-1950 and thereafter. See 27 N. C. Law Rev. 463.

§ 18-81. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages enumerated in § 18-64, subsection (a) of seven dollars and fifty cents (\$7.50) per barrel of thirty-one gallons, or the equivalent of such tax in containers of more or less than thirty-one gallons, and in bottles or other containers of not more than twelve ounces, a tax of two and one-half cents per bottle or container, and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents per bottle or container: Provided fruit cider of alcoholic content not exceeding that provided in this article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent per bottle or container.

(b) The payment of the tax imposed by the preceding subsection shall be evidenced as to containers of one quart, or its equivalent, or less, by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which the tax has been paid at the rate prescribed in the preceding subsection.

(c) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages described in section 18-64, subsection (b) of sixty cents (60 cts.) per gallon. The foregoing tax to apply to naturally fermented wines. The tax on imitation, sub-standard or synthetic wines (as defined in the United States Treasury Regulations) shall be two dollars and forty cents (\$2.40) per gallon.

Unless the Commissioner of Revenue shall by regulation prescribe a method other than the use of tax stamps, the payment of the tax levied in this subsection shall be evidenced by the affixing to the bottles or containers wherein such beverages are offered for sale North Carolina wine taxpaid stamps, which shall be of such design and of such denomination as shall be prescribed by the Commissioner of Revenue; provided, however, that no stamp evidencing the payment of unfortified wine tax shall be of a smaller denomination than six cents (6c). The Commissioner of Revenue shall make arrangements with some manufacturer to manufacture and release wine taxpaid stamps provided for in this section, and said stamps shall be sold at a discount of two per cent (2%) as sole compensation for North Carolina wine taxpaid stamp losses sustained in the process of production of wines, and no compensation or refund shall be made for taxpaid wines given as free goods or advertising or for losses sustained by spoilage and breakage incident to the sale and distribution of wines. The provisions of subsections (c) through (n), inclusive, of this section shall be applicable with respect to the requirement of affixing wine taxpaid stamps to bottles or containers wherein wine is sold, and the words "taxpaid crowns and lids" or similar words used in such subsections shall be taken to include wine taxpaid stamps. The Commissioner of Revenue shall have authority to promulgate rules and regulations relative to the time and manner of affixing wine taxpaid stamps and such other rules and reg-

ulations as may be deemed expedient and proper to carry out and enforce the provisions of this section, and he may require bottlers, jobbers, wholesalers and retailers to render such reports in such form and at such times as in his discretion may be deemed necessary in the proper administration of this section. Any person, firm or corporation violating any of the provisions of this section or any of the rules and regulations issued hereunder shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or by both fine and imprisonment, in the discretion of the court.

The Commissioner of Revenue is hereby authorized and empowered to provide by regulation for the collection of the taxes levied in this subsection by a method other than the use of tax stamps when it appears to the commissioner that said tax may be more conveniently and efficiently collected in some way other than by the use of tax stamps as provided herein.

(s) If any dealer, either at wholesale or retail shall expose for sale or have in his possession either in storage or on display any nontax-paid beverages enumerated under § 18-64 (a) and (b), the commissioner of revenue shall have the authority to revoke any privilege license issued under this article to said dealer and said license shall not be renewed for the balance of the tax year; in addition, the commissioner may refuse to issue new license to such dealer unless the dealer can satisfactorily show to the commissioner of revenue that he will in the future comply with the provisions of this article and the rules and regulations of the commissioner issued under authority hereof.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(t) From the taxes collected annually under subsection (a) and subsection (r) of this section amounts equivalent to one-half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold under the provisions of this article. The amounts distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein as shown by the latest federal decennial census. Where such beverages may be licensed to be sold in both the county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the state: Provided, further, that if said area within a county is a municipality for which the popu-

lation is shown by the latest federal decennial census, reduction of such amounts shall be based on such population rather than on area. The commissioner of revenue shall determine the amounts distributable to each county and municipality, for the period July 1st, 1947, to September 30th, 1947, inclusive, and shall distribute such amounts within sixty (60) days thereafter; and the commissioner of revenue annually thereafter shall determine the amounts distributable to each county and municipality for each twelve-month period ending September 30th and shall distribute such amounts within sixty (60) days thereafter. (1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; 1943, cc. 564, 565; 1945, c. 708, s. 6; 1947, c. 1084, ss. 7-9; 1951, c. 1162, s. 1.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, made changes in subsections (a) and (b). It also made changes in the first paragraph of subsection (r) and inserted subsection (s) immediately before the last paragraph. The 1947 amendment made changes in subsections (a) and (r) and added subsection (t). The 1951 amendment rewrote subsection (r). As subsections (c) through (q) were not affected by the amendments they are not set out.

Section 10 of the 1947 amendatory act provides: "The new tax rates herein provided shall become effective July 1st, 1947, and said rates shall apply to all beverages enumerated in G. S. § 18-64 which are sold or offered for sale after that date, whether shipped into the state prior to that date or not. Prior to the sale after that date of beverages on which has been paid the tax at the rate applicable prior to that date, report shall be made to the commissioner of revenue as to such beverages and the increased tax thereon shall be paid."

§ 18-81.1. Use of funds allocated to counties and municipalities.—The funds allocated to counties and/or municipalities under subsection (t) of § 18-81 may be used by said counties or municipalities as any other general or surplus funds of said unit may be used. (1947, c. 1084, s. 11.)

§ 18-83. Nonresident manufacturers and wholesale dealers to be licensed.—From and after April thirtieth, one thousand nine hundred thirty-nine, every nonresident desiring to engage in the business of making sales of the beverages described in § 18-64, to wholesale dealers licensed under the provisions of this article, shall first apply to the commissioner of revenue for a permit so to do. The commissioner of revenue may require of every such applicant that a bond in a sum not to exceed two thousand dollars (\$2,000.00) be executed by such applicant and deposited with the commissioner, conditioned upon the faithful compliance by such applicant with the provisions of this article, and particularly that such applicant shall not make sales of any of the beverages described in section 18-64 to any person in this state except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars (\$150.00), if the commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of the beverages defined in § 18-64, he shall then issue a permit to such applicant which shall bear a serial number. The license issued under this section to any person who does not have a permit from the board of alcoholic control as provided in this chapter for the sale for resale of beverages described in § 18-64 (b) shall only permit said licensee to engage in the business of selling for resale the beverages

described in § 18-64(a). Every holder of such non-resident permit and license shall thereafter put the number of such permit on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this article, the commissioner of revenue may revoke such permit or license.

Any resident manufacturer licensed under § 18-67 shall not be required to post the bond required by this section. (1939, c. 158, s. 518½; 1945, c. 903, s. 9.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, inserted the fourth sentence.

§ 18-83.1. Resident wholesalers shall not purchase beverages for resale from unlicensed non-residents.—It shall be unlawful for any resident wholesale distributor or bottler to purchase any of the beverages described in § 18-64 for resale within this state from any nonresident who has not procured the permit or license required in the preceding section. (1945, c. 708, s. 6.)

§ 18-85. Tax on spirituous liquors; sale of fortified wines in A. B. C. stores.—In lieu of taxes levied in Schedule E of the Revenue Act on the sale of spirituous liquors, there is hereby levied a tax of eight and one-half per cent (8½%) on the retail price of spirituous distilled liquors of every kind that is sold in this State, including liquors sold in county or municipal liquor stores. Provided, however, that in no event shall the amount paid under this section by county or municipal liquor stores exceed one-half of the net profits from liquors sold through such stores in any county or municipality. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Act, and the liability for such tax shall be subject to all the rules, regulations and penalties provided in Schedule E and in other sections of the Revenue Act for the payment or collection of taxes.

Spirituous liquors as referred to in this section shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-four per cent (24%) by volume.

Fortified wines may be sold in county or municipal alcoholic beverage control stores duly established under the authority of article 3 of this chapter or of any other applicable law. (1939, c. 158, s. 519½; 1941, c. 339, s. 4; 1951, c. 1162, s. 2.)

Editor's Note.—

The 1951 amendment rewrote this section.

§ 18-85.1. Tax on fortified wines.—In addition to other taxes levied in this article, there is hereby levied a tax upon the sale of fortified wines as defined in sections 18-96 and 18-99 of forty cents (40c) per gallon. Unless the Commissioner of Revenue shall by regulation prescribe a method other than the use of tax stamps, the payment of such tax is to be evidenced by the affixing to the bottles or containers wherein such wine is sold of North Carolina wine taxpaid stamps, which stamps shall be of such design and shall be issued in such denominations as may be prescribed by the Commissioner of Revenue; provided, however, that no stamp shall be issued of a lesser de-

nomination than four cents (4c). All of the provisions of subsection (r) of section 18-81 relative to the tax on unfortified wines shall be applicable to the tax levied in this section. Any person, firm or corporation violating any of the provisions of this section or any of the rules and regulations promulgated by the Commissioner of Revenue relative to the administration of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine or imprisonment or by both fine and imprisonment, in the discretion of the court.

The Commissioner of Revenue is hereby authorized and empowered to provide by regulation for the collection of the taxes levied in this section by a method other than the use of tax stamps when it appears to the commissioner that said tax may be more conveniently and efficiently collected in some way other than by the use of tax stamps as provided herein. (1951, c. 1162, s. 3.)

§ 18-88.1. Wine for sacramental purposes exempt from tax.—The tax levied in this article upon the sale of beverages described in § 18-64 (b) shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of § 18-21. (1945, c. 708, s. 6.)

§ 18-89. Administrative provisions.—The commissioner of revenue and the authorized agents of the state department of revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this article that are enumerated in the Revenue Act in administering taxes levied in Schedule B of that act. Any person, firm or corporation engaging in any activity for which a state, county, or municipal license is required under this article without obtaining said license, or continuing any such activity after the expiration of any state, county, or municipal license, granted under this article, shall be subject to the same liability for criminal prosecution, and for penalties, as is prescribed in § 105-109. (1939, c. 158, s. 523; 1945, c. 708, s. 6.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added the second sentence.

§ 18-90.2. Revocation of license upon revocation of permit.—Whenever the state board of alcoholic control shall certify to the commissioner of revenue that any permit issued by said board under the provisions of this chapter has been cancelled or revoked, the commissioner of revenue shall thereupon immediately revoke any license which has been issued under this article to the person whose permit has been revoked by said board, and such revocation by the commissioner shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1945, c. 903, s. 12.)

§ 18-91.1. Persons, firms, or corporations engaged in more than one business to pay on each.—When any person, firm or corporation is engaged in more than one business or trade which is made under the provisions of this article subject to state license taxes, such person, firm, or corporation shall pay the license taxes prescribed in this article for each separate business or trade. (1945, c. 708, s. 6.)

Art. 5. Fortified Wine Control Act of 1941.**§ 18-94. Title of article.**

For subsequent law exempting from its application wines defined in this article, see § 18-49.4.

§ 18-96. Definition of "fortified wines."—Fortified wines shall mean any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume, and which has been approved as to identity, quality and purity by the state board of alcoholic control as provided in this chapter. (1941, c. 339, s. 1; 1945, c. 903, s. 10.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added that part of the section appearing after the word "volume" in line seven.

§ 18-97. Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.—It shall be unlawful for any person, firm or corporation, except alcoholic beverage control stores operated in North Carolina, to sell, or possess for sale, any fortified wines as defined herein. It shall be unlawful for any person to purchase on order and receive by mail or express from any such alcoholic beverage control store fortified wines in quantities in excess of one gallon at any one time. Upon the request of any chief of police or sheriff any alcoholic beverage control system shall furnish the names of any persons ordering such wines, and the dates and amounts of such orders. Nothing herein contained shall be construed to permit any person to order and receive by mail or express any spirituous liquors. (1941, c. 339, s. 2; 1945, c. 635; c. 708, s. 6.)

Editor's Note.—The 1945 amendments struck out the word "not" formerly appearing after the word "quantities" in line eight.

§ 18-99. Application of other laws; sale of sweet wines; licensing of wholesale distributors.—The provisions of article 3 of this chapter shall apply to fortified wines: Provided, in any county in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell sweet wines for consumption on the premises in hotels and restaurants which have a Grade A rating from the state board of health, and it shall be legal to sell said wines in drug stores and grocery stores for off premises consumption; such sales however shall be subject to the rules and regulations of the state alcoholic beverage control board. For the purpose of this section, sweet wines shall be any wine made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume, and approved by the state board of alcoholic control as to identity, quality and purity as provided in this chapter: Provided further that the state alcoholic control board shall approve and authorize the licensing of wholesale wine distributors in such counties where alcoholic board control stores are operated. (1941, c. 339, s. 6; 1945, c. 903, s. 11.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, rewrote the first proviso.

Art. 6. Light Domestic Wines; Manufacture and Regulation.**§ 18-100. Manufacture of domestic wines permitted.**

For subsequent law exempting from its application light wines authorized by this article, see § 18-49.4.

Art. 7. Beer and Wine; Hours of Sale.**§ 18-105. Sale between certain hours unlawful.**

Editor's Note.—This section is implicitly repealed as to the sale of beer by § 18-141, providing that beer may not be sold after 11:00 P. M. 27 N. C. Law Rev. 463.

For comment on this and the three following sections, see 21 N. C. Law Rev. 356.

§ 18-106. Permitting consumption on premises during certain hours unlawful.

Editor's Note.—Nothing in article 12 of this chapter purports to change the hours permissible on premises consumption of beer. 27 N. C. Law Rev. 463.

§ 18-107. Regulation by counties and municipalities.

Local Modification.—Town of Hamlet in Richmond county: 1945, c. 931; Town of Rockingham in Richmond county: 1945, c. 930.

§ 18-108.1. "Beer" defined.—Wherever used in this article, the word "beer" is defined to include beer, lager beer, ale, porter, and other brewed or fermented beverages containing one half (½) of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America. (1945, c. 780.)

Art. 8. Establishment of Standards for Lawful Wine; Permits, etc.

§ 18-109. Powers of state board of alcoholic control.—The state board of alcoholic control shall be referred to herein as "the board". The board is authorized and empowered:

(1) To adopt rules and regulations establishing standards of identity, quality and purity for the wines described in § 18-64 (b) and in article five of this chapter. These standards shall be such as are deemed by said board to best protect the public against wine containing deleterious, harmful or impure substances or elements, or an improper balance of elements, and against spurious or imitation wines and wines unfit for beverage purposes. Provided, nothing in this or in any other section of this article or act shall authorize said board to increase the alcoholic content of the wines described in § 18-64 (b) and in article five of this chapter, or to permit the sale or possession of any wines in any county of the state where the same are now or shall hereafter be prohibited by law.

(2) To issue permits to resident or non-resident manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose of resale, or offering wine for sale for the purpose of resale, whether on their own account or for or on behalf of other persons, which permit shall only authorize the possession or sale in this state of wines meeting the standards adopted by the board; and to revoke any such permit on violation of any of the provisions of this article or of any of the rules and regulations promulgated under the authority of this article.

(3) To test wines possessed or offered for sale, or sold in this state and to make chemical or laboratory analyses of said wines or to determine in

any other manner whether said wines meet the standards established by said board; to confiscate and destroy any wines not meeting said standards; to enter and inspect any premises upon which said wines are possessed or offered for sale; and to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of said wines.

(4) To take all proper steps for the prosecution of persons violating the provisions of this article, and for carrying out the provisions and intent thereof.

(5) To employ such personnel as may be necessary for the efficient administration and enforcement of this article, subject to the provisions of the Executive Budget Act.

(6) To exercise all other powers which may be reasonably implied from the granting of express powers herein, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said board; and to exercise any and all of the powers granted said board under § 18-39 which are needed for the proper administration and enforcement of this article.

(7) The advertisement and sale of wine in this state shall be subject to all existing laws and the following additional authority and powers hereby expressly granted to the board:

(a) The board, in its discretion, may approve or disapprove all forms of advertising of wine, including the type and amount of display material which may be used in the place of business of a retail permit holder;

(b) The board shall have the sole power, in its discretion, to determine the fitness and qualification of an applicant for a permit to sell wine at retail. The board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant;

(c) The board shall have authority, in its discretion, to determine the number of retail permits to be granted in any locality. In addition to the powers herein granted to the state board of alcoholic control, said board is authorized and empowered to adopt rules and regulations regulating and fixing the hours of sale in the several counties and municipalities therein in which wine is authorized to be sold. The board shall not issue a permit hereunder for the sale of wine in any pool room or billiard parlor or in any other place of business, of whatsoever kind and character, if in the discretion of the board, it is not a proper place for the sale of wine;

(d) The board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner;

(e) Every person intending to apply for any permit to sell wine at retail hereunder shall, not more than thirty (30) days and not less than ten (10) days before applying to the board for such permit, make application to the county and municipal authority, as provided for in chapter 18, article IV, of the General Statutes of North Carolina, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation

in the county, city or town wherein such person proposes to engage in such business;

(f) Every person desiring a permit under the provisions of this subsection shall, after publishing notice of his intention as provided in subsection (e) above, file with the board an application therefor on forms provided by the board and a statement in writing and under oath setting forth such information as the board shall require;

(g) Any objections to the issuance of the permit to an applicant shall be filed in writing with the board and the board shall not refuse to grant any such permit except upon a hearing held after ten (10) days' notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to his last known post office address. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by counsel;

(h) All persons holding a license to sell wine at retail at the time of the enactment of this law shall be deemed to have complied with all requirements of the board in filing application for a permit to sell wine at retail, except operators of pool rooms and billiard parlors, but shall be subject to the action of the board in suspension or revocation of licenses, as provided for herein. All permits shall be for a period of one year unless sooner revoked or suspended and shall be renewable May first of each calendar year;

(i) The board shall certify to the department of revenue the names and addresses of all persons to whom the board has issued permits and no license issued to an applicant shall be valid until the applicant has obtained the permit, as provided by this subsection;

(j) The board may suspend or revoke any permit issued by it if in the discretion of the board it is of the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced;

(k) Before the board may suspend or revoke any permit issued under the provisions of this subsection, at least ten (10) days' notice of such proposed or contemplated action by the board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post office address. The board shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel;

(l) The action of the board in refusing to issue a permit or in suspending or revoking same pursuant to the provisions of this subsection shall not be subject to review by any court nor shall any mandamus lie in such case;

(m) In case where the board suspends or revokes a permit, the board shall grant the permittee a reasonable length of time in which to dispose of his stock.

(8) All licenses shall be issued under the provisions of article IV of chapter 18 of the General Statutes. The granting of a permit hereunder to sell wine shall be required in addition to the requirements of article IV of chapter 18 of the General Statutes as to securing a license to sell wine at retail. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3.)

Editor's Note.—The 1947 amendment rewrote the preliminary paragraph and added subsections (7) and (8). Section 3 of the amendatory act provides that the act shall not repeal any special, public-local or private act prohibiting the sale of wine in any county in this state, or any act authorizing the board of commissioners of any county of this state, or the governing board of any municipality, in its discretion, to prohibit the sale of wine; and shall not repeal any act prohibiting the sale of wine by vote of the people of any county or municipality and any county or municipality in which wine is permitted to be sold hereafter under the provisions of article 11 of this chapter.

For discussion of this act, see 23 N. C. Law Rev. 350.

§ 18-110. Duties of persons possessing wine or offering the same for sale.—All persons possessing or offering for sale or reselling any of the wines described in § 18-64 (b) and in article five of this chapter, shall keep clear, complete and accurate records which will reveal the sources from which said wines were acquired, the date of acquisition, and any other information which may be required to be preserved by rules and regulations of the board. All such persons shall freely permit representatives of the board to enter and inspect the premises upon which such wines are possessed or offered for sale, to test and analyze any of such wines, and to examine all books, records, accounts, invoices, or other papers or data relating to such wines. (1945, c. 903, s. 1.)

§ 18-111. Statement of analysis to be furnished.—Manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon the request of the board, furnish a verified statement of a laboratory analysis of any wine sold or offered for sale by such persons. (1945, c. 903, s. 1.)

§ 18-112. Manufacturers, bottlers, wholesalers, et cetera, to obtain permit for sale from board.—All manufacturers of wine, wineries, bottlers of wine, wholesalers of wine, or any other persons selling wine for the purpose of resale, whether on their account or for or on behalf of other persons, whether any of such manufacturers, wineries, bottlers, wholesalers or other persons are residents or nonresidents of this state, shall, as a condition precedent to the sale or the offering for sale of any wine described in § 18-64 (b) and in article five of this chapter, apply for and obtain from the state board of alcoholic control a permit for the sale of wines approved by said board. The sale of wines without such a permit, or the sale with such a permit of wines not approved by the board, shall be unlawful. (1945, c. 903, s. 1.)

§ 18-113. Violation misdemeanor; permit revoked.—Any person who violates any of the provisions of this article, or any of the rules and regulations promulgated under the authority of this

article, shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. Any permit issued under authority hereof shall be subject to suspension or revocation by the board when it appears that the permit holder has violated any of the provisions of this article. Provided, however, that when the board shall determine that any person has violated any of the provisions hereof, before his permit shall be either suspended or revoked, he shall be given five (5) days written notice, by registered mail, advising the permit holder of the charges against him and fixing a day, hour and place for a hearing, which hearing shall be conducted by the board. The permit holder shall be entitled to appear in person or be represented by counsel at such hearing. (1945, c. 903, s. 1.)

§ 18-113.1. Misdemeanor for retailer to sell unapproved wines.—It shall be unlawful for any person selling at retail any of the wines described in § 18-64 (b) and in article five of this chapter, to sell wines, the brands of which are not on the approved list of wines prepared by the state board of alcoholic control, unless specific authority for the sale of said wines has been obtained from said board. It shall be the duty of all retailers to secure from the state board of alcoholic control an approved list of wines and it shall be unlawful for retailers to purchase from manufacturers, wholesalers or distributors any wines not on said approved list, unless specific authority for such purchase is obtained from the state board of alcoholic control.

It shall be unlawful for any person other than a manufacturer, distributor or bottler to buy, or to sell at retail to any one person, more than one gallon of wine at any one time, whether in one or more places.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1945, c. 903, s. 1; 1949, c. 1251, s. 3.)

Editor's Note.—The 1949 amendment inserted the second paragraph. Section 4½ of the amendatory act provides that its provisions shall apply only to the counties and cities that have established or may establish alcoholic beverage control stores.

§ 18-113.2. Types of wine included under provisions of article.—The types of wine included under the provisions of this article shall include all types of wine as defined in G. S. § 18-64 (b) and article 5 of this chapter. (1949, c. 1251, s. 1.)

Editor's Note.—Section 4½ of the act from which this section was codified provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores."

§ 18-114. Funds for administration of article.—The governor and the council of state are authorized to allocate from the contingency and emergency fund such funds for the administration of this article as may be found to be necessary. (1945, c. 903, s. 1.)

§ 18-115. Definition of "person."—As used in this article, the word "person" shall include natural persons, partnerships, associations, joint stock companies, corporations, and any other form of organization for the transaction of business. (1945, c. 903, s. 1.)

§ 18-116. Effective date; disposition of wines on hand.—This article shall be effective from and after the ratification of this article. Provided, no standards adopted by the state board of alcoholic control shall be effective until thirty days after the adoption of the regulation establishing said standards; and provided further, that any person affected by the adoption of any standard by the board shall be granted sixty days after the effective date of the standard within which to dispose of any wines on hand at the effective date of said standard which do not comply with said standard. (1945, c. 903, s. 1.)

Editor's Note.—The act inserting this article was ratified on March 19, 1945.

§ 18-116.1. Additional power of local governing body to suspend or revoke retail wine license.—In addition to the other grounds provided by law for refusing to grant, or for revoking or suspending wine licenses, the governing body of any county or city may revoke or suspend the license of any retail licensee within its jurisdiction for violating any existing law or regulation of the board concerning the sale of wine. In any proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him, and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 1251, s. 4.)

Editor's Note.—Section 4½ of the act adding §§ 18-116.1 to 18-116.5 provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores."

For comment on this and the four following sections, see 27 N. C. Law Rev. 463.

§ 18-116.2. Authority of local A. B. C. boards to revoke or suspend permit or limit sales to A. B. C. stores.—In addition to the authority of the state board, the local A. B. C. boards may, within their respective counties, suspend or revoke any permit for the sale of wine if in the discretion of the local A. B. C. board it is of the opinion that the permittee is not a suitable person to hold such permit, or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced; provided, further, that the local A. B. C. boards shall have and retain at all times the discretionary right to limit, within the territory over which they have jurisdiction, the sale of wine to A. B. C. stores exclusively, if in the opinion of a local A. B. C. board conditions warrant such restriction. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.3. Effect of revocation of license or permit by local authority.—In the event any county or municipality, through its governing body, shall for cause revoke any license, such revocation shall automatically revoke any other wine license or permit held by the licensee; and in all cases where a permit is revoked by the board or a local A. B. C. board, such revocation shall render void any state, county, or municipal license issued hereunder. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.4. Authority of local boards to restrict days and hours of sale of wine.—In addition to the authority of the state board to regulate and fix the days and hours of the sale of wine, the

local A. B. C. boards shall have authority, in their discretion, to further restrict the days and hours of the sale of wine within their respective territories. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.5. Investigation of licensed premises; examination of books, etc., refusal to admit inspector; powers and authority of inspectors; use of A. B. C. officers as inspectors.—All officers, inspectors and investigators appointed by either the state board or local A. B. C. boards shall have authority to investigate the operation of the licensed premises of all persons licensed under this article, to examine the books and records of such licensee, to procure evidence with respect to the violation of this article, or any rules and regulations adopted thereunder, and to perform such other duties as the board may direct. Such inspectors shall have the right to enter any such licensed premises in the state in the performance of their duty, at any hour of the day or night when wine is being sold or consumed on such licensed premises. Refusal by such permittee or by any employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The officers, inspectors and investigators so appointed shall, after taking the oath prescribed for peace officers, have the same powers and authority, including the right to serve all criminal process and to make arrests, as other peace officers.

All alcoholic beverage control officers now employed, or who may hereafter be employed, may be used by the board, or the local A. B. C. boards, as inspectors in counties and cities having alcoholic beverage control stores, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

Art. 9. Substandard, Imitation and Synthetic Wines.

§ 18-117. Possession or sale prohibited.—It shall be unlawful for any retail wine licensee in the state of North Carolina to have in his possession, to sell, or offer for sale any imitation, substandard, or synthetic wine. (1945, c. 974, s. 1.)

§ 18-118. Violation a misdemeanor.—Violation of the provisions of this article shall constitute a misdemeanor and be punishable by a fine or imprisonment in the discretion of the court. (1945, c. 974, s. 2.)

Art. 10. Regulation or Prohibition of Sale of Wine.

§ 18-119. Certain counties authorized to regulate or prohibit sale of wine.—From and after the effective date of this article, the board of county commissioners of Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties shall have full power and authority, by resolution duly adopted, to regulate or prohibit the sale of wine within said respective counties, except that it may not prohibit the sale of wine in any municipality of said counties unless the governing body adopts a resolution prohibiting the sale of wine within the corporate limits of

said municipality. (1945, c. 1076, s. 1; 1947, c. 886, s. 1; c. 918, s. 1.)

Editor's Note.—By Session Laws 1945, c. 961, the commissioners of Swain county, and the governing authority of any municipality therein, may decline to issue any licenses authorized under this chapter for the sale of wine. And by Session Laws 1945, cc. 927, 1092, the commissioners of Bladen county may do the same.

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-120. Municipalities in certain counties authorized to regulate or prohibit sale of wine.—The governing body of any municipality in Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties, from and after the effective date of this article shall have full power and authority, by resolution adopted, to regulate or prohibit the sale of wine within the corporate limits of its municipality. (1945, c. 1076, s. 2; 1947, c. 886, s. 2; c. 918, s. 2.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-121. Rules and regulations.—The board of county commissioners of Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties and/or the governing body of any municipality of said counties may adopt rules and regulations regulating the sale of wine within the territory specified in §§ 18-119 and 18-120, fixing the hours of sale, the places of business to which license may be issued, the location of places of business which may engage in the sale of wine, and pass upon the qualifications of applicants for license and may in its discretion prescribe the terms and conditions upon which a licensee may engage in the sale of wine. (1945, c. 1076, s. 3; 1947, c. 886, s. 3; c. 918, s. 3.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-122. Effective date of resolution prohibiting sale.—Upon the passage or adoption of any resolution as provided in this article, prohibiting the sale of wine, any person, firm, or corporation theretofore licensed to sell wine and having on hand stocks of wine, shall have thirty (30) days from the date of the passage of such resolution in which to dispose of such stock of wine. (1945, c. 1076, s. 4.)

§ 18-123. Violation a misdemeanor.—Any person, firm, or corporation violating the provisions of this article or any resolution adopted by the board of commissioners of either Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties or the governing body of any municipality therein, pursuant to the authority prescribed herein, shall be guilty of a misdemeanor, and upon conviction or confession of guilt, shall be punished in the discretion of the courts. (1945, c. 1076, s. 5; 1947, c. 886, s. 4; c. 918, s. 4.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

Art. 11. Elections on Question of Sale of Wine and Beer.

§ 18-124. Provision for elections in counties or

municipalities.—(a) Compliance with article required.—For the purpose of determining whether or not wine or beer or both shall be sold in any municipality having a population of one thousand (1,000) or more according to the last federal census or within the area of any county outside the corporate limits of such a municipality, an election shall be called within any such municipality or within the county as a whole when, and only when, the conditions of this article are complied with.

(b) Petition requesting election.—Upon the presentation to it of a petition signed by fifteen per cent (15%) of the registered voters of the county that voted for governor in the last election requesting that an election be held for the purpose of submitting to the voters of the county the question of whether or not wine or beer or both shall legally be sold therein, the county board of elections shall call an election for the purpose of submitting said question or questions to the voters of the county.

(c) Requirements concerning petition.—No petition filed pursuant to the provisions of this article shall be considered by the county board of elections unless said petition shall state upon its face that at the election requested by those signing the petition there shall be submitted to the voters (1) the question of the legal sale of wine or (2) the question of the legal sale of beer or (3) the question of the legal sale of both wine and beer. Nor shall any petition be considered unless it states that the signers thereof are registered voters of the county in which the election is requested. The signatures on said petition shall be in the genuine handwriting of the signers, and said petition shall show opposite the name of each signer the correct precinct in which petitioner last voted. Failure to comply with any of the provisions herein shall disqualify the name of said petitioner.

(d) Time of calling election.—The county board of elections shall upon request, prepare and furnish petition forms to any person wishing to circulate a petition calling for an election on beer or wine or both. The board of elections, having had a request for petition forms, shall date such forms and the petition must be completed and returned to the board of elections within ninety (90) days from date of delivery to petitioner. Failure to return such petition in ninety (90) days shall render the same void. It shall also be the duty of the board of elections, upon release of petition forms, to give public notice of the fact that such petition is being circulated. Whenever a petition for an election is presented to the county board of elections, pursuant to the provisions of this article, said board shall within thirty (30) days call the election petitioned for.

(e) Notice and conduct of election.—Thirty days' public notice shall be given of any election called pursuant to the provisions of this article prior to the opening of the registration books for the same, and such election shall be held under the same law and regulations as are provided for the election of members of the general assembly, except that no absentee ballots shall be voted in said election.

(f) Restrictions as to time of election.—No elec-

tion shall be held pursuant to the provisions of this article in any county within sixty (60) days of the holding of any general election, special election, or primary election in said county or any municipality thereof.

(g) Time between elections.—Whenever an election is held pursuant to the provisions of this article in any county, no other election pursuant to the provisions of this article shall be held in such county within three (3) years of the holding of the preceding election pursuant to the provisions of this article: Provided, that this subsection shall not prevent the holding of a municipal election in such county as hereinafter provided within three (3) years of the holding of said county election. (1947, c. 1084, s. 1; 1951, c. 999, ss. 1, 2.)

Local Modification.—Moore, as to subsection (f): 1951, c. 732.

Editor's Note.—Section 5 of the act from which this article was codified provided that no election shall be called pursuant to its provisions within 160 days after its effective date of July 1, 1947.

The 1951 amendment inserted the last two sentences of subsection (c) and rewrote subsection (d). Section 4 of the amendatory act, ratified the 14th day of April, provided "none of the provisions of this act shall apply to Moore county until 120 days after ratification".

For brief discussion of act from which this article was codified, see 25 N. C. Law Rev. 382.

Requisite Signers of Petition.—The requirement that a petition for an election on the question of prohibiting the sale of beer and wine in a county shall be signed by 15% of the registered voters of the county who voted for Governor in the last general election, was held to refer to the total number of votes cast for Governor in such election and does not require that each signer of the petition should have personally voted for gubernatorial candidate in such election. *Weaver v. Morgan*, 232 N. C. 642, 61 S. E. (2d) 916.

Restriction as to Time of Election.—A county may not hold an election on the question of legalizing the sale of beer and wine therein within sixty days from an election in a municipality of the county on the same question, irrespective of the time of making the order calling such election. *Ferguson v. Riddle*, 233 N. C. 54, 62 S. E. (2d) 525.

As this section makes no exceptions as to the requirement that an election on the question of legalizing the sale of beer and wine shall not be held within sixty days of the holding of a municipal election it is always within the power of a municipality in the county, if it sees fit, to render ineffectual a county election on the legal sale of beer and wine by calling a municipal election within the sixty-day period. *Ferguson v. Riddle*, 233 N. C. 54, 62 S. E. (2d) 525.

Cited in *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663.

§ 18-125. Form of ballots.—If such election is called to determine whether or not wine shall be sold within the county, the ballot shall contain the following:

- For the legal sale of wine
- Against the legal sale of wine

If such election is called to determine whether or not beer shall be sold within the county, the ballot shall contain the following:

- For the legal sale of beer
- Against the legal sale of beer

If such an election is called to determine whether or not wine and/or beer shall be sold within the county, the ballot shall contain the following:

- For the legal sale of wine
- Against the legal sale of wine
- For the legal sale of beer
- Against the legal sale of beer

(1947, c. 1084, s. 2.)

§ 18-126. Effect of vote for or against sale of beer or wine.—(a) Vote on sale of beer.—If a majority of the votes cast in such election shall be for the legal sale of beer, then the governing board of the county and the governing board of each municipality in said county shall issue licenses to sell beer as defined in G. S. § 18-64 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of beer, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any beer of more than one-half of one per cent of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of beer.

(b) Vote on sale of wine.—If a majority of the votes cast in such election shall be for the legal sale of wine, then the governing board of the county and the governing board of each municipality in said county shall issue to applicants entitled to same licenses to sell wine as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of wine, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any wine of more than three per cent (3%) of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of wine. (1947, c. 1084, s. 3.)

Where defendant was convicted of the unlawful sale of tax-paid beer in a trial free from error, the solicitor formally admitted that at the time of the sale, defendant possessed and displayed licenses for the sale of beer from the city, county and state, which "were then in full force and effect." The supreme court stayed the judgment, since the judicial admission of the solicitor brought the sale within the protective provisions of the statute and disclosed that no criminal offense had been committed. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663.

§ 18-127. Elections in certain municipalities after majority vote in county against sale of wine or beer.—After the holding of a county election pursuant to the provisions of this article in which a majority of the votes cast is against the legal sale of wine or beer or both, the governing board of any municipality in said county having a popula-

lation of one thousand (1,000) or more according to the last federal census shall call an election to determine whether or not the beverage or beverages, the legal sale of which has been prohibited as a result of said county election, shall legally be sold within the corporate limits of said municipality notwithstanding the results of the county election. An election authorized by this section shall be called by the governing board of the municipality only upon being presented with a petition signed by fifteen per cent (15%) of the registered voters of said municipality that voted for the governing body of such municipality in the last primary or election in whichever voted the greatest number of votes requesting that such election be held.

The petition shall state whether the election is to be held to determine whether or not wine or beer or both is legally to be sold within said municipality, but no election shall be held in said municipality to determine whether or not any beverage is legally to be sold therein unless the sale of such beverage has been prohibited in the county in which said municipality is located. No petition shall be considered unless it complies with this paragraph nor unless it states that the signers thereof are registered voters of the municipality in which the election is requested.

The provisions of this article, including the laws and regulations adopted by reference, relating to county elections, including the provisions relating to the calling of elections, notice of elections, holding of elections, ballots, and results of elections, are hereby in all respects made applicable to any municipal election held pursuant to the provisions of this section except that the county board of elections shall not conduct any such election.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be against the sale of the beverage or beverages voted on, then the sale or possession for the purpose of sale of such beverage or beverages shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court as hereinbefore provided.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be for the sale of the beverage or beverages voted on, then the governing board of said municipality shall issue to applicants entitled to same licenses to sell such beverage or beverages as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes, notwithstanding the result of the county election or any public, special, local or private act to the contrary, whether passed before or after the ratification of this article. (1947, c. 1084, s. 4.)

§ 18-128. Wine for sacramental purposes not prohibited.—Nothing in this article shall prevent the purchase or possession of wine for sacramental purposes by any organized church or ordained minister of the gospel. (1947, c. 1084, s. 6.)

Local Modification.—Dare, Moore and Washington: 1951, c. 257.

§ 18-128.1. Certain wholesalers excepted.—Nothing in this article shall prevent bottlers,

manufacturers or wholesalers of beer, who have complied with Article 12 of Chapter 18 of the General Statutes, from bottling, manufacturing, possessing, transporting or selling beer as a wholesaler to any person, firm or corporation who has complied with the provisions of Article 12 of Chapter 18 of the General Statutes. (1951, c. 998, s. 1.)

Art. 12. Additional Powers of State Board over Malt Beverages.

§ 18-129. Power of state board of alcoholic control to regulate distribution and sale of malt beverages; determination of qualifications of applicant for permit, etc.—The state board of alcoholic control shall be referred to herein as "the board", and said board in addition to all powers now conferred upon it by law is hereby vested with additional powers to regulate the distribution and sale of malt beverages as follows:

The distribution and sale of beer in this state shall be subject to all existing laws and the following additional authority and powers are hereby expressly granted to the board.

The board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture or bottle beer. The board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant. (1949, c. 974, s. 1.)

Editor's Note.—Section 19 of the act from which this article was codified made it effective from and after April 14, 1949.

For comment on this article, see 27 N. C. Law Rev. 463.

§ 18-130. Application for permit; contents.—All resident bottlers or manufacturers of beer and all resident wholesalers and retailers of beer shall file a written application for a permit with the state board of alcoholic control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the state of North Carolina;

(2) The particular place for which the license is desired, designating the same by a street and number if practicable; if not, by such other apt description as definitely locates it; and if said place is outside a municipality within the county, the distance to the nearest church or public or private school from said place;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this state for a period of at least one year immediately preceding the date of filing his application and that he is not less than twenty-one years of age;

(7) The place of birth of applicant and that he is a citizen of the United States, and, if a

naturalized citizen, when and where naturalized;

(8) That the applicant has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either state or federal;

(9) That the applicant has not during five years next preceding the date of said application had any permit or license issuable hereunder or any license issued to him pursuant to the laws of this state, or any other state, to sell alcoholic beverages of any kind revoked;

(10) That the applicant is not the holder of a federal special tax liquor stamp;

(11) If the applicant is a firm, association or partnership, the application shall state the matters required in subsections (6), (7), (8) and (9), with respect to each of the members thereof, and each of said members must meet all of the requirements in said subsections provided;

(12) If the applicant is a corporation, organized or authorized to do business in this state, the application shall state the matters required in subsections (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five per cent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation, and each of said persons must meet all the requirements in said subsections provided; provided, however, that the requirement as to residence shall not apply to said officers, directors and stockholders of such corporation, but such requirement shall apply to any such officer, director or stockholder, agent or employee who is also the manager and in charge of the premises for which permit is applied for. (1949, c. 974, s. 1.)

§ 18-131. Application to be verified; refusal or revocation of permit; penalty for false statement; independent investigation of applicant.—The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The foregoing provisions and requirements are mandatory prerequisites for the issuance of a permit and in the event any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, permit shall be refused. If a permit is granted on any application, containing a false statement knowingly made, said permit shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor and subject to the penalty provided by law for misdemeanors. In addition to the information furnished in any application, the chief of malt beverage division shall make such additional and independent investigation of each applicant, and of the place to be occupied, as deemed necessary or advisable. (1949, c. 974, s. 2.)

§ 18-132. Permit revoked if federal special tax liquor stamp procured.—If an applicant, after obtaining a permit, shall procure a federal special tax liquor stamp, the board shall revoke his permit forthwith. (1949, c. 974, s. 3.)

§ 18-133. Notice of intent to apply for permit; posting or publication of notice; objections to issuance of permit and hearing thereon.—Every

person intending to apply for any permit to sell beer at retail hereunder shall, not more than thirty days and not less than ten days before applying to the board for such permit, give written notice of such intention to the county and municipal authorities in which applicant proposes to maintain his business, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation in the county, city or town wherein such persons propose to engage in such business.

Any objections to the issuance of the permit to an applicant shall be filed in writing with the board and the board shall not refuse to grant any such permit except upon a hearing, if requested in writing by applicant, held after ten days notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to the address given in his application. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by counsel. (1949, c. 974, s. 4.)

§ 18-134. Status of persons holding license at time of ratification of article.—All persons holding a license to sell beer at retail at the time of the ratification of this article shall be deemed to have complied with all the requirements of the board in filing application for a permit to sell beer at retail; provided, however, that such licensee shall make application for a permit in the manner prescribed in this article on or before June 30, 1949, and upon failure to make such application, such license held by such retailer shall be void. (1949, c. 974, s. 5.)

§ 18-135. Certification to department of revenue of permits issued; issuance of license; revocation of permit or license.—The board shall certify to the department of revenue the names, locations and addresses of all persons to whom the board has issued permits, and no license issued to an applicant (subject, however, to the provisions of § 18-134) shall be valid until the applicant has obtained the permit as provided by this article.

Provided, however, that when a permit has been issued by the board the permittee, upon payment of fees now provided by law, shall have license issued to him by the commissioner of revenue and by the governing body of any county or municipality wherein said permittee shall conduct his business. In all cases where a permit is revoked by the board, such revocation shall render void any state, county or municipal license issued hereunder and in the event any county or municipality through its governing body shall for cause revoke any license such revocation shall automatically revoke any other malt beverage license or permit held by the licensee.

Provided, further, however, that the jurisdiction herein conferred upon the board to revoke or suspend permits shall not preclude the governing body of any county or municipality from revoking or suspending the license of any retail licensee within its jurisdiction for violating any existing law regulating the sale of malt beverages or of the provisions of this article. In any

proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 974, s. 6.)

§ 18-136. Suspension or revocation of permit upon personal disqualification, etc.—The board may suspend or revoke any permit issued by it if in the discretion of the board it is the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place. (1949, c. 974, s. 7.)

§ 18-137. Hearing upon suspension or revocation of permit.—Before the board may suspend or revoke any permit issued under the provisions of this article, at least ten days notice of such proposed or contemplated action by the board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post office address. The board shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel. (1949, c. 974, s. 8.)

§ 18-138. Rules and regulations for enforcement of article.—The board is hereby vested with power to adopt rules and regulations for carrying out the provisions of this article, but not inconsistent herewith, and to amend or repeal such regulation. Every regulation or amendment thereto adopted by the board shall become effective on the tenth day after the date of its adoption and the filing of a certified copy thereof in the office of the secretary of state. (1949, c. 974, s. 9.)

§ 18-139. Effect of article on existing local regulations as to sale of beer.—Nothing in this article shall require any county or municipality to issue licenses for any territory where the sale of beer is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of beer is unlawful as a result of local option election, and this article shall not repeal any special, public-local or private act prohibiting the sale of beer in any county in this state, or any act authorizing the board of commissioners of any county of this state, or the governing body of any municipality, in its discretion, to prohibit the sale of beer. (1949, c. 974, s. 10.)

§ 18-140. Chief of malt beverage division and assistants; inspectors.—(a) To more adequately insure the strict enforcement of the regulations of the board and of the provisions of this article, the board shall appoint a person to be known and designated as "chief of malt beverage division", who shall be in charge of the administration of such division. Said board in addition to said chief of malt beverage division may appoint one or more assistants to the chief of the malt beverage division, all of whom shall have full author-

ity to make investigations, hold hearings and to make findings of fact. Upon the approval of the said board of the findings and orders of suspension or revocation of the permit of any licensee, such findings of said chief, assistant or assistants shall be deemed to be the findings and the order of the board. The board shall employ an adequate number of field men to be designated as "inspectors", not less than fifteen in number who shall devote their full time to the enforcement of the provisions of this article and such rules and regulations as may be promulgated thereunder by the board.

(b) Such inspectors shall investigate the operation of the licensed premises of all persons licensed under this article, examine the books and records of such licensee, procure evidence with respect to the violation of this article or any rules and regulations adopted thereunder and perform such other duties as the board may direct. Such inspectors shall have the right to enter any such licensed premises in the state in the performance of their duty at any hour of the day or night. Refusal by such permittee or by any other employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The inspectors so appointed shall, after taking the oath prescribed for peace officers, have the same power and authority in the enforcement of this article as other peace officers.

(c) All alcoholic beverage control officers now employed or who may hereafter be employed may be used by the board as inspectors in counties and cities having alcoholic beverage control stores in addition to the other inspectors provided for under this article, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 974, s. 11; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2.)

Editor's Note.—The first 1951 amendment deleted the words "when beer is being sold or consumed on such licensed premises" formerly appearing at the end of the first sentence of subsection (b). The second 1951 amendment deleted the provisions formerly appearing in subsections (a) and (b) with respect to the compensation of the chief inspector and inspectors.

§ 18-141. Sale and consumption of beer during certain hours prohibited.—No beer shall be sold between the hours of 11:45 P. M. and 7:30 A. M., nor shall any beer be consumed in any place where beer is sold between the hours of 12 o'clock midnight and 7:30 A. M. (1949, c. 974, s. 12; 1951, c. 997, s. 1.)

Editor's Note.—The 1951 amendment changed the hour "11:00 P. M." to "11:45 P. M." Prior to the amendment this section prohibited sales only.

Effect on § 18-105.—Section 18-105, which prohibits the sale of beer and/or wine after 11:30 P. M., is implicitly repealed as to the sale of beer by the provision in this section that beer may not be sold after 11:00 P. M. Nothing in this article, however, purports to change the hours of permissible on premises consumption of beer, which are set by § 18-106 at 7:00 A. M. to 12:00 midnight. 27 N. C. Law Rev. 463.

§ 18-142. Keeping places of business clean, etc.—The board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner. (1949, c. 974, s. 13.)

§ 18-143. Appropriation for malt beverage division.—For the efficient administration and enforcement of this article, an appropriation is here-

by made for the use of the state board of alcoholic control, which appropriation shall be in addition to the appropriation to the state board of alcoholic control in the biennial appropriation acts, of a sum in an amount not less than three per cent (3%) and not more than five per cent (5%) of the total malt beverage taxes collected by the commissioner of revenue, the percentage within the limitations herein provided to be determined by the state board of alcoholic control and certified to the director of the budget. The appropriation herein provided shall be deducted before the distribution as provided under subsection (t) of § 18-81, G. S., is made. The director of the budget shall estimate the amount of the appropriation to be provided by the percentage of collections requested by state board of alcoholic control and shall make advance allocation based upon such estimate, and the enforcement fund provided by such appropriation shall be set up in a special fund to be designated as "the malt beverage control and enforcement fund". (1949, c. 974, s. 16.)

§ 18-144. **Application of article.**—This article shall apply to all licenses to be issued for the license tax year 1949-1950 and thereafter. (1949, c. 974, s. 17.)

Art. 13. Wholesale Malt Beverage Salesman's Permit.

§ 18-145. **Permit required; renewal.**—Every salesman for a wholesale distributor of malt beverages shall apply, by May 1, 1951, to the board for a wholesale salesman's permit to sell such beverages, and shall renew the permit by May 1 of each succeeding year thereafter. This shall be deemed to include salesmen stationed at the wholesaler's warehouse as well as route salesmen who sell and deliver malt beverages to retailers. All persons entering such employment after May 1, 1951, shall apply to the board in like manner for a salesman's permit. (1951, c. 378, s. 1.)

§ 18-146. **Qualifications of applicant.**—Such salesman shall be 21 years of age, a citizen of the United States, and no salesman's permit shall be issued to any person who has been convicted within two years preceding the filing of his application of violating the State or federal prohibition laws, or who has been convicted of a felony or of any crime involving moral turpitude. No salesman's permit shall be issued to any person whose permit or license issued to him pursuant

to the laws of this State or any other state to sell alcoholic beverages of any kind has been revoked during the two years next preceding the date of application for a permit. (1951, c. 378, s. 2.)

§ 18-147. **Salesmen licensed at time of ratification of article.**—All persons holding a malt beverage salesman's license on March 27, 1951 shall be deemed to have complied with all the requirements of the board in filing application for a permit to sell malt beverages at wholesale, except in cases where the board upon investigation finds as a fact that the holder of such a license is an undesirable person to be engaged in the beer business. (1951, c. 378, s. 3.)

§ 18-148. **License invalid until permit obtained.**—The board shall certify to the Department of Revenue the names, locations, and addresses of all persons to whom the board has issued wholesale salesman's permits, and no license issued to an applicant shall be valid until the applicant has obtained a permit as provided by this article. (1951, c. 378, s. 4.)

§ 18-149. **Suspension and revocation; acting without permit a misdemeanor.**—The board may suspend or revoke any permits issued by it if the salesman holding such permit is adjudged guilty by the board of violating any of the North Carolina laws or regulations pertaining to the sale of malt beverages; any person who shall engage in the wholesale sale or distribution of malt beverages as a salesman without a permit from and after May 1, 1951, shall be guilty of a misdemeanor or fined or imprisoned, or both, in the discretion of the court. (1951, c. 378, s. 5.)

§ 18-150. **Salesman responsible for acts of helper.**—Each route salesman shall be responsible under this article for all sales and deliveries of malt beverages by his helper. (1951, c. 378, s. 6.)

§ 18-151. **Hearing.**—Permit holders cited for violation by the board shall have the right to a hearing as provided by law in G. S. 18-137. (1951, c. 378, s. 7.)

§ 18-152. **Employing salesman who has no permit.**—No wholesale distributor of malt beverages shall after May 1, 1951, employ as a salesman any person who does not have a salesman's permit, and the permits of wholesale distributors violating the provisions of this section shall be subject to revocation or suspension by the board. (1951, c. 378, s. 8.)

Chapter 19. Offenses against Public Morals.

§ 19-1. What are nuisances under this chapter.

—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey, or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are

also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 25; 1949, c. 1164; C. S. 3180.)

Editor's Note.—The 1949 amendment inserted in lines five and six the words "or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act."

Applied in State v. Lancaster, 228 N. C. 157, 44 S. E. (2d) 733.

Cited in State v. Alverson, 225 N. C. 29, 33 S. E. (2d) 135; State v. Gordon, 225 N. C. 241, 249, 34 S. E. (2d) 414 (con. op.).

§ 19-2. Action for abatement; injunction.

Public Nuisances.—This and the following sections are

not applicable to proceedings brought to abate a public nuisance as defined by § 90-103. *State v. Townsend*, 227 N. C. 642, 44 S. E. (2d) 36.

Procedure Cannot Be Invoked against Alcoholic Control Board.—It was never intended that the procedure here invoked to abate a nuisance should be applied against an alcoholic control board set up under color of legislative authority, or against one who rents a building to such a

board for the purpose of operating a liquor control store. *State v. Lancaster*, 228 N. C. 157, 158, 44 S. E. (2d) 733.

The proceeding by a citizen in the name of the state for injunction, the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. *State v. Alverson*, 225 N. C. 29, 33 S. E. (2d) 135.

Chapter 20. Motor Vehicles.

Art. 2. Uniform Driver's License Act.

- Sec.
20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.
20-13. [Repealed.]
20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.
20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.
20-36. [Repealed.]

Art. 2A. Operators' Licenses and Registration Plates for Afflicted or Disabled Persons.

- 20-37.1. Motorized wheel chairs or similar vehicles.

Art. 3. Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

- 20-53. Application for specially constructed, reconstructed, or foreign vehicle; inspection of foreign vehicles before registration.
20-64.1. Revocation of license plates by Utilities Commission.
20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

Part 4. Transfer of Title or Interest.

- 20-77. Transfer by operation of law; liens.

Part 5. Issuance of Special Plates.

- 20-81.1. Special plates for operators of amateur radio stations.

Part 6. Vehicles of Nonresidents of State, etc.

- 20-84.1. Permanent plates for city busses.

Part 7. Title and Registration Fees.

- 20-91.1. Taxes to be paid; suits for recovery of taxes.
20-91.2. Overpayment of taxes to be refunded with interest.
20-99. Remedies for the collection of taxes.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

- 20-117.1. Equipment required on all semi-trailers operated by contract carriers or common carriers of property.
20-118.2. Authority to fix higher weight limitations at reduced speeds for certain vehicles.
20-120. Operation of flat trucks on state highways regulated; trucks hauling leaf tobacco in barrels or hogsheads.
20-136.1. Location of television viewers.

Sec.

- Part 10. Operation of Vehicles and Rules of the Road.
20-140.1. Reckless driving upon driveways of public or private institutions, etc.
20-141.1. Restrictions in speed zones near rural public schools.
20-166. Duty to stop in event of accident; accident reports.

Part 11A. Blind Pedestrians—White Canes or Guide Dogs.

- 20-175.1. Public use of white canes by other than blind persons prohibited.
20-175.2. Right-of-way at crossings, intersections and traffic control signal points; white cane or guide dog to serve as signal for the blind.
20-175.3. Rights and privileges of blind persons without white cane or guide dog.
20-175.4. Violations made misdemeanor.

Part 12. Penalties.

- 20-180. Penalty for speeding and reckless driving.

Art. 3A. Motor Vehicle Law of 1947.

Part 1. Safe Use of Streets and Highways.

- 20-183.1. Rights, privileges and duties; declarations of policy.

Part 2. Inspection of Motor Vehicles.

- 20-183.2 to 20-183.8. [Repealed.]

Art. 3B. Permanent Weighing Stations and Portable Scales.

- 20-183.9. Establishment and maintenance of permanent weighing stations.
20-183.10. Operation by department of motor vehicles; uniformed personnel with powers of peace officers.
20-183.11. Refusal of operator to cooperate in weighing vehicle; removal of excess portion of load.
20-183.12. Portable scales.

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

- 20-197 to 20-211. [Repealed.]

Art. 7. Miscellaneous Provisions Relating to Motor Vehicles.

- 20-217. Motor vehicles to stop for school, church and Sunday school busses in certain instances.
20-218.1. [Repealed.]

Art. 8. Sales of Used Motor Vehicles Brought into State.

- 20-220 to 20-223. [Repealed.]

Art. 9. Motor Vehicle Safety and Financial Responsibility Act.

- Sec.
 20-224. Title.
 20-225. Purposes and construction of article.
 20-226. Definitions.
 20-227. Motor vehicle liability policy defined; provisions and requisites of policy; coverage, etc.
 20-228. Commissioner authorized to adopt regulations and administer article.
 20-229. When article does not apply.
 20-230. Proof of financial responsibility must be given when driver's license is suspended or revoked.
 20-231. Revocation of license and registration certificates and plates upon conviction of certain offenses; provisions for reinstatement when proof of financial responsibility given.
 20-232. Revocation of licenses of mental incompetents and inebriates; procedure.
 20-233. Appeal from action of commissioner; review by court of record; effect.
 20-234. Revocation or suspension of license, etc., for failure to satisfy judgment.
 20-235. Judgment specifically defined.
 20-236. Commissioner's duty to revoke or suspend license, etc.
 20-237. When judgment deemed satisfied; credits on judgment.
 20-238. Installment payments on judgment by order of court.
 20-239. Installments in default; licenses, etc., subject to revocation and suspension.
 20-240. Effect of court order permitting installment payments.
 20-241. Judgment creditor may consent to issuance or renewal of licenses pending satisfaction of judgment, upon proof of financial responsibility.
 20-242. Proof of financial responsibility required of unlicensed person at fault in accident.
 20-243. State responsible for safekeeping of deposits held by treasurer under this article.
 20-244. Bankruptcy listing of claim for damages does not relieve judgment debtor hereunder.
 20-245. Applicable to resident and nonresident alike.
 20-246. Commissioner to transmit record of conviction in North Carolina to officials of home state of nonresident.
 20-247. Suspension or revocation upon conviction or adverse judgment against North Carolina resident in out-of-state court.
 20-248. Proof of financial responsibility by owner on behalf of chauffeur or member of household.
 20-249. Proof of financial responsibility on behalf of another by owner who holds certificate from utilities commission.
 20-250. Revoked and suspended licenses, certificates and plates to be surrendered to commissioner; penalty for failure.
 20-251. Proof of financial responsibility specifically defined.
 20-252. Proof of financial responsibility; how made.

Sec.

- 20-253. Nonresidents; how proof of financial responsibility established.
 20-254. Nonresident may elect to file certificate of insurance carrier authorized to transact business in this state; default of foreign insurance carriers; effect.
 20-255. Liability under other statutes not affected; article not applicable to certain policies.
 20-256. Bond as proof of financial responsibility.
 20-257. Nature of bond required; sureties.
 20-258. Conditions of bond to conform to those of motor vehicle liability policy.
 20-259. Cancellation of bond; notice required.
 20-260. Bond constitutes a lien in favor of state; notice of cancellation; recordation of bond.
 20-261. Release of bond by commissioner; certificate of cancellation.
 20-262. Discharge of lien of bond by order of court.
 20-263. Judgment creditor may sue on bond or proceed against parties to bond, if judgment unsatisfied.
 20-264. Deposit of cash or securities as proof of financial responsibility.
 20-265. State treasurer custodian of deposits; depletion of deposits; duties of treasurer.
 20-266. Cancellation or substitution of bond or certificate of insurance; legal determination of disputes as to ownership or liability.
 20-267. Commissioner must require replacement of unsatisfactory proof of financial responsibility.
 20-268. When commissioner may consent to cancellation or release of bonds, policies, funds or securities; waiver of requirement of proofs of financial responsibility.
 20-269. When commissioner may not release proof.
 20-270. Re-establishment of proof as requisite to reissuance of license.
 20-271. Commissioner to furnish abstract of record of license.
 20-272. Operation of motor vehicle while revocation or suspension of license, etc., in effect; penalties.
 20-273. Forgery of evidence of ability to respond in damages; penalties.
 20-274. Additional penalties.
 20-275. Self-insurers.
 20-276. Assignment of risk.
 20-277. Judgments subsequently obtained arising out of accidents prior to effective date of article unaffected.
 20-278. Clerk of court required to furnish abstract of convictions and judgments.
 20-279. Other remedies unaffected.

Art. 10. Financial Responsibility of Taxicab Operators.

- 20-280. Filing proof of financial responsibility with governing board of municipality or county.

Art. 1. Department of Motor Vehicles.

- § 20-1. Department of motor vehicles created; powers and duties.—A department of the gov-

ernment of this state, to be known as the department of motor vehicles, is hereby created. It is the intent and purpose of this article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the department of motor vehicles agencies now operated under the department of revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the commissioner of revenue or by the motor vehicle bureau, the auto theft bureau, the division of highway safety, the major of the state highway patrol, the officials handling the Uniform Driver's License Act; and the department of motor vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all powers, duties and functions relating to the collection of motor fuel taxes, and the collection of the gasoline and oil inspection taxes, shall continue to be vested in and exercised by the commissioner of revenue, and wherever it is now provided by law that reports shall be filed with the commissioner or department of revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the department of revenue and the commissioner of motor vehicles shall make available to the commissioner of revenue all information from the files of the department of motor vehicles which the commissioner of revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this article shall deprive the utilities commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1; 1949, c. 1167.)

Editor's Note.—The 1949 amendment made changes rendered necessary by reason of the transfer of the administration of the gasoline and oil inspection law to the department of agriculture.

For acts, relating to parking meters not affected by this chapter, see Session Laws 1947, c. 54 (city of Shelby); c. 66 (town of Laurinburg); c. 675 (city of Statesville); c. 735 (town of Mooresville); c. 1035 (Cabarrus county). And see Session Laws 1949, relating to city of Statesville.

§ 20-2. Commissioner of motor vehicles.—The department of motor vehicles shall be under control of an executive officer to be designated as the commissioner of motor vehicles, who shall be appointed by the governor and be responsible directly to the governor and subject to removal by the governor at his discretion and without requirement of the assignment of any cause. The commissioner shall be paid an annual salary to be fixed by the governor, with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business.

In any action, proceeding, or matter of any kind, to which the commissioner of motor vehicles is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the assistant commissioner on be-

half of the commissioner. (1941, c. 36, s. 2; 1945, c. 527.)

Editor's Note.—The 1945 amendment added the second paragraph.

Art. 2. Uniform Driver's License Act.

§ 20-6. Definitions.

"Revocation" shall mean that the licensee's privilege to drive a vehicle is terminated for the period stated in the order of revocation.

(1951, c. 1202, s. 1.)

Editor's Note.—

The 1951 amendment rewrote the definition of "revocation". As the rest of the section was not affected by the amendment, it is not set out.

Quoted in *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632.

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees. — (a) Except as otherwise provided in § 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the department under the provisions of this article. Except as otherwise provided in § 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the department under the provisions of this article.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the department.

(c) No person shall hereafter be issued an operator's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles over the highways of the state. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the state, the department shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the department may require.

(d) The department shall cause each person who has heretofore been issued an operator's license to be examined or re-examined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the state. Those persons found, as a result of such examination or re-examination, to be capable of safely operating motor vehicles over the highways of the state shall be reissued operators' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the state shall not be reissued operators' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the department may require. The department may once reissue operators' licenses without examination to licensed operators who have passed an operator's examination given by the department subsequent to July 1st, 1945, and prior to July 1st, 1947.

(e) The department is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a

motor vehicle, the department may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the department. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the department from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The operators' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within sixty days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this article, the department shall issue a new license to him. A new license issued within sixty days prior to the expiration of an applicant's old license or within twelve months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

(g) Every chauffeur's license issued under this section shall automatically expire on the birthday of the licensee in the year following the year of issuance, and chauffeurs shall renew their licenses annually after an examination which may include road tests, oral and, in the case of literate applicants, written tests, and tests of vision as the department may require: Provided, that the commissioner may, in proper cases, waive the examination required by this subsection: Provided, further, that no chauffeur's license issued hereunder shall expire in less than six months from the date of issuance.

(h) Upon receipt of information that the physical or mental condition of any person has changed since his or her examination for an operator's or chauffeur's license and before a new examination is required by this section, the department may, after ten (10) days' written notice, require such person to take another examination to determine his or her capability to operate safely motor vehicles over the highways of the state. If such person is found to be capable of safely operating vehicles over the highways of the state, license shall be reissued to him or her and no fee shall be collected by the department for such examination and reissuance of license. If such person is found to be incapable of safely operating vehicles over the highways of the state, no license shall be issued or reissued to him or her unless such person shall subsequently pass an examination given by the department.

(i) For the examination and issuance or reissuance of an operator's or chauffeur's license or the reissuance of an operator's or chauffeur's license without an examination, the licensee shall pay to the department a fee of two dollars (\$2.00).

(j) The fees collected under this section and § 20-14 shall be placed in a special fund to be

designated the "Operators' and Chauffeurs' License Fund" and shall be used under the direction and supervision of the assistant director of the budget for the administration of this section.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(l) Any person who, except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this article, may apply for a temporary learner's permit, and the department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of thirty (30) days, during daylight hours. Any such learner's permit may be renewed, or a new permit issued for an additional period of thirty (30) days. Such person must, while operating a motor vehicle over the highways, be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

(m) Every operator's or chauffeur's license issued by the department shall bear thereon the distinguishing number assigned to the licensee and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(n) All operators' licenses issued by the department of motor vehicles prior to July 1, 1947 shall expire as follows and the holders thereof shall not be permitted to operate motor vehicles over the highways of North Carolina unless they secure new operators' licenses as required by law:

(1) A license issued to a person whose last or surname begins with the letter "A" or the letter "B" shall expire April 6, 1949;

(2) A license issued to a person whose last or surname begins with the letter "C" or the letter "D" shall expire April 6, 1949;

(3) A license issued to a person whose last or surname begins with the letters "E", "F" or "G" shall expire April 6, 1949;

(4) A license issued to a person whose last or surname begins with the letters "H", "I", "J" or "K" shall expire at midnight, June 30, 1949;

(5) A license issued to a person whose last or surname begins with the letter "L" or the letter "M" shall expire at midnight, December 31, 1949;

(6) A license issued to a person whose last or surname begins with the letters "N", "O", "P" or "Q" shall expire at midnight, June 30, 1950;

(7) A license issued to a person whose last or surname begins with the letters "R", "S" or "T" shall expire at midnight, December 31, 1950;

(8) A license issued to a person whose last or surname begins with the letters "U", "V", "W",

"X", "Y" or "Z" shall expire at midnight, June 30, 1951.

(o) The punishment for a violation of this section shall be a fine of not less than twenty-five dollars (\$25.00) or imprisonment for not less than thirty (30) days, or both such fine and imprisonment, in the discretion of the court: Provided, that no person whose operator's license has expired shall be convicted of operating a motor vehicle without an operator's license if he produces in court a valid new operator's license issued to him within thirty days after the expiration of his prior license. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendments inserted present subsections (m) and (n), renumbered former subsection (m) as (o) and deleted the former provision of subsection (a) relating to the operation of a motor vehicle while under instruction of and accompanied by a licensed operator.

The first 1951 amendment rewrote subsections (a) and (g). The second 1951 amendment added the last two sentences to subsection (f), the second proviso to subsection (g) and the proviso to subsection (o).

Driving without a License Is Negligence Per Se.—Under this section it is negligence per se for one to drive a motor vehicle without a license, but such negligence must be the proximate cause of injury in order to be actionable. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-9. What persons shall not be licensed.

(f) The department shall not issue an operator's or chauffeur's license to any person whose license is in a state of revocation or suspension in any state of which such person was a resident at the time of the suspension or revocation of his license. (1935, c. 52, s. 4; 1951, c. 542, s. 3.)

Editor's Note.—

The 1951 amendment added subsection (f) at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Cited in *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-10. Age limits for drivers of public passenger-carrying vehicles.—It shall be unlawful for any person, whether licensed under this article or not, who is under the age of twenty-one years to drive a motor vehicle while in use as a public passenger-carrying vehicle.

No person fourteen years of age or under, whether licensed under this article or not, shall operate any road machine, farm tractor or motor driven implement of husbandry on any highway within this State. Provided any person may operate a road machine; farm tractor, or motor driven implement of husbandry upon a highway adjacent to or running in front of the land upon which such person lives when said person is actually engaged in farming operations. (1935, c. 52, s. 5; 1951, c. 764.)

Editor's Note.—The 1951 amendment added the second paragraph.

§ 20-13: Repealed by Session Laws 1947, c. 1067, s. 11.

§ 20-16. Authority of department to suspend license.—(a) The department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which manda-

tory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver, and where such property damage has not been compensated for;

3. Is an habitually reckless or negligent driver of a motor vehicle;

4. Is incompetent to drive a motor vehicle;

5. Is an habitual violator of the traffic laws;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation;

8. Has been convicted of illegal transportation of intoxicating liquors;

9. Has, within one (1) year, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour; or

10. Has been convicted of operating a motor vehicle at a speed in excess of seventy-five (75) miles per hour.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this state, no driver's or chauffeur's license shall be suspended by the department of motor vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may, except as provided in section 20-231, require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2.)

Editor's Note.—The first 1947 amendment added the last clause of paragraph 2 of subsection (a) and made changes in former subsection (b). The second 1947 amendment added paragraphs 9 and 10 to subsection (a).

The first 1949 amendment inserted the present subsection (b) and redesignated former subsection (b) as subsection (c). The second 1949 amendment inserted in line sixteen of subsection (c) the words "except as provided in section 20-231." For brief discussion of these amendments, see 27 N. C. Law Rev. 371, 372.

Judgment in Excess of Jurisdiction of Superior Court.—A judgment of the Superior Court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period,

is in excess of the jurisdiction of such court and is void. *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18.

Power to suspend or revoke a driver's license is exclusively in the department of motor vehicles subject to review by the superior court. *State v. Warren*, 230 N. C. 299, 52 S. E. (2d) 879.

Discretionary suspensions and revocations of licenses by the department of motor vehicles are reviewable under § 20-25, but mandatory revocations under § 20-17 are not so reviewable. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696. See *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18.

Construed with § 20-23.—This section and § 20-23 are parts of the same statute relating to the same subject matter and must be construed in *pari materia*. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696.

The language of subsection (7) of this section and § 20-23 is almost identical. This section is the real source of authority. The latter section prescribes a rule of evidence and adds the power of revocation, when this section is the basis of action. *Id.*

Conviction of Drunken Driving in Another State.—Upon a receipt of notification from the highway department of another state that a resident of this state had there been convicted of drunken driving, the department of motor vehicles has the right to suspend the driving license of such person. In *re Wright*, 228 N. C. 301, 45 S. E. (2d) 370.

A provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal. *State v. Warren*, 230 N. C. 299, 52 S. E. (2d) 879.

§ 20-17. Mandatory revocation of license by department.—The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.
3. Any felony in the commission of which a motor vehicle is used.
4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident.
5. Perjury or the making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership of motor vehicles.
6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.
7. Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale. (1935, c. 52, s. 12; 1947, c. 1067, s. 14.)

Cross Reference.—As to power to suspend or revoke license generally, see § 20-16 and note.

Editor's Note.—Prior to the 1947 amendment this section was divided into subsections (a) and (b). The amendment struck out subsection (b) relating to extension of period of suspension or revocation.

Review of Revocation.—Mandatory revocations under this section are not reviewable under § 20-25. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696.

Evidence that defendant had been convicted for operating an automobile while under the influence of intoxicants, was competent on the question as to whether a driver's license issued to defendant had been legally revoked. *State v. Stewart*, 224 N. C. 528, 31 S. E. (2d) 534.

§ 20-19. Period of suspension or revocation.—(a) When a license is suspended under paragraph 9 of § 20-16, the period of suspension shall be not less than sixty (60) days nor more than six (6) months, as may seem just and proper to the department.

(b) When a license is suspended under paragraph 10 of § 20-16, the period of suspension shall be not less than six months and not more than one year.

(c) When a license is suspended under any other provision of law, the period of suspension shall be not more than one year.

(d) When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, the period of revocation shall be three years.

(e) When a license is revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug, the revocation shall be permanent: Provided, that the department may, after the expiration of five years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past five years, and that his conduct and attitude is such as to entitle him to favorable consideration.

(f) When a license is revoked for any other reason, the period of revocation shall be one year. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4.)

Editor's Note.—The 1947 amendment rewrote this section. The 1951 amendment rewrote subsections (d), (e) and (f).

§ 20-23. Suspending resident's license upon conviction in another state.

Construed with § 20-16.—See note to § 20-16.

And § 20-25.—This section and § 20-25 must be construed in *pari materia*. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696.

Conviction of Drunken Driving.—Upon a receipt of notification from the highway department of another state that a resident of this state had there been convicted of drunken driving, the department of motor vehicles has the right to suspend the driving license of such person. In *re Wright*, 228 N. C. 301, 45 S. E. (2d) 370.

Notice May Be from Any Source.—This section does not limit the notice of conviction in another state, upon which the department may act, to notice from a judicial tribunal or other official agency. Under the wording of the statute, from whatever source the notice may come, the department may act. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696.

§ 20-24. When court to forward license to department and report convictions.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's ap-

pearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4.)

Editor's Note.—The 1949 amendment repealed former subsection (d) and redesignated former subsection (e) as subsection (d).

Meaning of Forfeiture of Bail or Collateral.—"Bail" as here used means security for a defendant's appearance in court to answer a criminal charge there pending. Ordinarily it is evidenced by a bond or recognizance which becomes a record of the court. The forfeiture thereof is a judicial act. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

The mere deposit of security with an arresting officer or magistrate pending issuance and service of warrant, which deposit is retained without the semblance of judicial or legal forfeiture is not a forfeiture of "bail" within the meaning of subsection (c) of this section. Id.

§ 20-25. Right of appeal to court.

By the 1941 Act, chapter 36, the power to suspend or revoke drivers' licenses after July 1, 1941, vested exclusively in the newly created Department of Motor Vehicles, subject to the same right of review by the Superior Court as existed prior to that date. State v. Cooper, 224 N. C. 100, 101, 29 S. E. (2d) 18.

Construed with § 20-23.—This section and § 20-23 must be construed in pari materia. In re Wright, 288 N. C. 584, 46 S. E. (2d) 696.

The jurisdiction vested by this section is not a delegation of legislative and administrative authority. The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

And failure of the section to provide standards for the guidance of the courts does not invalidate it or negate the jurisdiction. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Such jurisdiction is not the limited, inherent power of courts to review the discretionary acts of an administrative officer. The power is conferred by statute, and the statute must be looked to in order to ascertain the nature and extent of the review contemplated by the legislature. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

The Section Imposes Additional Jurisdiction.—The court has inherent authority to review the discretionary action of an administrative agency, whenever such action affects personal or property rights, upon a prima facie showing, by petition for a writ of certiorari, that such agency has acted arbitrarily, capriciously, or in disregard of law. This section dispenses with the necessity of an application for writ of certiorari, provides for direct approach to the courts and enlarges the scope of the hearing. That the legislature had full authority to impose this additional jurisdiction upon the courts is beyond question. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

But no discretionary power is conferred upon the court in reviewing the suspension or revocation of driving licenses, and the court may determine only if, upon the facts, petitioner's license is subject to suspension or revocation under the provisions of the statute. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Discretionary suspensions and revocations of driving licenses by the department of motor vehicles are reviewable under this section. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696; State v. Cooper, 224 N. C. 100, 29 S. E. (2d) 18.

By Trial De Novo.—All suspensions, cancellations and revocations of driving licenses made in the discretion of the department of motor vehicles, whether under §§ 20-16, 20-23 or any other provision of this chapter, are reviewable by trial de novo. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

The hearing in the superior court is de novo, and the court is not bound by the findings of fact or the conclusion of law made by the department. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

But mandatory revocations under § 20-17 are not reviewable. And no right accrues to a licensee who petitions for a review of the order of the department when it acts under the terms of § 20-17, for then its action is mandatory. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Hearing by Department Is Prerequisite to Court Review.—Section 20-16(b) provides for a rehearing by the department of motor vehicles upon application of a licensee whose license has been suspended, and this procedure should be

followed and should be made to appear in the petition before review by the superior court. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

Cancellation of Suspension.—Petitioner was arrested in South Carolina charged with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him and no trial had, and his bond was forfeited. His license was suspended by the department of motor vehicles upon information of the highway department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the superior court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact was not guilty. It was held that the findings supported the court's order directing the respondent to cancel the suspension and to restore license to petitioner. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

§ 20-28. Unlawful to drive while license suspended or revoked.—(a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than two hundred dollars (\$200.00) or imprisonment in the discretion of the court, or both such fine and imprisonment. In addition, the defendant's license shall be suspended or revoked, as the case may be, for an additional period of double the period of the suspension or revocation in effect at the time of his or her apprehension for a violation of this section.

(b) Any person whose license has been permanently revoked, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is permanently revoked shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16.)

Editor's Note.—The 1945 amendment substituted "shall" for "may" in line six. The 1947 amendment rewrote this section.

Intent Immaterial.—The operation of a motor vehicle upon the highways of the State by a person whose driver's license has been revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. State v. Correll, 232 N. C. 696, 62 S. E. (2d) 82.

§ 20-29. Surrender of license.—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. Pickup notices for operators' or chauffeurs' licenses or revocation or suspension of license notices and orders or demands issued by the department for the surrender of such licenses may be served and executed by patrolmen or

other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7.)

Editor's Note.—The 1949 amendment added the second sentence.

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.—The commissioner of motor vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the suspension or revocation of his license. The commissioner may, in his discretion and upon the written application of any persons qualified to receive an operator's or chauffeur's license, issue to such person an operator's or chauffeur's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any chauffeur's or operator's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted operator's or chauffeur's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121.)

Editor's Note.—The 1949 amendment added the provisions pertaining to the issuance of limited or restricted licenses.

§ 20-30. Violations of license provisions.

(f) To photostat or otherwise reproduce an operator's or chauffeur's license or to possess an operator's or chauffeur's license which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the commissioner. (1935, c. 52, s. 24; 1951, c. 542, s. 4.)

Editor's Note.—The 1951 amendment added subsection (f). As the rest of the section was not affected by the amendment it is not set out.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle.

Instruction.—An instruction to the effect that it would be negligence per se for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held liable unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, was held sufficient to cover this as-

pect of the case. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 414, 42 S. E. (2d) 593.

§ 20-34. Unlawful to permit violations of this article.

Permitting Violation Is Negligence Per Se.—Under this section it is negligence per se for the owner of a car or one having it under his control to permit a person under legal age to operate same, but such negligence must be proximate cause of injury in order to be actionable. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.—It shall be unlawful for any employee of the Department of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of an operator's or chauffeur's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars (\$5,000.00) or by both such fine and imprisonment. (1951, c. 211.)

§ 20-35. Penalties for misdemeanor.

Cited in *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-36: Repealed by Session Laws 1947, c. 1067, s. 11.

§ 20-37. Limitations on issuance of licenses.

Editor's Note.—For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

Authority to License and Regulate Taxicabs.—In adopting this section the General Assembly delegated the authority to license taxicabs and regulate their use on public streets to the several municipalities. *Suddreth v. Charlotte*, 223 N. C. 629, 27 S. E. (2d) 650.

In the exercise of this delegated power, it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so. *State v. Stallings*, 230 N. C. 252, 52 S. E. (2d) 901.

Under such delegated power a city may require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. *Id.*

Art. 2A. Operators' Licenses and Registration Plates for Afflicted or Disabled Persons.

§ 20-37.1. Motorized wheel chairs or similar vehicles.—Any afflicted or disabled person who is qualified to operate a motorized wheel chair or other similar vehicle not exceeding one thousand pounds gross weight, may apply to the department of motor vehicles for a special operator's license and permanent registration plates. When it is made to appear to the satisfaction of the department of motor vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as

a means of earning a livelihood, said department shall, upon the payment of a license fee of \$1.00 for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle operator's license, which shall be renewed annually upon the payment of a fee of 50c, and permanent registration plates for such vehicle. The initial \$1.00 fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143.)

Art. 3. Motor Vehicle Act of 1937.

Part 1. General Provisions.

§ 20-38. Definition of words and phrases.

(f) Established Place of Business.—Means the place actually occupied by a dealer or manufacturer and at which a permanent business of bargaining, trading and selling motor vehicles is or will be carried on as such in good faith, and at which place of business shall be kept and maintained the books, records and files necessary and incident to the conduct of the business of automobile dealers or manufacturers.

(g) Passenger Vehicles. — (1) Excursion passenger vehicles.

Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.

(2) For hire passenger vehicles.

Passenger motor vehicles engaged in the business of transporting passengers for compensation; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by neighbor fellow workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan.

(3) Common carriers of passengers.

Passenger motor vehicles operated under a franchise certificate issued by the utilities commission under §§ 62-121.5 through 62-121.79, for operation on the public highways of this state between fixed termini or over a regular route for the transportation of persons or property for compensation.

(4) Motorcycle.

Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.

(5) U-Drive-It passenger vehicles.

Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee; provided, this shall not include passenger motor vehicles of nine passenger capacity or less which

are leased for a term of one year or more to the same person, firm, or corporation.

(6) Private passenger vehicles.

All other passenger vehicles not included in the above definitions.

(r) Property-Hauling Vehicles. — (1) Contract carrier vehicles.

Motor vehicles used for the transportation of property for hire, but not licensed as common carrier of property vehicles under the provisions of §§ 62-121.5 through 62-121.79: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to perishable foods which are still owned by the grower while being delivered to the first or primary market, by an operator of not more than one truck or trailer for hire, nor to merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. Provided, however, that the term "for hire" shall not include motor vehicles whose sole operation in carrying the property of others is limited to the transportation of T. V. A. or A. A. A. phosphate, and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States agricultural adjustment administration or fuel for the exclusive use of the public schools of the state. Provided, further, that, for the duration of any contract for carrying the United States mail in force at the time this proviso becomes effective, the term "for hire" shall not include any motor vehicle whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to such a contract.

(2) Common carrier of property vehicles.

Every motor vehicle used for the transportation of property between fixed termini, or over a regular route, with the right to make occasional trips off said route as provided in §§ 62-121.5 through 62-121.79: Provided, only such vehicles shall be so classified as the utilities commission shall determine to be reasonably necessary for the proper handling of the business on said route, and the determination so arrived at shall be duly certified by the utilities commissioner to the motor vehicle bureau; provided further, that vehicles operating as interstate common carriers under authority of the interstate commerce commission shall be included herein unless they do contract hauling in North Carolina in which event they shall be licensed as contract carriers.

(3) Private hauler vehicles.

All motor vehicles used for the transportation of property not falling within one of the above defined classifications.

(4) Semi-Trailer.

Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.

(5) Trailers.

Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.

(t) Owner.—A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article; except that in all such instances when the rent paid by the lessee includes charges for services of any nature and/or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle, and said vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

When a vehicle is leased to a common carrier of property or a common carrier of passengers and is actually used by said franchise carrier in the operation of his business, such lessee, at his election, may be deemed the owner of the vehicle for the purposes of this article.

Provided that any lessee who fails to transfer the title to any vehicle which is under lease back to the lessor and surrender or have transferred any license issued to him pursuant to this article within 20 days after the termination of the lease shall be subject to an additional license tax of \$100.00 on each vehicle.

For the purposes of this article, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(gg) Resident.—As to individuals, every person who is a resident of this State and the fact that such person leaves the State temporarily shall not be sufficient to terminate his residence here. Any person who leaves this State shall be presumed to continue to be a resident of this State if his family continues to reside in this State or his children continue to attend school in this State, or if his dwelling in this State is maintained by him as a place of occupancy which is not used by parties other than members of his family. (1937, c. 407, s. 2; 1939, c. 275; 1941, cc. 22, 36, 196; 1943, cc. 201, 202; 1945, c. 414, s. 1; cc. 653, 838; 1947, c. 220, s. 1; 1949, cc. 814, 1287; 1951, c. 571; c. 705, s. 1; c. 770; c. 819, ss. 1, 2; c. 1023, s. 1.)

Editor's Note.—

The first 1945 amendment, effective Jan. 1, 1946, added the exception clause to subsection (t). The second 1945 amendment added at the end of paragraph (1) of subsection (r) the words "or fuel for the exclusive use of the public schools of the state." The third 1945 amendment added the second proviso to paragraph (2) of subsection (r).

The 1947 amendment rewrote subsection (f).

The 1949 amendments rewrote subsection (q) (5) and the first proviso of subsection (r) (1).

The 1951 amendments substituted "common carriers of passengers" for "franchise bus carriers", "contract carrier" for "contract hauler" and "common carrier of property" for "franchise hauler"; changed the reference "§§ 62-103 to 62-121" to "§§ 62-121.5 through 62-121.79"; added the last proviso to the first paragraph of subsection (r)

and the last three paragraphs of subsection (t); and added subsection (gg) at the end of the section.

As only subsections (f), (q), (r), (t) and (gg) were affected by the amendments the rest of the section is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 356.

Portion of Sidewalks as Highways.—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of § 20-138 prohibiting drunken driving. *State v. Perry*, 230 N. C. 361, 53 S. E. (2d) 288.

Handcart Not Vehicle.—A handcart, being moved solely by human power, is excluded from the category of vehicles defined in subsection (ff) of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Applied in Sparks v. Willis, 228 N. C. 25, 44 S. E. (2d) 343 (as to subsections (a) and (w)).

Cited in Bobbitt v. Haynes, 231 N. C. 373, 57 S. E. (2d) 361.

Part 2. Authority and Duties of Commissioner and Department.

§ 20-43. Records of department.—(a) All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours.

(b) The commissioner may destroy any registration records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department.

(c) The commissioner, upon receipt of notification from another state or foreign country that a certificate of title issued by the department has been surrendered by the owner in conformity with the laws of such other state or foreign country, may cancel and destroy such record of certificate of title. (1937, c. 407, s. 8; 1947, c. 219, s. 1.)

Editor's Note.—The 1947 amendment added subsection (c) to this section.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title.—Every owner of a vehicle intended to be operated upon any highway of this state and required by this article to be registered shall, before the same is so operated, apply to the department for and obtain the registration thereof, the registration plates therefor, and a certificate of title therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in § 20-79: Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer having not more than two wheels with a gross weight of vehicle and load of twenty-five hundred (2500) pounds or less, and towed by a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or a passenger car but before operating a trailer as described above upon the highways of the state, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by part-seven of this article; provided that the commissioner of motor vehicles or his duly authorized agent is empowered to grant a special one-way trip permit to move a vehicle without license upon good cause being shown.

(1937, c. 407, s. 15; 1943, c. 648; 1945, c. 956, s. 3; 1947, c. 219, s. 2.)

Editor's Note.—

The 1945 amendment, effective April 1, 1945, inserted in the proviso the words "a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or." The 1947 amendment added the provision at the end of the section relating to special one-way trip permit.

§ 20-51. Exempt from registration.

(e) Any vehicle owned and operated by the government of the United States.

(f) Farm tractors equipped with rubber tires and trailers or semi-trailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor and trailer or semi-trailer while on any trip within a radius of ten miles from the point of loading. This section shall not be construed as granting any exemption to farm tractors and trailers or semi-trailers which are operated on a for hire basis, whether money or some other thing of value is paid or given for the use of such tractors and trailers or semi-trailers. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2.)

Editor's Note.—The 1949 amendment rewrote paragraph (f). The 1951 amendment rewrote paragraph (e). As the rest of the section was not affected by the amendments it is not set out.

§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle; inspection of foreign vehicles before registration.—(a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this state, the owner shall surrender to the department all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in sub-division (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the department in its discretion, and upon a proper showing, shall register said vehicle in this state but shall not issue a certificate of title for such vehicle.

(c) Before any motor vehicle, which has been registered or licensed for use in any other state or foreign country, can be registered for use upon the highways of this State, as required by the motor vehicle laws, the person applying for said license shall be required to file with the motor vehicle department a certificate signed by a member of the state highway patrol showing that the motor vehicle has been inspected by said official, and that the same is in such mechanical condition as to meet the requirements and laws of this State as to motor vehicles which may be lawfully operated upon the streets and highways of this State. The members of the state highway patrol shall be required to make the necessary

inspections of such motor vehicles and when, from such inspections, it is found that such motor vehicles desired to be registered in this State are in such mechanical condition as to meet the requirements of the laws of the State, furnish the certificate herein provided for to the applicant without any charge being made for such services. (1937, c. 407, s. 18; 1949, c. 675.)

Editor's Note.—The 1949 amendment added subsection (c) to this section.

The necessity for subsection (c) of this section arose out of the repeal of the 1947 Motor Vehicle Inspection Law, §§ 20-183.2 to 20-183.8. It is intended to prevent the state from becoming a dumping ground for vehicles that cannot pass the vehicle inspection laws of other states. 27 N. C. Law Rev. 471.

§ 20-56. Registration indexes.—The department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described and keep a record thereof in suitable books or on index cards as follows:

(a) Under a distinctive registration number assigned to the vehicle;

(b) Alphabetically, under the name of the owner;

(c) Under the motor number or any other identifying number of the vehicle; and

(d) In the discretion of the department, in any other manner it may deem advisable. (1937, c. 407, s. 20½; 1949, c. 583, s. 5.)

Editor's Note.—The 1949 amendment rewrote subsection (c).

§ 20-61. Owner dismantling or wrecking vehicle to return evidence of registration.—Any owner dismantling or wrecking any vehicle shall forward to the department the certificate of title, registration card and/or other proof of ownership, and the registration plate or plates last issued for such vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. The commissioner upon receipt of certificate of title and notice from the owner thereof that a vehicle has been junked or dismantled may cancel and destroy such record of certificate of title. (1937, c. 407, s. 25; 1947, c. 219, s. 3.)

Editor's Note.—The 1947 amendment added the last sentence.

§ 20-63. Registration plates to be furnished by the department.—(a) The department upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semi-trailer and two registration plates for every other motor vehicle: Provided, that whenever the commissioner determines that there is an actual or threatened shortage of metal, he may provide for the issuance of only one registration plate for each motor vehicle. Registration plates issued by the department under this article shall be and remain the property of the state, and it shall be lawful for the commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the commissioner finds that any registration plate issued for any vehicle pursuant to the pro-

visions of this article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the department. When said registration plate or plates are so surrendered to the department, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plates or plates on which the numbers are not readily distinguishable and who wilfully refuses to surrender said plates to the department shall be guilty of a misdemeanor.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer or semi-trailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a motorcycle, trailer or semi-trailer, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a motorcycle, trailer or semi-trailer shall be attached to the rear thereof.

(1951, c. 102, ss. 1-3.)

Editor's Note.—

The 1951 amendment added the proviso to the first sentence of subsection (a) and the last three sentences of the subsection. It also added the proviso at the end of the first sentence of subsection (d). As the rest of the section was not affected by the amendment only these two subsections are set out.

§ 20-64. Transfer of registration plates.

(c) Registration plates issued by the department for vehicles operated for hire may be retained by the owner for transfer to another vehicle belonging to the same owner; or, at the option of the owner to whom issued, by written consent of the owner, may be transferred and assigned with the same vehicle to the new owner upon payment of a fee of one dollar (\$1.00) as otherwise provided for a transfer; except that registration plates issued for common carriers of property and franchise bus vehicles may not be transferred and assigned from one owner to another but shall be retained by the owner to whom originally issued; provided, however, if the owner of common carrier of property or franchise bus plates sells out his entire fleet and rights to another who licenses all the vehicles in North Carolina in his name for the same license year, such owner of the common carrier of property or franchise bus plates may secure a refund for the unexpired portion of such plates on a monthly basis beginning the first day of the month following such sale if there is any credit remaining over and above any 6% gross receipts tax due: Provided, further, that common carrier flat rate registration plates may be transferred at the option of the owner to whom issued by the written consent of such owner. (1937, c. 407, s. 28; 1945, c. 576, s. 1; 1947, c. 914, s. 1; 1951, c. 188; c. 819, s. 1.)

Editor's Note.—The 1945 amendment rewrote subsection (c) and the 1947 amendment added the first proviso thereto. The first 1951 amendment added the second proviso to subsection (c) and the second 1951 amendment substituted "common carrier of property" for "franchise hauler" in said subsection. As subsections (a) and (b) were not changed they are not set out.

§ 20-64.1. Revocation of license plates by Utilities Commission.—The license plates of any carrier of persons or property by motor vehicle for

compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of either the North Carolina Truck Act of 1947 or the Bus Act of 1949, or for the wilful violation of any lawful rule or regulation made and promulgated by the North Carolina Utilities Commission under said acts. To that end said Commission shall have power upon complaint or upon its own motion, after notice and hearing under the rules of evidence prescribed in G. S. 62-18, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding thirty (30) days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the North Carolina Utilities Commission upon receipt of a certified copy of the same.

This section shall be in addition to and independent of other provision of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120.)

Editor's Note.—The Truck Act referred to in this section is codified as §§ 62-121.5 through 62-121.42, and the Bus Act is codified as §§ 62-121.43 through 62-121.79.

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.—(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor

vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose. (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment; Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his cause of action shall have accrued. (1951, c. 494.)

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interest thereto, he shall endorse upon the reverse side of the registration card issued for such vehicle the name and address of the transferee and the date of transfer, and shall immediately deliver such card and registration plates to the transferee if such plates are subject to transfer with the vehicle as set out in § 20-64. If the registration plates are not subject to transfer the registration card and plates may be retained by the transferor of the vehicle and no endorsement would be necessary.

(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall also endorse an assignment and warranty of title in form approved by the department upon the reverse side of the certificate of title or execute an

assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in section 20-74 shall apply if application for transfer is not made within twenty days. Any owner selling or transferring his interest to a motor vehicle who willfully fails or refuses to endorse an assignment of title shall be guilty of a misdemeanor. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5.)

Editor's Note.—The 1947 amendment rewrote subsection (a) and added the last sentence of subsection (b).

§ 20-73. New owner to secure transfer of registration and new certificate of title.—The transferee within twenty days after the purchase shall apply to the department for a transfer of registration of the vehicle and shall present the certificate of title endorsed and assigned as hereinbefore provided to the department, and make application for and obtain a new certificate of title for such vehicle except as otherwise permitted in sections 20-75 and 20-76. Any transferee willfully failing or refusing to make application for title shall be guilty of a misdemeanor. (1937, c. 407, s. 37; 1939, c. 275; 1947, c. 219, s. 6.)

The 1947 amendment added the second sentence.

§ 20-76. Title lost or unlawfully detained.—Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the department is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the department is satisfied that the applicant is entitled thereto and that § 20-72 has been complied with it is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fee for duplicate title and/or replacement. (1937, c. 407, s. 40; 1947, c. 219, s. 7.)

Editor's Note.—The 1947 amendment inserted the reference to § 20-72.

§ 20-77. Transfer by operation of law; liens.—(a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a transfer of registration to himself and a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of

authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases: Provided, however, transfers of registration shall only be made as provided for in § 20-64, sub-sections (a), (b) and (c).

(b) In the event of transfer as upon inheritance, devise or bequest, the department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. However, if no administrator has qualified or the clerk of the superior court refuses to issue a certificate, the department may upon affidavit showing satisfactory reasons therefor effect such transfer; provided, that if a decedent dies intestate leaving surviving a spouse and a minor child or children, or a spouse and a child or children mentally incompetent, whether of age or not, and no guardian has been appointed for said child or children, the surviving spouse shall be authorized to transfer the interest of the child or children in said motor vehicle, as provided in this subsection, to a purchaser thereof, but the new title so issued shall not affect the validity nor be in prejudice of any creditor's lien.

(c) **Mechanic's or Storage Lien.**—In any case where a vehicle is sold under a mechanic's or storage lien, the department shall be given a twenty-day notice as provided in § 20-114.

(d) The owner of a garage, storage lot or other place of storage shall have a lien for his lawful and reasonable storage charges on any motor vehicle deposited in his place of storage by the owner or any other person having lawful authority to make such storage, and may retain possession of the motor vehicle until such storage charges are paid. If the storage charges are not paid when due, the garage owner or other storage keeper may satisfy said lien as follows:

1. The garage owner or storage keeper shall give written notice to the person who made the storage, to the registered owner, if known, and to any other persons known to claim any lien on or other interest in the motor vehicle. Such notice shall be given by delivery to the person, or by registered letter addressed to the last known place of business or abode of the person to be notified.

2. The notice shall contain a description of the motor vehicle; an itemized statement of the claim for storage charges; a demand that the storage charges be paid on or before a day specified, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and a statement that unless the storage claim is paid on or before the day specified, the motor vehicle will be advertised for sale and sold at auction at a specified time and place.

3. If payment is not made by the day specified in the notice, a sale of the motor vehicle may be had to satisfy the lien. The sale shall be held at the place where the vehicle was stored, or if such place is manifestly unsuitable for the purpose, at the court house in the county where vehicle was stored. The advertisement of such sale shall con-

tain the name and address of the registered owner of the vehicle, if known or ascertainable; the name and address of the person who made the storage; a description of the motor vehicle, including the make, year of make, model, motor number, serial number and license number, if any; a statement of the amount of storage charges; and the place, date and hour of sale. The advertisement shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than three conspicuous public places in such place. A copy of said advertisement shall be sent to the commissioner of motor vehicles at least twenty days prior to the sale. From the proceeds of the sale the garage owner or storage keeper shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, shall be held by the garage owner or storage keeper and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the motor vehicle. If no claim is made for said balance within ten days the garage owner or storage keeper shall immediately pay such balance into the office of the clerk of the superior court of the county wherein the sale was held, and the clerk shall hold said money for twelve months for delivery on demand to person entitled thereto, and if no claim is made within said period, said balance shall escheat to the University of North Carolina.

4. At any time before the motor vehicle is so sold any person claiming a right of property or possession therein may pay the garage owner or storage keeper the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment, and upon receiving such payment, the garage owner or storage keeper shall deliver the motor vehicle to the person making such payment if he is a person entitled to the possession thereof.

Where no specific agreement is made at the time of storage regarding the time when storage charges shall be due, such charges shall be due ninety days after the storage commenced. (1937, c. 407, s. 41; 1943, c. 726; 1945, cc. 289, 714.)

The first 1945 amendment inserted the proviso in the second sentence of subsection (b). The second 1945 amendment added subsection (d).

§ 20-78. When department to transfer registration and issue new certificate.—(a) The department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, shall transfer the registration thereof under its registration number to the new owner, and shall issue a new registration card and certificate of title as upon an original registration.

(b) The department shall maintain a record of certificates of title issued and may, after three (3) years from year of issue, at its discretion, destroy such records, maintaining at all times the records of the last two owners.

The commissioner is hereby authorized and empowered to provide for the photographic or

photostatic recording of certificate of title records in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in tracing of titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions and proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726; 1947, c. 219, s. 8.)

Editor's Note.—The 1947 amendment rewrote subsection (b).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.—(a) Every manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall apply to the motor vehicle department for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the department shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this state, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the calendar year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer. The license and plates issued under this section shall be in lieu of the registration of such vehicle.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the department license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semi-trailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00).

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the department to such manufacturer or dealer of each vehicle, owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required or issued for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semi-trailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semi-trailers, of collecting accounts, contact-

ing prospective customers and generally carrying on routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business; Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the commissioner from the dealer, which shall be valid for not more than forty-eight hours: Provided further, that motor vehicles, trailers and semi-trailers sold by dealers may be operated for a period not exceeding ten days from the date of sale by the purchaser thereof with dealer's demonstration plates, provided the purchasers have in their possession receipts from the dealers upon which the dealer has certified that the necessary amount of money to pay for titles and licenses has been paid by the purchasers to the dealers to be forwarded to the motor vehicle bureau, either direct or through one of its branch offices, on such form as approved by the commissioner.

(1947, c. 220, s. 2; 1949, c. 583, s. 3; 1951, c. 985, s. 2.)

Editor's Note.—The 1947 amendment rewrote subsection (a). The 1949 amendment inserted the next to last paragraph of subsection (a). It also substituted in the first and second lines of the last paragraph the words "any provision" for the words "the provisions," and made said paragraph applicable to "firm or corporation." The 1951 amendment inserted the words "or issued" in the seventh line of subsection (b). As subsections (c) through (e) were not affected by the amendment, they are not set out.

§ 20-80. National guard plates.—The commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina National Guard with a set thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this state, except that such license plates shall bear on the face thereof the following words, "National Guard." The said license plates shall be issued only to officers of the North Carolina National Guard, and for which license plates the commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The adjutant general of North Carolina shall furnish to the commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina National Guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number eleven hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words national guard, said plates shall be removed and the authority to use the same shall thereby be canceled; however, upon application to the commissioner, he shall reissue said

plate to the officer of the national guard to whom the same were originally issued, and upon said re-issue the commissioner shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1937, c. 407, s. 44; 1941, c. 36; 1949, c. 1130, s. 7.)

Editor's Note.—The 1949 amendment inserted the word "eleven" in place of the word "five" in line twenty-five of this section.

§ 20-81.1. Special plates for operators of amateur radio stations.—Every owner of a motor vehicle who holds an unrevoked and unexpired official amateur radio station license, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees, as provided by G. S. 20-87, and an additional fee of one dollar (\$1.00) be issued registration plates upon which shall be inscribed the official amateur radio call letters of such person as assigned by the Federal Communications Commission. Such registration plates shall be in addition to the regular registration plates.

No such special registration plates shall be issued unless the amateur radio operator who is eligible to receive them shall make application to the Department of Motor Vehicles before the 30th day of April of the year preceding that for which plates are to be issued. This application shall be made on forms which shall be provided by the Department of Motor Vehicles and shall contain satisfactory proof that the applicant holds an unrevoked and unexpired official amateur radio station license and shall state the call letters which have been assigned to the applicant.

Special registration plates issued pursuant to this section shall not be replaced annually but shall be permanent plates. These plates shall be valid so long as the amateur radio operator to whom they are issued shall hold an unrevoked and unexpired official amateur radio station license. (1951, c. 1099.)

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-84. Vehicles owned by state, municipalities or orphanages, etc.—The department, upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the state or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the state or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the state or some department thereof, or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose.

In lieu of the annual one dollar (\$1.00) regis-

tration provided for in this section, the department may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the department shall collect a fee of one dollar (\$1.00) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388.)

Editor's Note.—The 1949 amendment added the second paragraph.

The 1951 amendment added the third paragraph.

§ 20-84.1. Permanent plates for city busses.—

The department may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city busses and trackless trolleys when such busses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates as provided for in this section, the department shall collect a fee of one dollar for each vehicle so registered and licensed. (1949, c. 583, s. 6.)

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees.—There shall be paid to the department for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

- (a) Each application for certificate of title. \$.50
- (b) Each application for duplicate certificate of title50
- (c) Each application of repossessor for certificate of title50
- (d) Each transfer of registration..... 1.00
- (e) Each set of replacement registration plates 1.00

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9.)

Editor's Note.—The 1947 amendment struck out former subsection (f) relating to duplicate registration card.

§ 20-87. Passenger vehicle registration fees.—

There shall be paid to the department annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(a) **Common Carriers of Passengers.**—Common carriers of passengers shall pay an annual license tax of ninety cents per hundred pounds weight of each vehicle unit, and in addition thereto six per cent of the gross revenue derived from

such operation: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of ninety cents per hundred pounds: Provided further, that common carriers of passengers operating from a point or points in this state to another point or other points in this state shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Common carriers of passengers operating between a point or points within this state and a point or points without this state shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this state and terminals outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of passengers operating through this state from a point or points outside this state to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of passengers be less than ninety cents per hundred pounds weight for each vehicle. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such common carriers of passengers by this state.

(b) **U-Drive-It Passenger Vehicles.**—U-drive-it passenger vehicles shall pay the following tax:

- Motorcycles: 1-passenger capacity\$12.00
- 2-passenger capacity 15.00
- 3-passenger capacity 18.00

Automobiles: \$60.00 per year for each vehicle of nine passenger capacity or less, and vehicles of over nine passenger capacity shall be classified as busses and shall pay \$1.90 per hundred pounds empty weight of each vehicle.

(c) **For Hire Passenger Vehicles.**—For hire passenger vehicles shall be taxed at the rate of \$60.00 per year for each vehicle of nine passenger capacity or less and vehicles of over nine passenger capacity shall be classified as busses and shall be taxed at a rate of \$1.90 per hundred pounds of empty weight per year for each vehicle; provided, however, no license shall issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing (1) that the operator of such taxicab has provided liability insurance or other form of indemnity for injury to persons or damage to property resulting from the operation of such taxicab, in such amount as required by the city or town, and (2) that the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January first, one thousand nine hundred and forty-five shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Union, Lee, Edgecombe and Nash counties on January first, one

thousand nine hundred and forty-five shall be entitled to certificates of necessity and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in §§ 62-121.5 through 62-121.79. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

(d) Excursion Passenger Vehicles.—Excursion passenger vehicles shall be taxed at the rate of \$8.00 per passenger capacity, with a minimum charge of \$25.00, but such vehicles operating under a certificate as a restricted common carrier under §§ 62-121.5 through 62-121.79, shall also be liable to the gross revenue six per cent tax to the extent it exceeds the tax herein levied under the same provisions provided for common carriers of passengers.

(e) Private Passenger Vehicles.—There shall be paid to the department annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Vehicles weighing 3500 pounds or less	\$10.00
Vehicles weighing 3501 pounds to 4500 pounds	\$12.00
Vehicles weighing 4501 pounds and over	\$15.00

provided, where there are models of the same make automobiles that fall within two or more of the above classes, the average weight based on the 1946 and immediate four prior years models shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. In event there are any make automobiles in operation with models falling into two or more of the above classes that did not manufacture any models in 1946, the average weight based on the last five years in which said make automobile was manufactured, shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. Provided further, where new make automobiles are produced after 1946 which has models falling into two or more of the above classes, the average weight shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. Provided, that a fee of only one dollar shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(f) Private Motorcycles.—The tax on private passenger motorcycles shall be five dollars (\$5.00); except that when a motorcycle is equipped with

an additional form of device designed to transport persons or property, the tax shall be ten dollars (\$10.00).

(g) Manufacturers and Motor Vehicle Dealers.—Manufacturers and dealers in motor vehicles, trailers and semi-trailers for license and for one set of dealer's plates shall pay the sum of twenty-five dollars (\$25.00), and for each additional set of dealer's plates the sum of one dollar (\$1.00).

(h) Driveaway Companies.—Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this state for compensation shall pay as a registration fee and for one set of plates one hundred dollars (\$100.00) and for each additional set of plates five dollars (\$5.00). (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2.)

Editor's Note.—The 1945 amendments added that part of subsection (c) beginning with the proviso, and rewrote subsection (f). The 1947 amendments made changes in subsections (b), (c), (e) and (g). And the 1949 amendment added the last proviso to subsection (e). The 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers" throughout the section; changed the reference in subsection (d) from "§§ 62-103 to 62-121" to "§§ 62-121.5 through 62-121.79"; and substituted "§§ 62-121.5 through 62-121.79" for "subsection (k) of § 62-103" in the third paragraph of subsection (c).

§ 20-88. Property hauling vehicles. — (a) **Determination of Weight.**—For the purpose of licensing, the weight of the several classes of motor vehicles used for transportation of property shall be the gross weight and load, to be determined by the manufacturer's gross weight capacity as shown in an authorized national publication, such as "Commercial Car Journal" or the statistical issue of "Automotive Industries," all such weights subject to verification by the commissioner or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the commissioner or his authorized agent: Provided, that any determination of weight shall be made only in units of one thousand pounds or major fraction thereof, weights of over five hundred pounds being counted as one thousand and weights of five hundred pounds or less being disregarded. Semi-trailers licensed for use in connection with a truck or truck-tractor shall in no case be licensed for less gross weight capacity than the truck or truck-tractor with which it is to be operated. The gross weight of a single unit equipped with three or more axles may be computed for license fee at a rate not in excess of the rate on trucks and semi-trailers of the same gross weight.

In licensing truck-tractors to be used in connection with a trailer or semi-trailer, the license on the truck-tractor may be limited to twenty thousand pounds gross weight and any weight in excess of twenty thousand pounds may be licensed on the trailer or semi-trailer.

(b) There shall be paid to the department annually, as of the first day of January, for the registration and licensing of trucks, truck-tractors, trailers and semi-trailers, fees according to the following classifications and schedules:

Schedule of Weights and Rates

Rates per hundred pounds gross weight:

	Private Hauler	Contract Carrier	Common Carrier of Property (Deposit)
Gross weight not over			
4,500 pounds	\$0.30	\$0.75	\$.60
4,501 pounds to 8,500 in- clusive .....	.40	.75	.60
8,501 pounds to 12,500 pounds inclusive .....	.50	1.00	.60
12,501 pounds to 16,500 inclusive .....	.70	1.15	.60
Over 16,500 pounds .....	.80	1.40	.60

(c) The minimum rate for any vehicle licensed under this section shall be twelve dollars (\$12.00), except that the license fee for a trailer having not more than two wheels with a gross weight of vehicle and load not exceeding twenty-five hundred (2500) pounds and towed by a vehicle licensed by the commissioner for not more than four thousand (4000) pounds gross weight or a passenger car shall be three dollars (\$3.00) for any part of the license year for which said license is issued: Provided, however, that any such trailers operated for hire shall be taxed at the same rate as contract carrier vehicles: Provided, further, that in addition to the motor vehicle licenses authorized to be issued pursuant to the provisions of this chapter, the department shall issue, upon application therefor, a license plate for trucks marked "farmer," which shall be issued upon evidence satisfactory to the department that the applicant is a farmer and is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section shall be placed upon motor trucks engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire: Provided further that the department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" license plates issued hereunder when trucks bearing such shall be sold and/or transferred. Applicants for license plates herein authorized shall pay therefor at a rate equal to one-half the present registration fee provided for trucks by this chapter; provided that the minimum rate for any vehicle licensed under this proviso shall be ten dollars (\$10.00); and provided, further, persons applying for "farmer" license under the provisions of this section shall not be entitled to the benefits of § 20-95. The term "farmer" as used in this section means any person engaged in the raising, growing and producing of farm products on a farm not less than ten acres in area, and who does not engage in the business of buying farm products for resale; and the term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes. Provided, such "farmer" license may be transferred if the new owner executes a statement on a form prescribed by the motor vehicle department showing that he is entitled to a "farmer" li-

cence; otherwise the same shall be surrendered and the new owner must pay the difference in the fee for a "farmer" license and the type of license required for the new operation as of the date of such transfer.

(e) Common Carriers of Property.—Common carriers of property shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, common carriers of property operating from a point or points in this state to another point or points in this state shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Common carriers of property operating between a point or points within this state and a point or points without this state shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this state and terminals outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this state from a point or points outside this state to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of property be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the utilities commission for service over a route within the state which is not now served by any common carrier of property the six per cent gross revenue tax may be reduced to four per cent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such common carriers of property by this state. Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.

In lieu of the six per cent gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, common carriers of property may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract carriers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license-year and after the election herein provided

for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a common carrier of property to make an election under this paragraph shall render such common carrier of property liable for the deposit required by subsection (b) of this section and the six per cent gross revenue tax levied by this subsection.

(f) Non-resident motor vehicle carriers which do not operate in intrastate commerce in this state, and the title to whose vehicles are not required to be registered under the provisions of this article, shall be taxed for the use of the roads in this state and shall pay the same fees therefor as are required with reference to like vehicles owned by residents of this state: Provided, that if any such fees as applied to non-residents shall at any time become inoperative, such carriers shall be taxed for the use of the roads of this state as common carriers of property as provided above: Provided further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(g) Contract carriers under the definitions of this article who receive and operate under a certificate or permit or other authority from the utilities commissioner as restricted common carriers under the provisions of §§ 62-121.5 through 62-121.79, shall, in addition to the rate of tax for contract carriers provided above, be subject to the gross six per cent tax to the extent that it exceeds the rate for contract carriers to be levied and collected in the same manner provided for common carriers of property, and the tax in the schedule provided for contract carriers shall be deemed a deposit only.

(1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; c. 819, ss. 1, 2.)

Editor's Note.—

The first 1945 amendment added the second paragraph of subsection (a). The second 1945 amendment, effective Jan. 1, 1946, struck out a former exception provision in subsection (e). The third 1945 amendment, effective Jan. 1, 1945, added the proviso at the end of subsection (c) and the fourth 1945 amendment, effective April 1, 1945, inserted in the first sentence of subsection (c) the words "a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or."

The first 1949 amendment rewrote the first sentence of subsection (c). The second 1949 amendment added the second paragraph of subsection (e).

The first 1951 amendment added the last sentence of the first paragraph of subsection (e). The second 1951 amendment substituted "common carrier of property" for "franchise hauler" and "contract carrier" for "contract hauler" at several places in the section, and changed the reference in subsection (g) from "§§ 62-103 to 62-121" to "§§ 62-121.5 through 62-121.79."

Only the subsections affected by the amendments are set out.

§ 20-89. Method of computing gross revenue of common carriers of passengers and property.—

In computing the gross revenue of common carriers of passengers and common carriers of property, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this state from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed

schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at six percent (6%) of the gross charges authorized by the utilities commission or interstate commerce commission on such operation if it had been for hire; and common carriers of property shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

When vehicles are leased from other operators who are licensed in this State as contract carriers, for hire passenger or common carriers of property any amounts paid to such operators under said lease may be deducted by the lessees from gross revenue on which tax is based in the event a copy of the lease and adequate records and receipts are maintained so as to clearly reflect such payments. Any revenue earned by a common carrier of property under a lease or rental shall be included in the gross revenue upon which said tax is based but revenue earned by a common carrier of passengers from coach rentals shall not be included in gross revenue on which tax is based. (1937, c. 407, s. 53; 1943, c. 726; 1945, c. 414, s. 2; c. 575, s. 2; 1951, c. 819, ss. 1, 2½.)

Editor's Note.—

The first 1945 amendment added the second paragraph. The second 1945 amendment, effective Jan. 1, 1946, added the proviso at the end of the first paragraph.

The 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers," "common carrier of property" for "franchise hauler" and "contract carriers" for "contract haulers" throughout the section, and rewrote the second paragraph.

§ 20-90. Due date of franchise tax.—The six per cent additional tax on common carriers of passengers and common carriers of property shall become due and payable on or before the twentieth day of the month following the month in which it accrues.

Whenever a contract carrier or a flat rate common carrier of property becomes a regular common carrier of property subject to the six per cent (6%) gross revenue tax under this chapter during the license renewal period, December 1 to January 31, said carrier's gross revenue for the six per cent (6%) tax purpose shall be all the revenue earned from operations on and after the January 1 following the carrier's change to a regular common carrier if such change is made in December and shall be all the revenue earned from operations on and after the January 1 preceding the carrier's change to a regular common carrier if such change is made in January.

Whenever a regular common carrier of property subject to the six per cent (6%) gross revenue tax under this chapter becomes a flat rate common carrier of property or a contract carrier during the license renewal period, December 1 to January 31, said carrier's gross revenue for the six per cent (6%) tax purposes shall be all

the revenue earned from operations up to and including operations on the December 31 following the carrier's change to a flat rate common carrier or a contract carrier if such change is made in December and shall be all the revenue earned from operations up to and including operations on the December 31 preceding the carrier's change to a flat rate common carrier of property or a contract carrier if such change is made in January. (1937, c. 407, s. 54; 1951, c. 729; c. 819, s. 1.)

The first 1951 amendment added the second and third paragraphs. The second 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers" and "common carriers of property" for "franchise haulers."

§ 20-91. Records and reports required of franchise carriers.—(a) Every common carrier of passengers and common carrier of property shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the commissioner, and such records shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the commissioner or his deputies or such other agents as may be duly authorized by the commissioner. Any operator of such a franchise line failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(b) All common carriers of passengers and common carriers of property shall, on or before the twentieth day of each month, make a report to the department of gross revenue earned and gross mileage operated during the month previous, in such manner as the department may require and on such forms as the department shall furnish.

(c) It shall be the duty of the commissioner, by competent auditors, to have the books and records of every common carrier of passengers and common carrier of property examined at least once each year to determine if such operators are keeping complete records as provided by this section of this article, and to determine if correct reports have been made to the state department of motor vehicles covering the total amount of tax liability of such operators.

(d) If any common carrier of passengers or common carrier of property shall fail, neglect, or refuse to keep such records or to make such reports or pay tax due as required, and within the time provided in this article, the commissioner shall immediately inform himself as best as he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the state from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said commissioner shall proceed immediately to collect the tax including the additional five per cent (5%). Any such common carrier of property or common carrier of passengers, having no records on the basis of which the commissioner can de-

termine the amount of the tax due by such carrier, shall be assessed on each vehicle at the rate applicable for contract carriers, and any bonds or deposits theretofore made shall be applied on such assessment and any further amount shall be collected as provided by law.

(e) Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the commissioner of motor vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of gross revenue or tax paid by any common carrier of passengers or common carrier of property as set forth or disclosed in any report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, utilities commission, or their or its duly authorized representatives; or the inspection by a legal representative of the state of the report or return of any common carrier of passengers or common carrier of property which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. Nothing in this subsection or in any other law shall prevent the exchange of information between the department of motor vehicles and the department of revenue when such information is needed by either or both of said departments for the purposes of properly enforcing the laws with the administration of which either or both of said departments is charged. (1937, c. 407, s. 55; 1939, c. 275; 1941, c. 36; 1943, c. 726; 1945, c. 575, s. 3; 1947, c. 914, s. 2; 1951, c. 190, s. 1; c. 819, s. 1.)

Editor's Note.—The 1945 amendment added the last sentence of subsection (d), and the 1947 amendment inserted the words "or pay tax due" in line three of subsection (d). The first 1951 amendment added the last sentence of subsection (e). The second 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers", "common carrier of property" for "franchise hauler" and "contract carriers" for "contract haulers" throughout the section.

§ 20-91.1. Taxes to be paid; suits for recovery of taxes.—No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this article. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commissioner of Motor Vehicles; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought

in the superior court of Wake County, or in the county in which the taxpayer resides. (1951, c. 1011, s. 1.)

§ 20-91.2. Overpayment of taxes to be refunded with interest.—If the Commissioner of Motor Vehicles discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs, if any), such overpayment shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer. Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the report, whichever is later. (1951, c. 1011, s. 1.)

§ 20-92. Revocation of franchise registration.—The failure of any common carrier of passengers or any common carrier of property to pay any tax levied under this article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles, and the utilities commission may revoke any franchise or permit issued such carrier. (1937, c. 407, s. 56; 1945, c. 575, s. 4; 1951, c. 819, s. 1.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, added at the end of this section the words "and the utilities commission may revoke any franchise or permit issued such carrier."

The 1951 amendment substituted "common carrier of passengers" for "franchise bus carrier" and "common carrier of property" for "franchise hauler."

§ 20-93. Bonds or deposit required.—The commissioner, before issuing any registration plates to a common carrier of passengers or a common carrier of property, shall either satisfy himself of the financial responsibility of such carrier or require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section. (1937, c. 407, s. 57; 1951, c. 819, s. 1.)

Editor's Note.—The 1951 amendment substituted "common carrier of passengers" for "franchise bus carrier" and "common carrier of property" for "franchise hauler."

§ 20-94. Partial payments.—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars (\$400.00), half of such payment may, if the commissioner is satisfied of the financial responsibility of such owner, be deferred until June first in any calendar year upon the execution to the commissioner of a draft upon any bank or trust company upon forms to be provided by the commissioner in an amount equivalent to one-half of such tax, plus a carrying charge of one-half of one per cent ($\frac{1}{2}$ of 1%): Provided, that any person using any tag so purchased after the first day of June in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the commis-

sioner to his duly authorized agents and/or the state highway patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the department until the draft has been paid. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10.)

Editor's Note.—

The 1945 amendment substituted "June" for "April" in lines seven and fourteen, and reduced the carrying charge from two per cent to one-half of one per cent.

The 1947 amendment added the last sentence.

§ 20-95. Licenses for less than a year.—Licenses issued on or after April first of each year and before July first for all vehicles, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be three-fourths of the annual fee. Licenses issued on or after July first and before October first, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-half the annual fee. Licenses issued on or after October first, except on two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-fourth of the annual fee. (1937, c. 407, s. 59; 1947, c. 914, s. 3.)

Editor's Note.—The 1947 amendment, which struck out the words "franchise haulers and" formerly appearing after the word "except" in line three, is effective as of January 1, 1948.

§ 20-96. Overloading. — The commissioner, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the fee at the rate per hundred pounds which would be assessed against such vehicle if its gross weight capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fraction thereof, excessive weights of five hundred pounds or less being disregarded and weights of more than five hundred pounds and not more than one thousand pounds being counted as one thousand. It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover any overload which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highways over the weight for which such vehicle is licensed, shall pay the penalties prescribed in § 20-118. Nonresidents operating under the provisions of § 20-83 shall be subject to the additional tax provided in this section when their vehicles are operated in excess of the licensed weight or, regardless of the licensed weight, in excess of the maximum weight provided for in § 20-118. Any resident or nonresident owner of a vehicle that is found in operation on a highway designated by the State Highway and Public Works Commission as a light traffic highway and along which signs are posted showing the maximum legal weight on said highway with a load in excess of the weight posted for said highway, shall be subject to the penalties provided in § 20-118. Any person who shall wilfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed.

Any peace officer who discovers a property hauling vehicle being operated on the highways with an overload as described in this section or which is equipped with improper registration plates is hereby authorized to seize said property hauling vehicle and hold the same until the overload has been removed or proper registration plates therefor have been secured and attached thereto. Any peace officer seizing a property hauling vehicle under this provision, may, when necessary, store said vehicle and the owner thereof shall be responsible for all reasonable storage charges thereon. When any property hauling vehicle is unloaded or partially unloaded under this provision, the removed load shall be cared for by the owner or operator of the vehicle without any liability on the part of the officer or of the State or any municipality because of damage to or loss of such removed load. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; c. 1207, s. 41½; c. 1253; 1951, c. 1013, ss. 1-3.)

Editor's Note.—The 1951 amendment rewrote this section. Section 8 of the amendatory act provided that "nothing in this act shall conflict with or repeal G. S. 20-119."

§ 20-97. Taxes compensatory; no additional tax.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

§ 20-99. Remedies for the collection of taxes.—

1. If any tax imposed by this chapter, or any other tax levied by the state and payable to the commissioner of motor vehicles, or any portion of such tax, be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the commissioner of motor vehicles shall issue an order under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the commissioner of motor vehicles the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner. Upon the issuance of said order to the sheriff, in the event the delinquent taxpayer shall be the operator of any common carrier of passengers or common carrier of property vehicle, the franchise certificate issued to such operator shall become null and void and shall be cancelled by the utilities commissioner, and it shall be unlawful for any such common carrier of passengers or the operator of any common carrier of property vehicle to continue the operation under said franchise.

2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this chapter, or which has been transferred by such taxpayer under circumstances which would

permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the commissioner of motor vehicles shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the commissioner of motor vehicles or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known:

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set off against the taxpayer, he shall, within ten days after service of said notice, answer the same by sending to the commissioner of motor vehicles by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the commissioner by registered mail; if the commissioner admits such defense or set off, he shall so advise the garnishee in writing within ten days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set off, and any amount attached or garnished hereunder which is not affected by such defense or set off shall be remitted to the commissioner as above provided in cases where the garnishee has no defense or set off, and with like effect. If the commissioner shall not admit the defense or set off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the commissioner of motor vehicles by default or after hear-

ing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or set off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the commissioner of motor vehicles or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in § 105-267, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the commissioner at any time within twelve months after said intangible is paid to him and if the commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407 and if such payment is denied, said party may appeal from the determination of the commissioner to the superior court of Wake county or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars (\$200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

3. In addition to the remedy herein provided, the commissioner of motor vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or

corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

4. The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1937, c. 407, s. 63; 1945, c. 576, s. 4; 1951, c. 819, s. 1.)

Editor's Note.—The 1945 amendment rewrote this section. The 1951 amendment substituted "common carrier of passengers" for "franchise bus carrier" and "common carrier of property" for "franchise hauler" in subsection 1.

§ 20-101. Vehicles to be marked.—All motor vehicles licensed as common carriers of passengers, common carrier of property vehicles and contract carrier vehicles, shall have printed on the side thereof in letters not less than three inches in height the name and home address of the owner, or such other identification as the utilities commissioner may approve. (1937, c. 407, s. 65; 1951, c. 819, s. 1.)

Editor's Note.—The 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers", "common carrier of property" for "franchise hauler" and "contract carrier" for "contract hauler."

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-110. When registration shall be rescinded.

(d) The department shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) The department shall rescind and cancel the license and dealer plates issued to any person when it is found that false or fraudulent statements have been made in the application for the same, and when and if it is found that the applicant does not have a bona fide place of business as provided by this article.

(f) The department shall rescind and cancel the dealer's license and dealer's license plates issued to any person who knowingly delivers a certificate of title to a vehicle purchased from him which does not show a proper or correct transfer of ownership or who wilfully fails to deliver proper certificate of title to a motor vehicle sold by him. (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4; 1951, c. 985, s. 1.)

Editor's Note.—The 1945 amendment added subsection (d), the 1947 amendment added subsection (e) and the 1951 amendment added subsection (f). As the rest of the section was not affected by the amendment, it is not set out.

§ 20-111. Violation of registration provisions.

(b) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or

to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired.

(d) To fail or refuse to surrender to the department, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this article provided.

(e) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. A violation of this subsection shall constitute a misdemeanor punishable in the discretion of the court not to exceed two years. (1937, c. 407, s. 75; 1943, c. 592, s. 2; 1945, c. 576, s. 6; c. 635; 1949, c. 360.)

The first 1945 amendment added at the end of subsection (b) the words "or to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired." The second 1945 amendment inserted a comma after the words "certificate" in line two of subsection (d). The 1949 amendment rewrote subsection (e). As only these subsections were affected by the amendments the rest of the section is not set out.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(d) No vehicle shall exceed a length of thirty-five feet extreme over-all dimension, inclusive of front and rear bumpers: Provided, that a passenger bus having three (3) axles shall not exceed forty (40) feet in length. A truck-tractor and semi-trailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-eight feet exclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided, that the state highway and public works commission shall have authority to designate any highways upon the state system as light-traffic roads when, in the opinion of the commission, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or busses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Pro-

vided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than eighteen feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty per cent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty per cent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system.

(h) Wherever there exist two highways of the primary State Highway System of approximately the same distance between two or more points, the state Highway and Public Works Commission shall have authority, when in the opinion of the Commission, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served thereby, to designate one of said highways the "truck route" between said points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways so selected for heavy vehicle traffic shall be so designated as "truck routes" by signs conspicuously posted thereon, and the highways upon which heavy vehicle traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum gross vehicle weight or axle load limits authorized for said highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on such signs over the highway thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for such highways from using such highway when the destination of such vehicle is located solely upon said highway, road or street: Provided, further, that nothing herein shall prohibit passenger vehicles or other light vehicles from using any highways so designated for heavy truck traffic.

(1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733.)

Editor's Note.—

The 1945 amendment substituted "forty-eight" for "forty-five" in line four of subsection (e), and the 1947 amendment added the proviso at the end of the subsection. The first 1951 amendment added the proviso to the first sentence of subsection (d) and the second 1951 amendment rewrote subsection (h). As the other subsections were not changed they are not set out.

Cited in *Hobbs v. Drewet*, 226 N. C. 146, 37 S. E. (2d) 121.

§ 20-117.1. Equipment required on all semi-trailers operated by contract carriers or common carriers of property.—(a) On every semi-trailer having a gross weight in excess of 3,000 pounds there shall be at least the following lighting devices and reflectors:

(1) On the front, two amber clearance lamps, one at each side.

(2) On the rear, one red tail lamp; one red or amber stop light; two red clearance lamps, one at each side; two red reflectors, one at each side.

(3) On each side, one amber side-marker lamp, located at or near the front; one red side-marker lamp, located at or near the rear; one amber rear-

reflector, located at or near the front; one red reflector, located at or near the rear.

(b) Side-marker lamps may be combined with clearance lamps. Side-marker lamps may be in combination with clearance lamps and may use the same light source.

(c) Clearance, side-marker and tail lamps shall when lighted be capable of being seen at a distance of 500 feet under normal atmospheric conditions during the time when lights are required.

(d) Stop lights shall be actuated by application of the service (foot) brakes and shall be capable of being seen and distinguished from a distance of 100 feet to the rear of the motor vehicle in normal daylight; but shall not project a glaring or dazzling light. The stop light may be incorporated with the tail lamp.

(e) Every reflector mounted on a motor vehicle shall be of such size and characteristics as to be readily visible at night from all distances within 500 feet to 50 feet from the motor vehicle when directly in front of a normal headlight beam. Whether or not the rear reflectors are incorporated in tail lamps, they shall be located on the rear of the motor vehicle at opposite sides and shall also meet the requirements as to visibility as set forth in this paragraph.

(f) Rear-vision mirror. Every tractor shall be equipped with at least one rear-vision mirror, firmly attached to the motor vehicle and so located as to reflect to the driver a view of the highway to the rear.

(g) Fuel container not to project. No part of any fuel tank or container or intake pipe shall project beyond the sides of the motor vehicle.

(h) Flag or light at end of load. Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1949, c. 1207, s. 1; 1951, c. 819, s. 1.)

Editor's Note.—The 1951 amendment substituted "contract carriers or common carriers of property" for "contract or franchise haulers" in the catchline.

§ 20-118. Weight of vehicles and load.—No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(a) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, eight thousand pounds.

(b) When the wheel is equipped with low-pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are equipped with low-pressure pneumatic tires, eighteen thousand pounds.

(e) For the purposes of this section an axle

load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than forty-eight inches apart.

(f) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than one hundred pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to one hundred pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(g) The gross weight of any vehicle having two axles shall not exceed thirty thousand pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger busses to be operated upon the highways of this State, the commissioner of motor vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. No license shall be issued to any passenger bus with two (2) axles having a weight, when fully equipped for operation on the highways, of more than twenty-two thousand, five hundred (22,500) lbs., and no license shall be issued for any passenger bus with three (3) axles having a weight, when fully equipped for operation on the highways, of more than thirty thousand (30,000) lbs. unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the 1st day of February, 1949. No special permits shall be issued for any passenger buses exceeding the foregoing specified weights for each group.

(h) The gross weight of any vehicle or combination of vehicles having three axles shall not exceed forty-four thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(i) The gross weight of any vehicle or combination of vehicles having four or more axles shall not exceed fifty-six thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(j) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed thirty thousand pounds.

(k) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds six hundred pounds upon any inch of tire roller or other support.

(l) Provided, however, that no vehicle or combination of vehicles which has an axle load in excess of eighteen thousand (18,000) pounds shall be allowed on any highway or portion of highway that has not been designated by the state highway and public works commission as a heavy duty highway.

Any vehicle or combination of vehicles may exceed the weight limitations hereinbefore set out by not more than five per centum (5%), except that the gross weight on any one axle of any vehicle

when the wheels attached to said axle are equipped with high-pressure, solid rubber or cushion tires shall not exceed 16,000 pounds and the gross weight on any one axle of a vehicle when the wheels attached to said axle are equipped with low-pressure pneumatic tires shall not exceed 18,000 pounds. Vehicles or combinations of vehicles having a gross weight in excess of forty thousand (40,000) pounds shall not be licensed or allowed to use the highways of the State, unless the engine furnishing the motive power of such vehicle or combination of vehicles shall have a piston displacement of three hundred (300) cubic inches, or more.

For each violation of this section, the owner of the vehicle shall pay to the department a penalty for each pound of weight of such vehicle and load in excess of the weight (including the 5%) fixed by this section for such vehicle and its load, in accordance with the following schedule: For the first 2,000 pounds or any part thereof 1c per pound. For the next 3,000 pounds or any part thereof 2c per pound. For each pound in excess of 5,000 pounds 5c per pound. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8.)

Editor's Note.—The 1949 amendment rewrote this section. The first 1951 amendment made changes in subsection (g), and the second 1951 amendment deleted the former last sentence of the section relating to the required piston displacement of vehicles or combinations thereof having a gross weight in excess of 50,000 pounds. The third 1951 amendment rewrote the first sentence of the next to the last paragraph, and added the last paragraph. Section 8 of the third 1951 amendment purports to repeal "subdivision (1)" of this section. There is no such subdivision or subsection, however there is a subsection (l), which consists of the paragraph beginning with "Provided" and ending with "highway", the last two paragraphs of the section not being parts of such subsection. Because of the great similarity between the typewritten or printed figure "1" and the letter "el" it is quite probable that the legislature intended to repeal subsection (l). A consideration of the legislative history of the amendatory act gives weight to this probability. The said section 8 of the third 1951 amendment further provides that "nothing in this act shall conflict with or repeal G. S. 20-119."

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing.—Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4.)

Editor's Note.—The 1949 amendment added the next to the last sentence and the 1951 amendment added the last sentence.

§ 20-118.2. Authority to fix higher weight limitations at reduced speeds for certain vehicles.—The State Highway and Public Works Commission is hereby authorized and empowered to fix higher weight limitations at reduced speeds for vehicles used in transporting property when the point of origin or destination of the motor vehicles is located upon any light traffic highway, county road, farm to market road, or any other roads of the secondary system only and/or to the extent only that the motor vehicle is necessarily using said highway in transporting the property from the bona fide point of origin of the property being transported or to the bona fide point of destination of said property and such weights may be different from the weight of those vehicles otherwise using such roads. (1951, c. 1013, s. 7A.)

Editor's Note.—Section 8 of Chapter 1013, Session Laws 1951, from which this section was codified, provided "nothing in this act shall conflict with or repeal G. S. 20-119."

§ 20-120. Operation of flat trucks on state highways regulated; trucks hauling leaf tobacco in barrels or hogsheads.—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the state any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

It shall be unlawful for any firm, person or corporation to operate or permit to be operated on any highway of this state a truck or trucks on which leaf tobacco in barrels or hogsheads is carried unless such barrels or hogsheads are reasonably securely fastened to such truck or trucks by metal chains or wire cables or tarpaulin, or manila or hemp ropes of not less than one-half inch in diameter, to hold said barrels or hogsheads in place under any ordinary traffic or road condition. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty (30) days; Provided that the provisions of this paragraph shall not apply to any truck or trucks on which the hogsheads or barrels of tobacco are arranged in a single layer, tier, or plane, it being the intent of this paragraph to require the use of metal chains or wire cables only when barrels or hogsheads of tobacco are stacked or piled one upon the other on a truck or trucks. Nothing in this paragraph shall apply to trucks engaged in transporting hogsheads or barrels of tobacco between factories and storage houses of the same company unless such hogsheads or barrels are placed upon the truck in tiers. In the event the hogsheads or barrels of tobacco are placed upon the truck in tiers same shall be securely fastened to the said truck as hereinbefore provided in this paragraph. (1939, c. 114; 1947, c. 1094.)

Editor's Note.—The 1947 amendment added the second paragraph.

§ 20-124. Brakes.

Violation of this section is negligence per se, but such violation must be proximate cause of injury to become actionable. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246, 250.

A charge as to proper brakes on motor vehicles, in com-

pliance with this section, where the evidence shows no mention of brakes, is a harmless inadvertence. *Hopkins v. Colonial Stores*, 224 N. C. 137, 29 S. E. (2d) 455.

Cited in *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209 (dis. op.).

§ 20-125. Horns and warning devices.

(b) Every vehicle owned and operated by a police department or by a fire department, either municipal or rural, or by a fire patrol, whether such fire department or patrol be a paid organization or a voluntary association, and every ambulance used for answering emergency calls, shall be equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

The operators of all such vehicles so equipped are hereby authorized to use such equipment at all times while engaged in the performance of their duties and services, both within their respective corporate limits and beyond.

In addition to the use of special equipment authorized and required by this subsection, the chief and one assistant chief of any police department or of any fire department, whether the same be municipal or rural, paid or voluntary, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in the performance of their official or semi-official duties or services either within or beyond their respective corporate limits.

And vehicles driven by inspectors in the employ of the North Carolina Utilities Commission shall be equipped with a bell, siren, or exhaust whistle of a type approved by the commissioner. (1937, c. 407, s. 88; 1951, cc. 392, 1161.)

Editor's Note.—The first 1951 amendment rewrote subsection (b) and the second 1951 amendment added the last paragraph thereto. As subsection (a) was not changed it is not set out.

§ 20-129. Required lighting equipment of vehicles.

(d) **Rear Lamps:** Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of fifty feet to the rear of such vehicle, and every trailer or semi-trailer shall carry at the rear, in addition to a rear lamp as above specified, a red reflector of a type which has been approved by the commissioner and which is so designed, located as to a height and maintained as to be visible for at least five hundred feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

Notwithstanding the provision of the first paragraph of this subsection, it shall not be necessary for a trailer, licensed for not more than 2500 pounds, to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors, each not less than four inches in diameter, and to be of a type approved by the commissioner, and which are so

designed, located as to height and maintained as for each reflector to be visible for at least five hundred feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway, such reflectors to be placed at the extreme end of the load.

(1947, c. 526.)

Editor's Note.—

The 1947 amendment added the second paragraph of subsection (d). As the rest of the section was not affected by the amendment it is not set out.

Purpose of Section.—This section was enacted to minimize the hazards incident to the movement of motor vehicles upon the public roads during the nighttime. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377.

Violation as Negligence Per Se.—The operation of a tractor-trailer on the highways at night without the rear and clearance lights burning as required by this section is negligence per se. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377.

Disabled Vehicle.—A tractor-trailer standing on the paved portion of a highway at nighttime is required to have the rear and clearance lights burning as provided by this section, regardless of whether or not the vehicle is disabled within the meaning of § 20-161(c). *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377.

Bicycle Being Carried by Pedestrian.—Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to a repair shop, and that he was hit by a vehicle entering the intersection against the stop light at a high rate of speed. The court held that the refusal to give defendants' requested instruction that the failure to have a light on the bicycle was a violation of subsection (f) of this section was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist. *Holmes v. Blue Bird Cab*, 227 N. C. 581, 582, 43 S. E. (2d) 71.

Evidence Requiring Submission to Jury.—Evidence that the car in which plaintiff was riding as a guest struck defendant's trailer which was standing across the highway in the car's lane of traffic, and that the trailer did not have burning the lights required by this section, is sufficient to overrule defendant's motion to nonsuit and motion for a directed verdict in its favor on the issue of negligence, since the question of proximate cause under the evidence is for the jury. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377.

Applied in *McKinnon v. Howard Motor Lines*, 228 N. C. 132, 44 S. E. (2d) 735; *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 534.

§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions.—It shall be unlawful for any person to drive upon the highways of this state any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, ambulances, wreckers, fire fighting vehicles or vehicles of a voluntary lifesaving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or to such lights as may be prescribed by the Interstate Commerce Commission, (1943, c. 726; 1947, c. 1032.)

Editor's Note.—The 1947 amendment rewrote the second sentence.

§ 20-134. Lights on parked vehicles.

Violation Is Negligence Per Se.—

Parking on a paved highway at night, without flares or other warning, is negligence. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388.

Cited in *McKinnon v. Howard Motor Lines*, 228 N. C. 132, 44 S. E. (2d) 735.

§ 20-136.1. Location of television viewers.—No person shall drive any motor vehicle equipped with any television viewer, screen, or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat, or which is

visible to the driver while operating the motor vehicle. (1949, c. 583, s. 4.)

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor or narcotic drugs.

Cross Reference.—For cases construing a similar section now repealed, see note to § 14-387 in original.

Necessity That Causal Connection Be Shown.—The violation of § 20-154 and this section, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter, unless a causal relation is shown between the breach of the statute and the death. *State v. Lowery*, 223 N. C. 598, 27 S. E. (2d) 688.

Violation Must Be Shown Beyond a Reasonable Doubt.—Before the state is entitled to a conviction under this section, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of the state while under the influence of intoxicating liquor or narcotic drugs. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688.

Permitting Intoxicated Person to Drive.—When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway while in a state of intoxication, the owner is as guilty as the man at the wheel. *State v. Gibbs*, 227 N. C. 677, 678, 44 S. E. (2d) 201.

"Under the Influence" Defined.—A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of this section, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688.

In prosecution under this section, an instruction that defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally co-ordinate or if he was abnormal in any degree from intoxicants was held without error. *State v. Biggerstaff*, 226 N. C. 603, 39 S. E. (2d) 619.

No Distinction between One Who Is Drunk and One under the Influence of Liquor.—The legislature did not intend that any distinction between a person who is drunk and one under the influence of liquor should be made in the interpretation and enforcement of this statute. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688, 690.

Instruction on Intoxication Held Erroneous.—An instruction that a person is under the influence of intoxicating liquor when "he has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties" is erroneous. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688.

Sufficiency of Evidence of Intoxication.—The testimony of two witnesses to the effect that from the detection of some "foreign" odor of an intoxicant from the mouth of a man whom they had not seen before, and who had been knocked unconscious by a blow on the head, they were of opinion he was under the influence of intoxicating liquor, standing alone, was insufficient to constitute substantial evidence that the man, previously, while driving an automobile on the highway, had been under the influence of intoxicants to the extent held necessary in *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688, to constitute violation of this section. *State v. Flinchum*, 228 N. C. 149, 150, 44 S. E. (2d) 724.

Portion of Sidewalk as Highway.—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of this section. *State v. Perry*, 230 N. C. 361, 53 S. E. (2d) 288.

When Nonsuit Proper.—Officers who reached the scene of an accident some thirty minutes after it occurred testified that in their opinion defendant driver was intoxicated or under the influence of something, and one of them testified that he smelled something on defendant's breath, but both testified that they did not know whether defendant's condition was due to drink or to injuries sustained by him in the accident. It was held that the evidence raises no more than a suspicion or conjecture as to whether defend-

ant was driving under the influence of liquor or narcotic drugs, and defendant's motion as of nonsuit should have been allowed. *State v. Hough*, 229 N. C. 532, 50 S. E. (2d) 496.

Evidence held sufficient to be submitted to the jury on a charge of driving a motor vehicle on the highways while under the influence of intoxicants in violation of this section. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724. See *State v. Sawyer*, 230 N. C. 713, 55 S. E. (2d) 464.

In Prosecution for Manslaughter.—Evidence that defendant was driving on the public highways of the state while under the influence of intoxicating liquor in violation of this section, and was driving recklessly in violation of § 20-140, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724.

Duty of Judge to Charge as to Good Character of Defendant.—Where defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor, in the absence of request it was not incumbent upon the trial judge to charge specifically as to the effect of evidence of the good character of the defendant. This was not an essential feature of the case. *State v. Glatly*, 230 N. C. 177, 52 S. E. (2d) 277.

§ 20-139. Operation upon driveways of public or private institutions while under the influence of intoxicating liquors, etc.—Any person who shall operate a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church or any of the institutions maintained and kept up by the State of North Carolina or any of its subdivisions while under the influence of narcotic drugs or intoxicating liquor, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in § 20-179. (1939, c. 292; 1951, c. 1042, s. 1.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 20-140. Reckless driving.

A motorist is under duty at all times to operate his vehicle at a reasonable rate of speed and maintain constant attention to the highway. *Williams v. Henderson*, 230 N. C. 707, 55 S. E. (2d) 462.

Duty to Keep Car under Control and Decrease Speed When Special Hazards Exist.—The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355.

Ability to Stop within Radius of Lights.—And one who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355.

Sufficiency of Evidence for Jury.—

Allegation that defendant violated the provisions of this section, in that truck was operated carelessly and heedlessly in willful and wanton disregard of rights and safety of others, at a speed and in a manner to endanger or be likely to endanger person and property and by operating same to the left, when he could have turned to the right and passed without striking plaintiff's testator, was not supported by evidence. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246, 251.

Evidence held sufficient to be submitted to the jury on a charge of reckless driving in violation of this section. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724; *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843.

Circumstantial evidence tending to identify defendant as the driver of the car which was driven in a reckless manner, was held sufficient to be submitted to the jury. *State v. Dooley*, 232 N. C. 311, 59 S. E. (2d) 808.

Evidence held properly submitted to the jury on the charge of reckless driving. *State v. Sawyer*, 230 N. C. 713, 55 S. E. (2d) 464.

In Prosecution for Manslaughter.—Evidence that defendant was driving on the public highways of the state while under the influence of intoxicating liquor in violation of § 20-138, and was driving recklessly in violation of this section, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724.

Evidence held sufficient to justify conviction of reckless driving. *State v. Steelman*, 228 N. C. 634, 46 S. E. (2d) 845.

The state's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway on which several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

The charge in a prosecution for reckless driving was held to be in substantial compliance with the requirements of § 1-180. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Applied in *State v. Flinchem*, 228 N. C. 149, 44 S. E. (2d) 724.

Quoted in *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868.

Cited in *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-140.1. Reckless driving upon driveways of public or private institutions, etc.—Any person who shall operate a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina or any of its subdivisions, carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in § 20-180. (1951, c. 182, s. 1.)

§ 20-141. Speed restrictions.—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

1. Twenty miles per hour in any business district;
2. Thirty-five miles per hour in any residential district;
3. Forty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one ton capacity, and school busses loaded with children;
4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, regular passenger carrying vehicles, and pick-up trucks of less than one ton capacity.

(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person,

vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(d) Whenever the state highway and public works commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) Whenever local authorities within their respective jurisdictions determine, upon the basis of an engineering and traffic investigation, that the speed permitted under this article at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(f1) Local authorities in their respective jurisdictions may in their discretion fix by ordinance such speed limits as they may deem safe and proper on those streets which are not a part of the state highway system and which are not maintained by the state highway and public works commission, but no speed limit so fixed for such streets shall be less than twenty-five miles per hour, and no such ordinance shall become or remain effective unless signs have been conspicuously placed giving notice of the speed limit for such streets. A violation of any ordinance adopted pursuant to the provisions of this subsection shall constitute a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or a prison sentence of not more than thirty days.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher speeds than those stated in subsection (b) hereof upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections: Provided, that signs are erected giving notice of the authorized speed.

Local authorities shall not have authority to modify or alter the basic rules set forth in subsection (a) herein, nor in any event to authorize by ordinance a speed in excess of fifty miles per hour.

(h) No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of wilful disobedience to this provision and refusal to comply with the direction of an officer in accordance

herewith, the continued slow operation by a driver shall be a misdemeanor.

(i) The state highway and public works commission shall have authority to designate and appropriately mark certain highways of the state as truck routes.

(j) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punished as provided in § 20-180. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendment inserted subsection (f).

For a brief comment of the 1949 amendment, see 27 N. C. Law Rev. 473.

Regulation of Speed at Night.—

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." He must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 119, 25 S. E. (2d) 388.

A motorist must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53; *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388.

One who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355.

Colliding with Vehicle Parked on Highway at Night without Signals.—The driver of a car is not required to anticipate that vehicles will be parked on the highway at night without the warning signals required by statute, but this does not relieve him of the duty to keep a proper lookout and not to exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmospheric conditions. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53. See § 20-161(a).

Where plaintiff's own evidence discloses that his lights and brakes were in good condition, that he was driving with his lights full on at thirty-five miles per hour, that he could see 150 feet ahead despite the darkness and heavy fog, and that he failed to see any obstruction and hit the rear of a truck parked on the highway in his lane of traffic without lights or warning flares, the evidence discloses contributory negligence on his part as a matter of law. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53.

Failure to Slacken Speed or Give Signal at Intersection.—Plaintiff's evidence tending to show that defendant's tractor with trailer was being driven at a speed of 35 miles per hour and entered an intersection with another highway without slackening speed or giving signal or warning, and collided with the truck in which plaintiffs' intestates were riding, which had already entered the intersection, is sufficient to overrule defendant's motions as of nonsuit on the issue of negligence, notwithstanding that defendant's vehicle was being operated upon the dominant highway. *Nichols v. Goldston*, 228 N. C. 514, 46 S. E. (2d) 320.

Limitation upon Privilege of Driving at Maximum Rate.—By provision of this section, speed in excess of that which is reasonable and prudent under the circumstances when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the prima facie limits prescribed. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

The fact that a vehicle is being driven within the statutory speed limit does not render the speed lawful when by reason of special hazards the speed is greater than is reasonable and prudent under the existing conditions. *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190.

Motorist Must Decrease Speed When Special Hazards Exist.—A speed greater than is reasonable and prudent under the conditions then existing is prohibited by this section, and the duty is imposed upon the driver to decrease the speed of his automobile when special hazard exists with respect to pedestrians or other traffic. *Baker v. Perrott*, 228 N. C. 558, 46 S. E. (2d) 461. See *Williams*

v. Henderson, 230 N. C. 707, 55 S. E. (2d) 462; *Riggs v. Akers Motor Lines*, 233 N. C. 160, 63 S. E. (2d) 197.

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-140, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355.

Curves and hills in the road are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." *Tyson v. Ford*, 228 N. C. 778, 47 S. E. (2d) 251.

Evidence Tending to Show "Speed Greater than Is Reasonable and Prudent."—Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251.

Burden of Showing Proximate Cause.—Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

Sufficient Evidence to Overrule Defendant's Motion to Nonsuit in Prosecution for Manslaughter.—

The state's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway whereon several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving under § 20-140, and driving at a speed in excess of fifty-five miles per hour in violation of this section. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Under this section prior to the 1947 amendment, evidence of speed greater than was reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, was evidence of negligence. *Steelman v. Benfield*, 228 N. C. 651, 46 S. E. (2d) 829.

Under this section prior to the 1947 amendment, where plaintiff's evidence tended to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve on an upgrade, an instruction that a speed of 45 miles per hour, rather than a speed in excess of 45 miles per hour, was prima facie evidence that the speed was unlawful, was held not prejudicial in view of the requirement in subsection 5(c) to reduce speed below the prima facie limits prescribed in traversing a curve or when special hazards exist with respect to other traffic. *Garvey v. Atlantic Greyhound Corp.*, 228 N. C. 166, 45 S. E. (2d) 58.

Evidence Negating Excessive Speed.—In *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246, 250, it was held that in the light of admitted facts as to the length of marks on the shoulder of highway and the point at which truck came to rest, suggestion of a speed of forty-five miles per hour as the truck was leaving the highway and going on the shoulder was contrary to human experience.

Evidence held to show violation of this section, and to warrant submission to the jury of the issue of defendants' negligence. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251. See *Brafford v. Cook*, 232 N. C. 699, 62 S. E. (2d) 327.

Contributory Negligence of Guest.—The evidence tended to show that plaintiff was a guest in a truck being driven by defendant, that it was misting rain and the road was wet, that defendant was driving at an excessive speed of 60 to 65 miles per hour, but that defendant was sober and was an experienced and competent driver, and that plaintiff remonstrated several times as to speed and was reassured by defendant that he had been driving for twenty-five years without an accident. In plaintiff's suit to recover for injuries sustained when the car skidded and turned over on the highway, it was held that plaintiff was not guilty of contributory negligence as a matter of law in failing to request that defendant stop the car and permit him to get out, but the issue of contributory negligence should have been submitted to the jury. *Samuels v. Bowers*, 232 N. C. 149, 59 S. E. (2d) 787.

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of

the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of § 1-180. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278.

Mere Reading of This Section Held Insufficient.—The mere reading of the statutory speed regulations laid down in this section, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions of the evidence adduced, is insufficient to meet the requirements of § 1-180. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Necessity of Referring to Subsection 4(c).—So material is the application of subsection 4(c) to questions of liability arising out of violation of statutory speed regulations where special hazards or unusual circumstances are shown that in *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. (2d) 915, it was held error that the trial court in that case charged the jury as to the speed limits fixed by this section without calling attention to the clause above referred to. *Garvey v. Atlantic Greyhound Corp.*, 228 N. C. 166, 45 S. E. (2d) 58.

Applied in *Sparks v. Willis*, 228 N. C. 25, 44 S. E. (2d) 343; *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724; *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361; *Whiteman v. Seashore Transp. Co.*, 231 N. C. 701, 58 S. E. (2d) 752.

Stated in *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84.

Cited in *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642; *Hobbs v. Queen City Coach Co.*, 225 N. C. 323, 331, 34 S. E. (2d) 211.

§ 20-141.1. Restrictions in speed zones near rural public schools.—Whenever the State Highway and Public Works Commission shall determine that the proximity of a public school to a public highway, coupled with the number of pupils in ordinary regular attendance at such school, results in a situation that renders the applicable speed set out in G. S. 20-141 greater than is reasonable or safe, under the conditions found to exist with respect to any public highway near such school, said commission shall establish a speed zone on such portion of said public highway near such school as it deems necessary, and determine and declare a reasonable and safe speed limit for such speed zone, which shall be effective when appropriate signs giving notice thereof are erected at each end of said zone so as to give notice to any one entering the zone. This section does not apply with respect to any portion of any street or highway within the corporate limits of any incorporated city or town. Operation of a motor vehicle in any such zone at a rate of speed in excess of that fixed pursuant to the powers granted in this section is a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1951, c. 782.)

§ 20-143. Vehicles must stop at certain railway grade crossings.

As to article on automobile accidents at railroad crossings, see 23 N. C. Law Rev. 223.

§ 20-145. When speed limit not applicable.—The speed limitations set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies, nor to vehicles operated by the duly authorized officers, agents and employees of the North Carolina Utilities Commission when traveling in performance of their duties in regulating and checking the traffic and speed of busses, trucks, motor vehicles and motor vehicle carriers subject to the

regulations and jurisdiction of the North Carolina Utilities Commission. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107; 1947, c. 987.)

Editor's Note.—The 1947 amendment inserted the reference to the utilities commission.

§ 20-146. Drive on right side of highway.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d), and is not a driver of a vehicle within the meaning of this section and § 20-149. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Proximate Cause.—

Where there was testimony of witnesses who were at the scene of the collision almost immediately after it occurred to the effect that they saw glass, flour and mud on the south side of the highway, intestate's right side and defendant's left side of the highway, and nothing of the kind on the opposite side of the highway, the north side, it was held that this was evidence that defendant's truck was being operated in violation of this and the two following sections, which required defendant to drive his truck on his right side of the highway and to give plaintiff's coupe half of the main traveled portion of the roadway as nearly as possible, and that this violation proximately caused the collision which resulted in the death of plaintiff's intestate. *Wyrick v. Ballard, etc., Co.*, 224 N. C. 301, 303, 29 S. E. (2d) 900.

Negligence Per Se.—

A violation of this section is negligence per se, but to be actionable, such negligence must be proximate cause of injury. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246, 251. See *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

Driving to Left to Avoid Collision.—Where bus driver cut his bus to the left and crossed the center line in an effort to avoid the collision, it was held that under the circumstances of case, such act was not negligence. *Ingram v. Smoky Mountain Stages*, 225 N. C. 444, 35 S. E. (2d) 337.

Evidence Sufficient to Show Violation of This Section.—A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in the opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. It was held that the testimony is sufficient to support an inference that the defendant violated this section in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and compulsory nonsuit was error. *Gladden v. Setzer*, 230 N. C. 269, 52 S. E. (2d) 804.

Quoted in *Maddox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613.

§ 20-148. Meeting of vehicles.

Cross Reference.—See annotations under § 20-146.

Violation as Negligence.—Violation of this section is negligence per se. *Hobbs v. Queen City Coach Co.*, 225 N. C. 323, 331, 34 S. E. (2d) 211.

A violation of this section would be negligence per se, and if such violation were proximate cause of the injury it would be actionable. *Wallace v. Longest*, 226 N. C. 161, 37 S. E. (2d) 112; *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345.

Assumption That Vehicle Will Turn to Right.—

In accord with original. See *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 418, 42 S. E. (2d) 593.

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with this section, and turn to its right in time to avoid a collision, is not applicable to a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard surface on its left side of the highway with its lights on, since the rule merely absolves a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation. *Webb v. Hutchins*, 228 N. C. 1, 44 S. E. (2d) 350.

Notwithstanding the right of a motorist to so assume,

still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 418, 42 S. E. (2d) 593, citing *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539.

Proximate Cause Is for Jury.—Proximate cause is a matter for consideration of the jury under the law as declared by the court. *Wallace v. Longest*, 226 N. C. 161, 37 S. E. (2d) 112, 116.

Where evidence tended to show that driver of defendant's truck, in meeting the pick-up truck in which plaintiffs were riding, was not passing on his right side of highway, and was not giving oncoming truck at least one-half of the main traveled portion of the roadway as nearly as possible, in violation of the provisions of this section, question of whether defendant's truck was on left side of highway and, if so, whether proximate cause of collision would be for jury. *Id.*

Evidence held sufficient to show violation of this section. *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868.

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251.

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Id.*

Charge to Jury.—In an action for damages caused by the collision of two motor vehicles, a charge that "If plaintiff has satisfied you from the evidence and by the greater weight that on this occasion the driver of the defendant's truck at the time of the collision failed to drive the defendant's truck upon the right half of the highway, then that would constitute negligence on the part of defendant's driver," seems to be in accord with this section. *Hopkins v. Colonial Stores*, 224 N. C. 137, 140, 29 S. E. (2d) 455.

Cited in *Ingram v. Smoky Mountain Stages*, 225 N. C. 444, 35 S. E. (2d) 337.

§ 20-149. Overtaking a vehicle.

A violation of this section is negligence per se. *Kleibor v. Colonial Stores*, 159 F. (2d) 894.

The rule of the road set out in § 20-152 does not apply where one motorist is overtaking and passing another, as authorized by § 20-149, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. *Maddox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d) and is not a driver of a vehicle within the meaning of § 20-146 and this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Contributory Negligence as Question for Jury.—The evidence tended to show that plaintiff's vehicle was following that of defendant, that defendant's truck slowed down and pulled to its left of the highway, that a person in the rear of the truck motioned plaintiff's driver to go ahead, and that as plaintiff's vehicle started to pass defendant's vehicle on its right, the driver of defendant's truck turned right to enter a private driveway, and the two vehicles collided. It was held that nonsuit on the ground of contributory negligence was erroneously entered, since, whether plaintiff's driver was guilty of contributory negligence in attempting to pass defendant's vehicle on the right is a question for the determination of the jury under the circumstances. *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632.

Applied in *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843.

§ 20-150. Limitations on privilege of overtaking and passing.

Negligence Per Se.—It is negligence per se for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. *Donivant v. Swain*, 229 N. C. 114, 47 S. E. (2d) 707; *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86.

A private driveway is not an intersecting highway within the meaning of subsection (c) of this section. *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632.

Evidence Sufficient to Show Violation of This Section.

The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicle collided when the driver of the truck made a left turn at the intersection. Held: It was error for the court to instruct the jury that the provisions of subsection (c) of this section did not apply. *Donivant v. Swain*, 229 N. C. 114, 47 S. E. (2d) 707.

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251.

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. *Id.*

Contributory Negligence as Barring Recovery.—Even though the driver of a truck which collided with plaintiff's automobile failed to observe certain statutory requirements, where the evidence is equally clear in showing that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at a highway intersection, without permission so to do by a traffic or police officer, in violation of this section, contributory negligence on the part of the plaintiff bars recovery. *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86.

Where plaintiff's evidence tended to show that he started passing a truck 275 feet from an intersection, nonsuit on the ground that plaintiff was contributorily negligent in attempting to pass at an intersection was properly denied, since the evidence was susceptible to the inference that plaintiff could have passed the truck before it reached the intersection had not the driver of the truck turned suddenly to the left 75 feet from the intersection in "cutting the corner." *Howard v. Bingham*, 231 N. C. 420, 57 S. E. (2d) 401.

Stated in *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246.

§ 20-151. Driver to give way to overtaking vehicle.

Applied in *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86.

§ 20-152. Following too closely.—(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.

(b) The driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within three hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1937, c. 407, s. 114; 1949, c. 1207, s. 4.)

Editor's Note.—The 1949 amendment substituted "three" for "one" in line four of subsection (b).

The rule of the road set out in this section does not apply where one motorist is overtaking and passing another, as authorized by § 20-149, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. *Maddox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613.

Contributory Negligence.—In *Killough v. Williams*, 224 N. C. 254, 255, 29 S. E. (2d) 697, plaintiff was held not guilty of contributory negligence in following too closely in the rear of a truck with which he collided.

Applied in *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843.

Stated in *State v. Steelman*, 228 N. C. 634, 46 S. E. (2d) 845.

§ 20-153. Turning at intersection.

Circumstances Warranting Inference of Negligence.—The plaintiff was lawfully in an intersection, standing in a position where he was clearly visible to the driver of the defendants' taxicab as the latter approached the intersec-

tion. The taxi driver, had he been keeping a proper lookout, could have seen plaintiff in ample time to avoid a collision. Instead he "cut the corner" in violation of subsection (a) of this section without giving any signal or warning of his approach. A collision resulted. These circumstances, unrebutted, warranted an inference of negligence and were sufficient to require the submission of appropriate issues to the jury. *Ward v. Bowles*, 228 N. C. 273, 45 S. E. (2d) 354.

Applied in *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86.

Cited in *Smith v. United States*, 94 F. Supp. 681.

§ 20-154. Signals on starting, stopping or turning.—(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the department, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn.

(c) No person shall operate over the highways of this State a right-hand drive motor vehicle or a motor vehicle equipped with the steering mechanism on the right-hand side thereof unless said motor vehicle is equipped with mechanical or electrical signal devices by which the signals for left turns and right turns may be given. Such mechanical or electrical devices shall be approved by the department. (1937, c. 407, s. 116; 1949, c. 1016, s. 1; 1951, cc. 293, 360.)

Editor's Note.—The 1949 amendment rewrote the first paragraph of subsection (b).

The first 1951 amendment added subsection (c) and the second 1951 amendment rewrote the last paragraph of subsection (b).

The manifest object of this section is to promote vehicular travel. In the very nature of things, drivers of motor vehicles act on external appearances. These matters being true, the language of this section must be accorded a reasonable and realistic interpretation to effect the legislative purpose. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115.

The requirement that a motorist shall not turn from a straight line until he has first seen that the movement can be made in safety does not mean that he may not make a left turn on the highway unless the circumstances be absolutely free from danger, but only that he exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115.

Making Left Turn without Signaling.—This section does not

require that a motorist give proper signal before making a left turn on the highway unless the surrounding circumstances afford him reasonable grounds for apprehending that such movement may affect the operation of another vehicle, and in exercising such provision he may, in the absence of notice to the contrary, assume that other motorists will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115.

Where a motorist makes a left turn across a street, without signaling, to enter a filling station, and makes such turn when a vehicle approaching from the opposite direction is 900 feet away, and is struck by such other vehicle which was traveling at a speed of approximately 70 miles per hour, such motorist does not violate this section, since the motorist had every reason to believe that he could complete his turn with safety to himself and others without affecting in any way the operation of the approaching vehicle. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115.

The stopping of a bus on the traveled portion of the highway to receive or discharge a passenger must be done with due regard to the provisions of this section. *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215.

Violation of Section as Negligence Per Se.—

Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. It is the stopping without giving a signal, approved by statute, whenever the operation of any other vehicle may be affected thereby. A violation of the statute is negligence per se. *Conley v. Pearce-Young-Angel Co.*, 224 N. C. 211, 29 S. E. (2d) 740.

The failure to give a signal as required by statute, before stopping a motor vehicle on a public highway, is negligence; and ordinarily it is for the jury to determine whether or not such negligence was the proximate cause of the injury. *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215.

The violation of either of the requirements of this section that a motorist before turning to the right or left from a direct line on the highway must first exercise reasonable care to ascertain that such movement can be made in safety and shall give the appropriate statutory signal of his intention to make a turn is negligence per se and is actionable if it proximately causes injury. *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538.

Violation Proximately Causing Injury Is Actionable.—The violation of this section, requiring that a driver turning from a direct line shall first see that such movement can be made in safety and, whenever such movement may affect the operation of another vehicle, to give proper signal, is negligence, and is actionable if such violation proximately causes injury to another. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115.

Causal Relation.—The violation of this section and of § 20-138, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter unless a causal relation is shown between the breach of the statute and the death. *State v. Lowery*, 223 N. C. 598, 601, 27 S. E. (2d) 638.

Intervening Negligence Insulating Primary Negligence.—Plaintiff's evidence tended to show that plaintiff was standing at the rear of a car parked completely off the hard surface on the right, that a car traveling at a speed of 45 to 50 miles per hour slowed down rapidly as it came near the parked car, that the driver of a truck following 250 feet behind the car, immediately he saw the brake light on the car, applied his brakes without effect and then applied his hand brake and skidded off the highway, striking the rear of the car and the plaintiff. Oncoming traffic prevented the truck driver from turning to the left. The driver of the truck testified that had his brakes been working properly he did not think he would have had any trouble stopping the truck. Held: Even conceding negligence on the part of the driver of the car in violating this section, the intervening negligence of the driver of the truck in driving at excessive speed or in operating the car with defective brakes, insulated any negligence of the driver of the car as a matter of law, since neither the intervening negligence nor the resulting injury could have been reasonably anticipated by the driver of the car from his act in rapidly decreasing speed. *Warner v. Lazarus*, 229 N. C. 27, 47 S. E. (2d) 496.

Contributory Negligence Barring Recovery.—An accident occurred when plaintiff's tractor-trailer, following defendant's tractor-trailer on the highway at night, rammed the rear of defendant's vehicle when it suddenly stopped on the highway. Plaintiff's allegations and evidence were to the effect that defendant's vehicle suddenly stopped without signal by hand or electrical device. Plaintiff's driver testified that

he was familiar with the highway and knew he was approaching an intersection where traffic was congested, that he was traveling between 110 and 115 feet behind defendants' vehicle, that he did not see it had stopped until he was within 75 feet of it, and that he immediately put on his brakes but was too close to stop before hitting its rear. It was held that plaintiff's evidence discloses contributory negligence as a matter of law barring recovery. *Fawley v. Bobo*, 231 N. C. 203, 56 S. E. (2d) 419.

Even though the driver of a truck which collided with plaintiff's automobile failed to observe the requirements of this and other sections, where the evidence is equally clear that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at the intersection of highway, without permission so to do by a traffic or police officer, in violation of provisions of § 20-159 (c), contributory negligence on the part of the plaintiff bars recovery. *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86.

Evidence Insufficient to Show Mechanical or Electrical Signal.—Plaintiff, a passenger in a bus, was injured when a truck following the bus collided with the rear thereof when the bus was stopped on the highway to permit a passenger to alight. Defendant bus company admitted that its driver gave no hand signal, but introduced evidence of a rule of the utilities commission as to the required lighting equipment on motor vehicles and evidence that the bus had been inspected and approved by an inspector of the utilities commission, and certificate of title issued by the department of motor vehicles, together with testimony of the driver that the stop lights were on only when the brakes were on and then only if one stopped the bus suddenly, and that he slowed down gradually before stopping the bus. Held: The evidence is insufficient to show that a mechanical or electrical signal as required by this section was given, and appellant's motion to nonsuit was properly denied. *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215.

§ 20-155. Right-of-way.—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156.

(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in section 20-154.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked cross-walk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. (1937, c. 407, s. 117; 1949, c. 1016, s. 2.)

Editor's Note.—The 1949 amendment rewrote subsection (b).

Entering Intersection "at Approximately the Same Time."—Subsection (a) does not apply unless the two vehicles approach or enter the intersection at approximately the same time. When that condition does not exist, the vehicle first reaching and entering the intersection has the right of way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress so as to allow the first arrival to pass in safety. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532.

Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532.

It cannot be held as a matter of law that plaintiff's automobile and defendants' truck approached or entered the intersection "at approximately the same time," when the latter was 125 feet away from the intersection when the former was entering it, and when plaintiff's automobile had crossed within four feet of the opposite curb when defendants' truck collided therewith. *Crone v. Fisher*, 223 N. C. 635, 637, 27 S. E. (2d) 642.

Entering Intersection Ahead of Other Car.—If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that, in the exercise of reasonable care and prudence, he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right-of-way and it is the duty of the defendant to reduce his speed and bring his car under control and yield. *Yellow Cab Co. of Charlotte v. Sanders*, 223 N. C. 626, 27 S. E. (2d) 631.

Where defendant's automobile came to a stop at an intersection 23 feet wide while the automobile decedent was traveling in was more than 125 feet away and a collision occurred when defendant attempted to cross the intersection, it was held that the two vehicles did not approach or enter the intersection at approximately the same time and therefore the automobile of the decedent did not have the right of way. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532.

If Vehicle on Left Has Already Entered Intersection.—This section does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection. *Kennedy v. Smith*, 226 N. C. 514, 39 S. E. (2d) 380.

Quoted in *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361.

§ 20-156. Exceptions to the right-of-way rule.

Quoted in *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361.

§ 20-157. What to do on approach of police or fire department vehicles.

Cited in *State v. Chavis*, 232 N. C. 83, 59 S. E. (2d) 348.

§ 20-158. Vehicles must stop at certain through highways.—(a) The state highway and public works commission, with reference to state highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.

(b) This section shall not interfere with the regulations prescribed by towns and cities.

(c) When a stop light has been erected or installed at any intersection in this State outside of the corporate limits of a municipality, no operator of a vehicle approaching said intersection shall enter the same with said vehicle while the stop light is emitting a red light or stop signal for traffic moving on the highway and in the di-

rection that said approaching vehicle is traveling.

(d) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days. (1937, c. 407, s. 120; 1941, c. 83; 1949, c. 583, s. 2.)

Editor's Note.—

The 1949 amendment inserted present subsection (c) and redesignated former subsection (c) as subsection (d).

Failure to Stop at Intersection Not Negligence Per Se.—The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence per se and is insufficient alone to make out a prima facie case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error. *Hill v. Lopez*, 228 N. C. 433, 45 S. E. (2d) 539. See *Nichols v. Goldston*, 288 N. C. 514, 46 S. E. (2d) 320; *Lee v. Robertson Chemical Corp.*, 229 N. C. 447, 50 S. E. (2d) 181. See *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361; *Bailey v. Michael*, 231 N. C. 404, 57 S. E. (2d) 372.

Cited in *Smith v. United States*, 94 F. Supp. 681.

§ 20-161. Stopping on highway.—(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: Provided further, that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway bridge: Provided further that in the event that a truck, trailer or semi-trailer be disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front and rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed, and after sundown red flares or lanterns. These warning signals shall be displayed as long as such vehicle is disabled upon the highways.

(1951, c. 1165, s. 1.)

Editor's Note.—The 1951 amendment substituted "and" for "or" in the sixth line from the end of subsection (a). As only this subsection was affected by the amendment, the rest of the section is not set out.

The stopping of a passenger bus on paved portion of highway outside of business or residential districts, for the purpose of permitting passenger to alight, is not parking or leaving a vehicle standing, within the meaning of this section. *Morgan v. Carolina Coach Co.*, 225 N. C. 668, 36 S. E. (2d) 263.

"The mere fact that the driver of a bus stops such vehicle on the traveled portion of the highway, for the purpose of receiving or discharging a passenger, nothing else appearing, will not be held to be a violation of § 20-161. *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426; *Peoples v. Fulk*, 220 N. C. 635, 18 S. E. (2d) 147; *Conley v. Pearce-Young-Angel Co.*, 224 N. C. 211, 29 S. E. (2d) 740; *Morgan v. Carolina Coach Co.*, 228 N. C. 280, 45 S. E. (2d) 339." *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215.

Parking in a Residential or Business District.—The parking or leaving standing of any vehicle in a business or

residential district is not a violation of this section. *Hammett v. Miller*, 227 N. C. 10, 17, 40 S. E. (2d) 480.

Parking on a paved highway at night, without flares or other warning, is negligence. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388.

Negligent Parking Need Not Be Anticipated.—Where defendant leaves his truck unattended, partly on a paved or improved portion of a state highway, between sunset and sunup, without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, it is an act of negligence, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on his right side of the road, under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained. *Caulder v. Gresham*, 224 N. C. 402, 30 S. E. (2d) 312.

Evidence Not Showing Contributory Negligence.—Where evidence tended to show that defendant's mud-spattered truck was parked on a dark, foggy morning, with all four wheels on the pavement without lights, flares, or any other mode of signal, and had been so parked for some time, and that plaintiff was compelled to dim his lights, when about 20 feet south of defendant's truck, in response to the dimmed lights of an oncoming car the lights of this car partly blinding plaintiff, who collided with the rear of defendant's truck, motion for nonsuit on the ground of contributory negligence was properly refused. *Cummins v. Southern Fruit Co.*, 225 N. C. 625, 36 S. E. (2d) 11.

Evidence of Negligence Sufficient to Go to Jury.—Evidence that a disabled truck was left standing on the hard-surface of a highway at night without warning flares or lanterns as required by subsection (a) of this section, and that a car, approaching from the rear, collided with the back of the truck, resulting in injuries to the driver and passengers in the car, is held sufficient to be submitted to the jury on the issue of negligence in each of the actions instituted by the driver and occupants of the car against the driver and owner of the truck. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53.

Nonsuit on Ground of Contributory Negligence Not Warranted.—Evidence disclosing that plaintiff's automobile was parked on a bridge 40 feet wide, leaving a space of 30 feet for the passage of traffic, that the driver of defendant's bus was blinded by the lights of an approaching car and hit the rear of plaintiff's car, and that the bridge constituted part of a city street and the parking of cars on the bridge was customary, was held not to warrant nonsuit on the ground of contributory negligence, since even though the parking of the car on the bridge was negligence per se, whether such negligence under the circumstances was a proximate cause of the injury is a question for the jury. *Boles v. Hegler*, 232 N. C. 327, 59 S. E. (2d) 796.

Applied in Parkway Bus Co. v. Coble Dairy Products Co., 229 N. C. 352, 49 S. E. (2d) 623.

Cited in *Riggs v. Gulf Oil Corp.*, 228 N. C. 774, 47 S. E. (2d) 254; *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377.

§ 20-166. Duty to stop in event of accident; accident reports.

(d) The driver of any vehicle involved in any accident resulting in injuries or death to any person, or property damage to an apparent extent of twenty-five dollars (\$25.00) or more, shall, within twenty-four hours, file or cause to be filed a report of such accident with the department, except that when such accident occurs within a city such report shall be made within twenty-four hours to the police department of such city. Every police department shall forward on the fifth day of each month every such report received during the previous calendar month, or a copy thereof, so filed with it to the main office of the department. All accident reports shall be made on forms approved by the department. With respect to any such accident involving a collision between any common carrier and another vehicle, such common carrier shall also make a report of the accident to the department, such report to be filed on or before the tenth day of the month following the

accident. Whenever any police officer of any city, town or county shall investigate an accident, a report showing the results of his investigation shall be made to the department by the investigating officer on forms to be supplied by the department under the provisions of subsection (f) of this section. Such reports shall be filed with the department on the fifth day of the next succeeding month after the investigation is made.

(e) Where a person required to report an accident by the preceding subsection is physically incapable of making such report, and there is another occupant in the vehicle at the time of the accident, such occupant shall make the report.

The department may require drivers, or common carriers involved in accidents, to file supplemental reports, and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the department.

All accident reports together with all supplemental reports above mentioned shall be without prejudice and shall be for the use of the department, and shall not be used in any manner whatsoever as evidence, or for any other purpose in any trial, civil or criminal, arising out of such accident: Provided, however, that all reports made by state, city or county police shall be subject to inspection by members of the general public at all reasonable times; and provided, further, that a certified copy of any such report shall be furnished to any member of the general public who shall request the same upon receipt of a fee of one dollar. The department shall be required to furnish, upon demand of any court, a properly executed certificate stating that a specific accident report has or has not been filed with the department solely to prove a compliance with this section, provided, further, that notwithstanding the foregoing provisions of this subsection, the department is hereby authorized to furnish, without charge, to the United States Veterans Administration or any of its agents, or to the State Veterans Commission or any of its agents, or to local veterans commissions or any of their agents, certified copies of accident reports made by State, county or city police officers.

(1951, c. 309; c. 794; c. 823.)

Editor's Note.—

The first 1951 amendment added the proviso at the end of subsection (e). The second 1951 amendment added the last two sentences of subsection (d). And the third 1951 amendment added the second proviso to the first sentence of the third paragraph of subsection (e). As the rest of the section was not affected by the amendment only subsections (d) and (e) are set out.

Driver Must Stop at Scene of Accident.—This section requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. *State v. Brown*, 226 N. C. 681, 40 S. E. (2d) 34.

Where defendant admitted that he knew he had hit a man and did not stop or return to the scene, his own testimony disclosed a violation of this section, and his good faith in stopping 200 yards away from the accident and obtaining aid for the injured man before proceeding on his way to his home was immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect was without error. *Id.*

Knowledge of Accident Is Essential Element of Offense.—Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an

essential element of the offense of "hit and run driving." *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494.

Former Jeopardy.—In a prosecution for hit and run driving the trial court properly refused to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law. *State v. Williams*, 229 N. C. 415, 50 S. E. (2d) 4.

§ 20-169. Powers of local authorities.—Local authorities, except as expressly authorized by § 20-141 and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rules or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1937, c. 407, s. 131; 1949, c. 947, s. 2.)

Prior to the 1949 amendment the first reference in line three was to "§ 20-141, subsection (g)," instead of "§ 20-141."

Cited in *Stewart v. Yellow Cab Co.*, 225 N. C. 654, 36 S. E. (2d) 256.

Part 11. Pedestrians' Rights and Duties.

§ 20-172. Pedestrians subject to traffic control signals.

Cited in *Metcalf v. Foister*, 232 N. C. 355, 61 S. E. (2d) 77.

§ 20-174. Crossing at other than cross-walks.

Duty of Pedestrian to Yield Right of Way.—It is the duty of pedestrian, in crossing highway at a point other than within a marked cross-walk or within an unmarked cross-walk at an intersection, to yield right of way to truck approaching upon the roadway. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246.

Pedestrian Need Not Yield Right of Way at Unmarked Intersection.—An instruction placing the duty upon a pedestrian to yield the right of way to vehicles in traversing a highway at an unmarked intersection of highways must be held for error. *Gaskins v. Kelly*, 228 N. C. 697, 47 S. E. (2d) 34.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of subsection (d) of this section, and is not a driver of a vehicle within the meaning of §§ 20-146 and 20-149. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Handcart Is Not "Vehicle."—A person pushing a handcart along the highway is a pedestrian within the purview of subsection (d) of this section, since a handcart, being propelled solely by human power, is not a vehicle as defined by § 20-38(ff). *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Motorist Must Use Due Care to Avoid Striking Pedestrian on Wrong Side of Highway.—The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in violation of subsection (d) of this section, and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. It was held that the fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under the duty notwithstanding the provisions of subsection (d) to exercise due care to avoid colliding with any pedestrian upon the highway. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484. For a discussion of this case, see 27 N. C. Law Rev. 274.

Warning Should Be Given Pedestrian.—

While ordinarily a motorist is not required to anticipate

that a pedestrian will leave a place of safety and get in a line of travel, when the circumstances are such that it should appear to the motorist that a pedestrian is oblivious of his approach, or when he may reasonably anticipate the pedestrian will come into his way, it is his duty to give warning by sounding his horn. *Williams v. Henderson*, 230 N. C. 707, 55 S. E. (2d) 462.

Subsection (e) States the Common Law.—Both the common law and subsection (e) of this section provide that notwithstanding the provisions of subsection (d) "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Necessity for Instruction.—The evidence disclosed that intestate was pushing a handcart on the rightside of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that § 20-146 and § 20-149 applied. Defendant contended that intestate was a pedestrian and was required by subsection (d) of this section to push the handcart along the extreme left-hand side of the highway. Held: An instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of § 1-180. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484.

Applied in *Sparks v. Willis*, 228 N. C. 25, 44 S. E. (2d) 343 (subsection (e)).

Cited in *Metcalf v. Foister*, 232 N. C. 355, 61 S. E. (2d) 77.

Part 11A. Blind Pedestrians—White Canes or Guide Dogs.

§ 20-175.1. Public use of white canes by other than blind persons prohibited.—It shall be unlawful for any person, except one who is wholly or partially blind, to carry or use on any street or highway, or in any other public place, a cane or walking stick which is white in color or white tipped with red. (1949, c. 324, s. 1.)

Section 6 of the act from which this part was codified provides that it shall become effective on Jan. 1, 1950.

§ 20-175.2. Right-of-way at crossings, intersections and traffic control signal points; white cane or guide dog to serve as signal for the blind.—At any street, road or highway crossing or intersection, where the movement of traffic is not regulated by a traffic officer or by traffic control signals, any blind or partially blind pedestrian shall be entitled to the right-of-way at such crossing or intersection, if such blind or partially blind pedestrian shall extend before him at arm's length a cane white in color or white tipped with red, or if such person is accompanied by a guide dog. Upon receiving such a signal, all vehicles at or approaching such intersection or crossing shall come to a full stop, leaving a clear lane through which such pedestrian may pass, and such vehicle shall remain stationary until such blind or partially blind pedestrian has completed the passage of such crossing or intersection. At any street, road or highway crossing or intersection, where the movement of traffic is regulated by traffic control signals, blind or partially blind pedestrians shall be entitled to the right-of-way if such person having such cane or accompanied by a guide dog shall be partly across such crossing or intersection at the time the traffic control signals change, and all vehicles shall stop and remain stationary until such pedestrian has completed passage across the intersection or crossing. (1949, c. 324, s. 2.)

§ 20-175.3. Rights and privileges of blind persons without white cane or guide dog.—Nothing contained in this part shall be construed to deprive any blind or partially blind person not carrying a cane white in color or white tipped with red, or being accompanied by a guide dog,

of any of the rights and privileges conferred by law upon pedestrians crossing streets and highways, nor shall the failure of such blind or partially blind person to carry a cane white in color or white tipped with red, or to be accompanied by a guide dog, upon the streets, roads, highways or sidewalks of this state, be held to constitute or be evidence of contributory negligence by virtue of this part. (1949, c. 324, s. 3.)

§ 20-175.4. Violations made misdemeanor.—Any person violating any provision of this part shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding thirty days, or both. (1949, c. 324, s. 4.)

Part 12. Penalties.

§ 20-176. Penalty for misdemeanor.—(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this article unless such violation is by this article or other law of this state declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this state provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment: Provided, that upon conviction for the following offenses—operating motor vehicles without displaying registration number plates issued therefor; permitting or making any unlawful use of registration number plates, or permitting the use of registration by a person not entitled thereto, and violation of §§ 20-116, 20-117, 20-122, 20-123, 20-124, 20-125, 20-126, 20-127, 20-128, 20-129, 20-130, 20-131, 20-132, 20-133, 20-134, 20-142, 20-143, 20-144, 20-146, 20-147, 20-148, 20-150, 20-151, 20-152, 20-153, 20-154, 20-155, 20-156, 20-157, 20-159, 20-160, 20-161, 20-162, 20-163, 20-165—the punishment therefor shall be a fine not to exceed fifty dollars (\$50.00) and not less than ten dollars (\$10.00), or imprisonment not to exceed thirty days for each offense. (1937, c. 407, s. 137; 1951, c. 1013, s. 7.)

Editor's Note.—

The 1951 amendment struck out "20-118" from the list of sections in subsection (b).

Quoted in *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868.

§ 20-179. Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.—Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars (\$100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars (\$200.00) or imprisonment for not less than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five

hundred dollars (\$500.00) or by both such fine and imprisonment in the discretion of the court. (1937, c. 407, s. 140; 1947, c. 1067, s. 18.)

Editor's Note.—The 1947 amendment rewrote this section.

Applied in *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724.

§ 20-180. Penalty for speeding and reckless driving.—Every person convicted of violating § 20-140, § 20-140.1 or § 20-141 shall be guilty of a misdemeanor. (1937, c. 407, s. 141; 1947, c. 1067, s. 19; 1951, c. 182, s. 2.)

Editor's Note.—The 1947 amendment rewrote this section.

The 1951 amendment inserted the reference to § 20-140.1.

Applied in *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724.

Stated in *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84.

Cited in *State v. Cody*, 224 N. C. 470, 31 S. E. (2d) 445.

§ 20-181. Penalty for failure to dim, etc., beams of headlamps.

Cars are required to dim or slant their headlights in passing. *Cummins v. Southern Fruit Co.*, 225 N. C. 625, 36 S. E. (2d) 11, 15.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

Cited in *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494.

Art. 3A. Motor Vehicle Law of 1947.

Part 1. Safe Use of Streets and Highways.

§ 20-183.1. Rights, privileges and duties; declarations of policy.—Fully cognizant of the fact that the preservation of human life is a sacred duty and obligation of the legislative, the judicial, and the executive branches of the government, the general assembly hereby recognizes the following rights, privileges, and duties, and makes the following declarations of policy:

(a) Each of the citizens of the state of North Carolina has the right and privilege of using the streets and highways of the state either as a pedestrian or a motorist or both, without needless exposure to accident, injury, or death occasioned by the reckless or otherwise unlawful operation by others of vehicles over or upon said streets and highways;

(b) The right and privilege of any person to use the streets and highways of the state is, however, subject to the right and privilege of other persons to use said streets and highways in a safe, lawful, sane, and prudent manner;

(c) In order to secure to law-abiding and prudent pedestrians and motorists the full enjoyment of the right and privilege herein declared to exist, those operators of vehicles who are heedless of the duties and obligations imposed upon them and unmindful of the rights of others shall be barred from the streets and highways of the state;

(d) To guarantee to motorists and pedestrians the safe use of the streets and highways of the state is the purpose of the general assembly in enacting this act. (1947, c. 1067, s. 1.)

Editor's Note.—The act from which this section was codified inserted §§ 20-183.1 to 20-183.8, repealed §§ 20-13 and 20-36, and amended §§ 20-7, 20-16, 20-17, 20-19, 20-28, 20-141, 20-179, 20-180 and 20-188. Except as otherwise expressly provided, the act is effective from July 1, 1947.

Session Laws 1947, c. 1067, s. 23, provides: "Notwithstanding any express repeal contained in this act or any

repeal implied from its terms and provisions, the existing laws of the state shall be and continue in full force and effect with respect to all acts done, committed or occurring prior to the effective dates of the respective parts or sections of this act affected or which ought to be affected by their terms and provisions and with respect to all liabilities, penalties, and punishments incurred or which ought to have been incurred with respect to said acts done, committed, or occurring prior to the effective dates of the respective parts or sections of this act."

Session Laws 1947, c. 1067, s. 24, provides: "When in any part or section of this act a greater or higher punishment, penalty, or loss of rights or privileges is imposed for a second or subsequent conviction of any offense than is imposed for a first conviction of such offense, no conviction occurring prior to the effective date of the part or section under which the punishment, penalty, or loss of rights or privileges is to be imposed shall be considered as a prior conviction of such offense in determining whether or not the conviction under any part or section of this act is a second or subsequent conviction of such offense."

Part 2. Inspection of Motor Vehicles.

§§ 20-183.2 to 20-183.8: Repealed by Session Laws 1949, c. 164.

Art. 3B. Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations.—The State Highway and Public Works Commission is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than twelve permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the State Highway and Public Works Commission and shall be maintained by said Commission.

There is hereby appropriated to the State Highway and Public Works Commission out of the State Highway and Public Works Fund the sum of three hundred thousand dollars (\$300,000.00). The funds appropriated by this paragraph shall be used exclusively for the purpose of carrying out the provisions of this section and may be expended at any time during the biennium ending June 30, 1953. (1951, c. 988, s. 1.)

Editor's Note.—The act inserting this article became effective July 1, 1951.

§ 20-183.10. Operation by department of motor vehicles; uniformed personnel with powers of peace officers.—The permanent weighing stations to be established pursuant to the provisions of this article shall be operated by the department of motor vehicles, and the personnel assigned to the various stations shall wear uniforms to be selected and furnished by the department of motor vehicles. The uniformed officers assigned to the various permanent weighing stations shall have the powers of peace officers in making arrests, serving process, and appearing in court in all matters and things relating to the weight of vehicles and their loads.

There is hereby appropriated to the department of motor vehicles out of the State Highway and

Public Works Fund the sum of two hundred fifty thousand dollars (\$250,000.00) for each year of the biennium ending June 30, 1953. The funds appropriated in this paragraph shall be expended exclusively for the operation of the permanent weighing stations established pursuant to this article. (1951, c. 988, s. 2.)

§ 20-183.11. Refusal of operator to cooperate in weighing vehicle; removal of excess portion of load.—When a permanent weighing station is established under the provisions of this section, it shall constitute a misdemeanor for the operator of any vehicle to refuse to permit his vehicle to be weighed at such station or to refuse to drive his vehicle upon the scales so that the same may be weighed. Any vehicle and its load found to be above the weight authorized in Chapter 20 of the General Statutes shall have immediately removed by the operator such portion of its load as may be necessary to decrease the gross weight of the vehicle to the maximum therefor specified in Chapter 20 of the General Statutes: Provided, that the department may allow any vehicle transporting refrigerated or iced perishable foods for human consumption to proceed without removing all or a portion of its load when the owner or operator has paid the taxes and penalties due because of the overload or has made satisfactory arrangements with the Commissioner of Motor Vehicles to pay said taxes and penalties. The material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of the owner or operator of such vehicle. (1951, c. 988, s. 3.)

§ 20-183.12. Portable scales.—In addition to the appropriation contained in § 20-183.9, there is hereby appropriated to the department of motor vehicles out of the State Highway and Public Works Fund the sum of sixty-five thousand dollars (\$65,000.00) for each year of the biennium ending June 30, 1953. The money appropriated in this section shall be used by the Commissioner of Motor Vehicles for the purchase and use of portable scales for weighing vehicles traveling over the streets and highways of this State. (1951, c. 988, s. 4.)

Art. 4. State Highway Patrol.

§ 20-185. Personnel; appointment; salaries.—The state highway patrol shall consist of a commanding officer, whose rank shall be designated by the governor, and such additional subordinate officers and men as the commissioner of motor vehicles, with the approval of the governor and advisory budget commission, shall direct. Members of the state highway patrol shall be appointed by the commissioner, with the approval of the governor, and shall serve at the pleasure of the governor and commissioner. The commanding officer, other officers and members of the state highway patrol shall be paid such salaries as may be established by the division of personnel of the budget bureau. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 1.)

Editor's Note.—Prior to the 1947 amendment the commanding officer was designated as "major."

§ 20-188. Duties of highway patrol.

Members of the state highway patrol, in addition

to the duties, power and authority hereinbefore given, shall have the authority throughout the state of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20.)

Editor's Note.—The 1947 amendment changed the above paragraph which was added at the end of this section by the 1945 amendment. As the rest of the section was not affected by the amendments it is not set out.

As to duty to refer to state courts cases involving vehicles seized or arrests made for unlawful transportation of liquor, see § 18-6.1.

Power to Make Arrests.—As to power of highway patrolman to make arrests, see 23 N. C. Law Rev. 338.

Where a highway patrolman is advised by a person that an armed convict had come to her home, made threats, and demanded food, such patrolman is given authority under this section to arrest such convict. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799.

Armed robbery is a crime of violence within the meaning of this section. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799.

The word "accused" in this section is used in the generic sense and does not import that the person to be arrested must have been accused of crime by judicial procedure. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799.

The use of an airplane by highway patrolmen to locate a person sought to be arrested by them is not a departure from the terms of their employment. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799.

§ 20-191. Establishment of district headquarters.

—The department of motor vehicles shall supply at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the commanding officer of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 2.)

Editor's Note.—The 1947 amendment substituted "commanding officer" for "major."

§ 20-192. Shifting of patrolmen from one district to another.—The commanding officer of the state highway patrol under such rules and regulations as the department of motor vehicles may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special purposes. Whenever a member of the state highway patrol is transferred from one point to another for the convenience of the State or otherwise than upon the request of the patrolman, the department shall be responsible for transporting the household goods, furniture and personal apparel of the patrolman and members of his household. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 3; 1951, c. 285.)

Editor's Note.—The 1947 amendment substituted "commanding officer" for "major."

The 1951 amendment added the second sentence.

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

§§ 20-197 to 20-211: Repealed by Session Laws 1947, c. 1006, s. 58.

Art. 7. Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for school, church and Sunday school busses in certain instances.—Every person using, operating, or driving a motor vehicle upon or over the roads or highways of the State of North Carolina, or upon or over any of the streets of any of the incorporated towns and cities of North Carolina, upon approaching from any direction on the same highway any school bus transporting children to or from school or any church or Sunday school bus transporting children to or from church or Sunday school, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state or upon any of the streets of any incorporated cities and towns of the state, shall bring such motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until said passengers are received or discharged at that place and until the "stop signal" of such bus has been withdrawn or until such bus has moved on.

The provisions of this section are applicable only in the event the school, church or Sunday school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" or the words "church bus" or "Sunday school bus" in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars (\$50.00) or imprisoned not to exceed thirty days. (1925, c. 265; 1943, c. 767; 1947, c. 527.)

Editor's Note.—

The 1947 amendment made this section applicable also to church and Sunday school busses.

A violation of this section is negligence per se, but such violation must be proximate cause contributing to injury and death of intestate to warrant recovery on that ground. *Morgan v. Carolina Coach Co.*, 225 N. C. 668, 36 S. E. (2d) 263, 266.

Evidence Failing to Show Violation of This Section.—The evidence tended to show that a school bus and two following cars stopped on the right side of the highway, that two children alighted, one of whom ran immediately in front of the bus across the highway, and the other, a boy eight years old, waited until the three vehicles were in motion and crossed the highway after the third vehicle had passed, and was struck by defendant's truck operated by defendant's agent which was traveling in the opposite direction about thirty miles per hour, and which failed to give any warning of its approach and failed to reduce speed prior to the collision. Held: Although the evidence fails to show a violation of the letter of this section, since the school bus was in motion and its stop signal had been withdrawn prior to the impact, the evidence is sufficient to be submitted to the jury upon the issues of the negligence of the driver of the truck and the contributory negligence of defendant's intestate. *Hughes v. Thayer*, 229 N. C. 773, 51 S. E. (2d) 488.

§ 20-218. Standard qualifications for school bus drivers; speed limit.—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the highway patrol of North Carolina, or from any representative duly designated by the commissioner of motor vehicles, and the chief mechanic in charge of school busses in said county

showing that he has been examined by a member of the said highway patrol, or a representative duly designated by the commissioner of motor vehicles, and said chief mechanic in charge of school busses, in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the state.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than thirty-five miles per hour.

Any person violating paragraph two of this section shall, upon conviction, be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216.)

The 1945 amendment inserted after the word "patrol" in line thirteen the words "or a representative duly designated by the commissioner of motor vehicles."

§ 20-218.1: Repealed by Session Laws 1949, c. 163, s. 1.)

As to jurisdiction over violations of motor vehicle laws formerly vested by the repealed section, see § 110-21.1. For comment on the repealed section, see 21 N. C. Law Rev. 356.

Art. 8. Sales of Used Motor Vehicles Brought into State.

§§ 20-220 to 20-223: Repealed by Session Laws 1945, c. 635.

Art. 9. Motor Vehicle Safety and Financial Responsibility Act.

§ 20-224. Title.—The short title of this article shall be "Motor Vehicle Safety and Responsibility Act." (1947, c. 1006, s. 1.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 455.

As to liability insurance covering negligent operation of municipal vehicles, see chapter 1015, possibly codified as §§ 160-191.1 to 160-191.5.

§ 20-225. Purposes and construction of article.—The purposes of this article are to promote greater safety in the operation of motor vehicles in this state and to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles, and of operators and owners of motor vehicles involved in accidents; and it is the legislative intent that this article be liberally construed so as to effectuate these purposes, as far as legally and practically possible. (1947, c. 1006, s. 2.)

§ 20-226. Definitions.—Unless a different meaning is clearly required by the context—

"Chauffeur" means every person who is employed for the principal purpose of operating a motor vehicle, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.

"Commissioner" means the commissioner of motor vehicles.

"Conviction" means conviction upon a plea of guilty, or of nolo contendere, or the determination of guilt by a jury or by a court though no sentence has been imposed or, if imposed, has been suspended, and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant, unless the forfeiture has been vacated.

"Department" means the department of motor

vehicles, acting directly or through its duly authorized officers and agents.

"Insured" means the person in whose name there is issued a motor vehicle liability policy, as defined in this article, and any other person insured under its terms.

"Judgment" means any judgment which has become final by expiration without appeal of the time within which appeal might be perfected, or by final affirmance on appeal, rendered by a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either.

"Motor vehicle" means every vehicle which is self-propelled, or designed for self-propulsion, and every vehicle drawn, or designed to be drawn, by a motor vehicle, and includes every device in, upon or by which any person or property is or can be transported or drawn upon a highway, except devices moved by human or animal power, and devices used exclusively upon stationary rails or tracks, and vehicles used in this state but not required to be licensed by the state.

"Nonresident" means every person who is not a bona fide resident of this state.

"Operator" means every person other than a chauffeur who is in actual physical control of a motor vehicle.

"Owner" means a person who holds the legal title to a vehicle. In the event a vehicle is the subject of an agreement for its conditional sale or lease with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, the conditional vendee or lessee of the mortgagor is deemed the owner; provided, that in all such instances, when the rent paid by the lessee includes charge for services of any nature, or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor is to be deemed the owner and the vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

"Person" includes individuals, firms, partnerships, associations, corporations, receivers, trustees, assignees for the benefit of creditors, executors, and administrators, but does not include the state of North Carolina or any political subdivision thereof.

Masculine terms include feminine.—Whenever the masculine form of a word is used herein, it shall be construed to include the feminine, unless the context clearly requires the contrary. (1947, c. 1006, s. 3.)

§ 20-227. Motor vehicle liability policy defined; provisions and requisites of policy; coverage, etc.

—(1) "Motor vehicle liability policy," when used herein, means an owner's or an operator's policy of liability insurance certified, as provided by this article, by an insurance carrier licensed to do business in this state, or by an insurance carrier not licensed to do business in this state upon

compliance with the provisions of this article, as proof of financial responsibility, or a policy issued under the provisions of the assigned risk plan prescribed by this article and issued by an insurance carrier authorized to transact business in this state, to or for the benefit of the named insured.

(2) Every owner's policy shall—

(a) Designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted;

(b) Insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession; and

(c) Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this state, any other state of the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, to the limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of one thousand dollars because of injury to or destruction of property of others in any one accident.

(3) Every operator's policy shall insure the person named therein as insured against loss from liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property, arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to an owner's policy.

(4) Every policy of insurance subject to the provisions of this article—

(a) Must contain an agreement that the insurance is provided in accordance with the coverage defined in this article as respects bodily injury, death, property damage and destruction, and that it is subject to all the provisions of this article and of the laws of this state relating to this kind of insurance;

(b) May grant any lawful coverage in excess of or in addition to the coverage herein specified, and this excess or additional coverage shall not be subject to the provisions of this article, but shall be subject to other applicable laws of this state.

(5) Every policy shall be subject to the following provisions which need not be contained therein:

(a) The liability of any insurance carrier to the insured under a policy becomes absolute when loss or damage covered by the policy occurs, and

the satisfaction by the insured of a judgment for the loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of the loss or damage.

(b) No policy shall be cancelled or annulled, as respects any loss or damage, by any agreement between the carrier and the insured after the insured has become responsible for the loss or damage, and any attempted cancellation or annulment shall be void.

(c) If the death of the insured occurs after the insured has become liable during the policy period, for loss or damage covered by the policy, the policy shall not be terminated by the death with respect to the liability, and the insurance carrier shall be liable thereunder as though death had not occurred.

(d) Upon the recovery of a judgment against any person for loss or damage if the person or the decedent he represents was at the accrual of the cause of action insured against the liability under the policy, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment.

(e) If the death, insolvency, or bankruptcy of the insured occurs within the policy period, the policy, during the unexpired portion of the period, shall cover the legal representative of the insured.

(f) No statement made by the insured or on his behalf, and no violation of the terms of the policy, shall operate to defeat or avoid the policy so as to bar recovery within the limits provided in this article.

(6) Any policy may provide—

(a) That the insured, or any other person covered by the policy shall reimburse the insurance carrier for payments made on account of any accident, claim or suit involving a breach of the terms, provisions or conditions of the policy;

(b) For proration of the insurance with other applicable valid and collectible insurance.

(7) Insurance carriers, authorized to issue policies as provided in this article, may, pending the issuance of the policy, execute an agreement to be known as a binder, which shall not be valid beyond thirty days from the date it becomes effective, or may, in lieu of a policy, issue an endorsement to an existing policy, each of which shall be construed to provide indemnity or protection in like manner and to the same extent as a formal policy. The provisions of this article apply to such binders and endorsements.

(8) When an insurance carrier has certified a policy under the provisions of this article, the insurance so certified cannot be cancelled or terminated until at least twenty days after a notice of cancellation or termination of the insurance has been filed in the office of the commissioner, except that a policy subsequently procured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates. Provided, that when an insurance carrier has certified a policy under the provisions of this article, such policy shall be deemed to be continued in full force and effect and to provide the insured with financial responsibility as required by this article until twenty days after notice of cancellation or termination of the policy, whether such cancellation or termination is by

reason of the expiration of the term of the policy or for other cause, it being the intent of this proviso to permit insurance carriers to issue renewal or substitute policies meeting the requirements of this article without the necessity of furnishing to the commissioner new certificates of insurance coverage upon the issuance of each renewal or substituted policy, and it being the further intent of this proviso to authorize the commissioner to rely upon the original certificate of liability insurance coverage so long as the insured maintains with the same insurance carrier adequate insurance coverage meeting the requirements of this article.

(9) No policy required under this article shall be issued or delivered in this state unless it complies with the terms and conditions of this article, and with all other applicable and not inconsistent laws of the state now or hereafter in force.

(10) Several policies of one or more insurance carriers which together meet the relevant requirements of this article shall be deemed a "motor vehicle liability policy" within the meaning of this article.

(11) Policies issued under the provisions of this article shall not insure any liability of the employer on account of bodily injury to, or death of, an employee of the insured for which benefits are payable under any workmen's compensation law. (1947, c. 1006, s. 4; 1949, c. 1161.)

Editor's Note.—The 1949 amendment added the proviso to subsection (8).

§ 20-228. Commissioner authorized to adopt regulations and administer article.—The commissioner shall administer and enforce the provisions of this article, and he is authorized to adopt regulations for its administration in accordance with the guiding principles prescribed in, and not inconsistent with, the terms of this article. (1947, c. 1006, s. 5.)

§ 20-229. When article does not apply.—This article, except its provisions as to the filing of proof of financial responsibility by a common carrier for its drivers and chauffeurs, does not apply to any vehicle operated under a permit or certificate of convenience and necessity issued by the North Carolina utilities commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it, or to any motor vehicle owned by the state of North Carolina, or any political subdivision thereof. However, this article shall not be construed to exempt the driver or operator of any motor vehicle owned by the state of North Carolina, or any political subdivision thereof, from the provisions of this article. (1947, c. 1006, s. 6.)

§ 20-230. Proof of financial responsibility must be given when driver's license is suspended or revoked.—Nothing in this article shall affect the authority or duty of the department of motor vehicles to issue, suspend or revoke operator's and chauffeur's license under the Uniform Drivers' License Act, article 2, chapter 20, of the General Statutes, and any amendments thereto; and any person whose operator's or chauffeur's license has been revoked or suspended under the provisions of the Uniform Drivers' License Act, as amended, shall not be entitled to have said license again issued or reinstated until such person shall

have given and thereafter maintains proof of his financial responsibility, as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license. (1947, c. 1006, s. 7; 1949, c. 977.)

Editor's Note.—The 1949 amendment added the proviso to this section.

For a brief comment on the 1949 amendments to this and the following section, see 27 N. C. Law Rev. 471.

§ 20-231. Revocation of license and registration certificates and plates upon conviction of certain offenses; provisions for reinstatement when proof of financial responsibility given.—The commissioner shall immediately revoke the operator's and chauffeur's license issued to any person, resident or nonresident, upon receiving a record of such person's conviction or forfeiture of bail in connection with any of the offenses set forth in General Statutes, § 20-17, and any amendments thereto, and such operator's and chauffeur's licenses shall remain suspended and revoked for at least one year, and shall not be reinstated or renewed thereafter unless and until such person shall have given, and thereafter maintains, proof of financial responsibility as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license.

Whenever the motor vehicle operator's or chauffeur's license of any person has been suspended, cancelled or revoked under the provisions of sections 20-16 or 20-17 and the period of such suspension, cancellation or revocation shall have expired, and such person shall have met the requirements of this article if required to furnish proof of financial responsibility as a condition precedent to the right to have such license restored or reissued, such license shall be immediately restored or reissued to such person without a re-examination of such person if such person would not have been required to be re-examined at the time of the application for the restoration or reissuance of the license, if the offense for which the license was suspended, cancelled or revoked had not been committed; provided, however, if such person has not been re-examined since July 1, 1947, any license issued to such person shall expire at the same time as licenses issued to persons whose last names begin with the same letter as such person's, as provided in subsection (n) of section 20-7. (1947, c. 1006, s. 8; 1949, c. 977; c. 1032, s. 1.)

Editor's Note.—The first 1949 amendment added the proviso to the first paragraph of this section. The second 1949 amendment added the second paragraph.

§ 20-232. Revocation of licenses of mental incompetents and inebriates; procedure.—(a) The commissioner, upon receipt of notice that any person has been (1) legally adjudged to be insane, or a congenital idiot, an imbecile, epileptic or feeble-minded, or (2) committed to, or has entered, an institution as an inebriate or an habitual user of narcotic drugs, shall forthwith revoke his

license and registration, but he shall not revoke the license if the person has been adjudged competent by judicial order or decree, or discharged as cured from an institution for the insane or feeble-minded, for the cure of inebriates, or for the treatment of habitual users of narcotic drugs, upon a certificate of the person in charge that the releasee is competent.

(b) In any case in which the person's license or registration has been revoked or suspended prior to his release it shall not be returned to him unless the commissioner is satisfied that he is competent to operate a motor vehicle with safety to persons and property and only then if he gives and maintains proof of financial responsibility.

(c) The clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the commissioner.

(d) The person in charge of every institution of any nature for the care or cure of the insane, idiots, imbeciles, epileptic, feeble-minded, inebriates or habitual users of narcotic drugs, shall forthwith report to the commissioner in sufficient detail for accurate identification the admission of every patient. (1947, c. 1006, s. 9.)

§ 20-233. Appeal from action of commissioner; review by court of record; effect.—Any person aggrieved by an order or act of the commissioner requiring a suspension or revocation of his license or registration under the provisions of this article, may file a petition in any court of record having criminal jurisdiction in the city or county in which the petitioner resides, for a review, but the commencement of such a proceeding shall not suspend the order or act, unless for good cause shown, a stay is allowed by the court pending final determination of the review. (1947, c. 1006, s. 10.)

§ 20-234. Revocation or suspension of license, etc., for failure to satisfy judgment.—(a) The commissioner shall suspend the operator's or chauffeur's license and all of the registration certificates and registration plates issued to any person who has failed for a period of sixty days to satisfy any judgment in amounts and upon a cause of action as hereinafter stated, immediately upon receiving authenticated report as hereinafter provided to that effect.

(b) The commissioner shall not, however, revoke the license of an owner, operator or chauffeur if the insurance carried by him was in a company which was authorized to transact business in this state and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner, operator or chauffeur is thereby unable to satisfy the judgment arising out of the accident. (1947, c. 1006, s. 11.)

§ 20-235. Judgment specifically defined.—The judgment herein referred to means any judgment for more than fifty dollars for damages because of injury to or destruction of property, including loss of its use, or any judgment for damages, including damages for care and loss of services, because of bodily injury to or death of any person arising out of the ownership, use or operation of any motor vehicle. (1947, c. 1006, s. 12.)

§ 20-236. Commissioner's duty to revoke or suspend license, etc.—The commissioner shall take

action as required in the two preceding sections upon receiving proper evidence that the person has failed for a period of sixty days to satisfy any judgment, in amount and upon a cause of action as stated in the two preceding sections, rendered by a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either. (1947, c. 1006, s. 13.)

§ 20-237. When judgment deemed satisfied; credits on judgment.—(a) Every judgment herein referred to shall for the purpose of this article be deemed satisfied: (1) when paid in full or when five thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or (2) when, subject to the limit of five thousand dollars because of bodily injury to or death of one person, the judgment has been paid in full or when the sum of ten thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or (3) when the judgment has been paid in full or when one thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident.

(b) Payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amount provided for in this section. (1947, c. 1006, s. 14.)

§ 20-238. Installment payments on judgment by order of court.—A judgment debtor upon five days' notice to the judgment creditor may apply to the court in which the judgment was obtained for the privilege of paying it in installments and the court, without prejudice to other legal remedies which the judgment creditor may have, may so order, fixing the amounts and times of payment of the installments. (1947, c. 1006, s. 15.)

§ 20-239. Installments in default; licenses, etc., subject to revocation and suspension.—If the judgment debtor fails to pay any installments as permitted by the order of the court, then, upon notice of default, the commissioner shall forthwith suspend the license and registration certificates and registration plates of the judgment debtor until the judgment is satisfied as provided in this article, except that the judgment debtor may apply, after due notice to the judgment creditor, to the court which allowed installment payment of the judgment, within thirty days after the default, for resumption of the privilege of paying the judgment in installments, if past due installments are first paid. (1947, c. 1006, s. 16.)

Editor's Note.—The word "payment" in the fourth line from the end of this section does not appear in the authenticated copy of the act in the office of the secretary of state but has been supplied by the editor as expressing the obvious intent of the legislature.

§ 20-240. Effect of court order permitting installment payments.—The commissioner shall not

suspend a license or registration of a motor vehicle, and shall restore any license or registration suspended following nonpayment of a judgment, if the judgment debtor obtains an order from the court in which the judgment was rendered permitting payment of the judgment in installments, and if the judgment debtor gives proof of his future financial responsibility as hereinafter provided, but default in payment of any installment will render the license or registration subject to suspension. (1947, c. 1006, s. 17.)

§ 20-241. Judgment creditor may consent to issuance or renewal of licenses pending satisfaction of judgment, upon proof of financial responsibility.—If the judgment creditor consents in writing, in such form as the commissioner prescribes, that the judgment debtor be allowed license and registration certificates and plates, the commissioner may allow same, notwithstanding default in the payment of the judgment or any installment thereof, for six months from the date of consent and thereafter until it is revoked in writing, if the judgment debtor furnishes proof of his future financial responsibility as hereinafter provided. (1947, c. 1006, s. 18.)

§ 20-242. Proof of financial responsibility required of unlicensed person at fault in accident.—Any unlicensed person involved in a motor vehicle accident, in which it should be determined that he is at fault, involving damages in excess of fifty dollars, must show and thereafter maintain proof of financial responsibility, as defined in this article, before obtaining license. (1947, c. 1006, s. 19.)

§ 20-243. State responsible for safekeeping of deposits held by treasurer under this article.—The state shall be responsible for the safekeeping of all bonds, cash and securities deposited with the treasurer of the state under the provisions of this article and if the deposit or any part thereof be lost, destroyed, or misappropriated the state shall make good the loss to any person entitled thereto. Bonds, cash or securities so deposited shall only be released by the treasurer upon consent of the commissioner given in conformity with the terms of this article. (1947, c. 1006, s. 20.)

§ 20-244. Bankruptcy listing of claim for damages does not relieve judgment debtor hereunder.—A discharge in bankruptcy listing a claim for damages arising out of the operation of a motor vehicle shall not relieve the judgment debtor from any of the requirements of this article. (1947, c. 1006, s. 21.)

§ 20-245. Applicable to resident and nonresident alike.—(a) Whenever by the laws of this state the commissioner has the power to suspend or revoke (1) the license of a resident operator or chauffeur, or (2) the registration certificates and registration plates of a resident owner, he is empowered (1) to suspend or revoke the license or to forbid the operation of a motor vehicle in this state by a nonresident operator or chauffeur, and (2) to forbid the operation within this state of any motor vehicle of a nonresident owner.

(b) Every provision of this article applies to any person who is not a resident of this state under the same circumstances as they would apply to a resident; and no nonresident may operate

any motor vehicle in this state and no motor vehicle owned by him may be operated in this state, unless and until the nonresident, or the owner of the motor vehicle, if another person, has complied with the requirements of this article with respect to furnishing security and giving proof of future financial responsibility. (1947, c. 1006, s. 22.)

§ 20-246. Commissioner to transmit record of conviction in North Carolina to officials of home state of nonresident.—Upon conviction of a nonresident or in case any unsatisfied judgment results in suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by him, or upon suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by the nonresident pursuant to any other provision or provisions of this article, the commissioner shall transmit a certified copy of the record of the conviction or the unsatisfied judgment or any other action pursuant to this article resulting in suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by such nonresident to the commissioner of motor vehicles or officer performing the functions of a commissioner in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which the nonresident resides. (1947, c. 1006, s. 23.)

§ 20-247. Suspension or revocation upon conviction or adverse judgment against North Carolina resident in out-of-state court.—(a) The commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this state upon receiving notice of his conviction, in a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, of an offense therein, which if committed in this state would be grounds for the suspension or revocation of the license granted to him, or registration of any motor vehicle registered in his name.

(b) The commissioner shall take like action upon receipt of notice that a resident of this state has failed, for a period of thirty days, to satisfy any final judgment in amount and upon a cause of action as stated herein, rendered against him in a court of competent jurisdiction of any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland or any province or territorial subdivision of either. (1947, c. 1006, s. 24.)

§ 20-248. Proof of financial responsibility by owner on behalf of chauffeur or member of household.—When the commissioner finds that any person required to give proof or furnish security under this article is or later becomes a chauffeur

or motor vehicle operator, however designated, or a member of the immediate family or household, in the employ or home of an owner of a motor vehicle, the commissioner shall accept proof of financial responsibility given by the owner in lieu of proof by such person to permit him to operate a motor vehicle for which the owner has given proof as herein provided. In case the person is one who is furnished proof of financial responsibility by his employer, he shall not be required to furnish security. The commissioner shall designate the restrictions imposed by this section on the face of such person's, operator's, or chauffeur's license. (1947, c. 1006, s. 25.)

§ 20-249. Proof of financial responsibility on behalf of another by owner who holds certificate from utilities commission.—If the owner of a motor vehicle is one whose vehicles are operated under a permit or certificate of convenience and necessity issued by the state utilities commission, proof by the owner on behalf of another as provided by this article may be made if there is filed with the commissioner satisfactory evidence that the owner has complied with the law with respect to his liability for damage caused by the operation of vehicles by providing the required insurance or other security, or has qualified as a self-insurer as described in § 20-275. (1947, c. 1006, s. 26.)

§ 20-250. Revoked and suspended licenses, certificates and plates to be surrendered to commissioner; penalty for failure.—(a) Any person whose operator's or chauffeur's license or registration certificates or registration plates have been suspended or revoked as provided in this article and have not been reinstated shall immediately return every such license, registration certificate and set of registration plates held by him to the commissioner. Any person wilfully failing to comply with this requirement is guilty of a misdemeanor.

(b) The commissioner is authorized to take possession of any license, registration certificate or set of registration plates upon their suspension or revocation under the provisions of this article or to direct any police officer to take possession of and return them to the office of the commissioner. (1947, c. 1006, s. 27.)

§ 20-251. Proof of financial responsibility specifically defined.—Proof of financial responsibility means proof of ability to respond in damages for liability thereafter incurred arising out of the ownership, maintenance, use or operation of a motor vehicle, in the amount of five thousand dollars because of bodily injury to or death of any one person, and subject to a limitation of five thousand dollars, for one person, in the amount of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of one thousand dollars because of injury to or destruction of property in any one accident. Proof in these amounts shall be furnished for each motor vehicle registered by the person. (1947, c. 1006, s. 28.)

§ 20-252. Proof of financial responsibility; how made.—(a) Proof of financial responsibility may be made: (1) by filing with the commissioner the written certificate of any insurance carrier, au-

thorized to do business in this state, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. This certificate shall give the effective date of the policy which must be the same date as the effective date of the certificate and, unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered. The commissioner is authorized to accept from the holder of a restricted or limited chauffeur's or motor vehicle operator's license, as proof of financial responsibility, a certificate of an insurance carrier, authorized to do business in this state, certifying that there is in effect a motor vehicle liability policy for the benefit of the holder of such license covering the operation by such person of a motor vehicle in accordance with the restriction or limitation to which such person's chauffeur's or operator's license is subject; (2) by filing with the commissioner proof that a satisfactory bond has been executed; (3) that an adequate deposit of cash or securities has been made; or (4) that self-insurance certificates have been filed.

(b) No motor vehicle shall be, or continue to be, registered in the name of any person required to file proof of financial responsibility unless it is so designated in the certificate. (1947, c. 1006, s. 29; 1949, c. 1160.)

Editor's Note.—The 1949 amendment inserted in subsection (a) the provision as to proof of financial responsibility of holder of restricted or limited operator's license.

§ 20-253. Nonresidents; how proof of financial responsibility established.—The nonresident owner of a foreign vehicle may give proof of financial responsibility by filing with the commissioner a written certificate or certificates of an insurance carrier not authorized to transact business in this state, but authorized to transact business in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which each motor vehicle described in the certificate is registered; or if the nonresident does not own a motor vehicle, then in the like jurisdiction in which the insured resides and otherwise conforming to the provisions of this article, and the commissioner shall accept the same if the insurance carrier, in addition to having complied with all other provisions of this article as requisite shall (1) execute a power of attorney authorizing the commissioner to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state; (2) duly adopt a resolution, which shall be binding upon it, declaring that its policies are to be deemed to be varied to comply with the law of this state and the terms of this article relating to the terms of motor vehicle liability policies issued herein; (3) agree to accept as final and binding the judgment of any court of competent jurisdiction in this state from which judgment no appeal is, or can be taken, duly rendered in any action arising out of a motor vehicle accident; or (4) deposit with the treasurer of North Carolina cash or securities such as are mentioned in § 20-264 or the surety bond of a

company authorized to do business in North Carolina, equal in value to eleven thousand dollars for each insurance policy filed as proof of financial responsibility. (1947, c. 1006, s. 30.)

§ 20-254. Nonresident may elect to file certificate of insurance carrier authorized to transact business in this state; default of foreign insurance carriers; effect.—(a) If a nonresident required to file a certificate of insurance under this article files the certificate of insurance of a company authorized to do business in this state the provisions of the foregoing section shall not apply.

(b) If any foreign insurance carrier which has qualified to furnish proof of financial responsibility defaults in any of its undertakings or agreements, the commissioner shall not thereafter accept any certificate of that carrier so long as the default continues and shall revoke licenses theretofore granted on basis of its policies unless the default be immediately repaired. (1947, c. 1006, s. 31.)

§ 20-255. Liability under other statutes not affected; article not applicable to certain policies.—This article does not apply to or affect (1) policies of automobile insurance against liability which may now or hereafter be required by any other law of this state but such policies if endorsed to conform to the requirements of this article shall be accepted as proof of financial responsibility when required under this article; (2) policies insuring solely the insured named in the policy against liability resulting from the maintenance, use or operation by persons in the insured's employ or in his behalf of motor vehicles now owned by the insured. (1947, c. 1006, s. 32.)

§ 20-256. Bond as proof of financial responsibility.—A person required to give proof of financial responsibility may file with the commissioner a bond meeting the requirements of this article. (1947, c. 1006, s. 33.)

§ 20-257. Nature of bond required; sureties.—The bond referred to in the foregoing section shall be executed by the person giving proof and by a surety company duly authorized to transact business in this state, or by the person giving proof and by one or more individual sureties owning real estate within this state and having an equity therein in at least the amount of the bond, which real estate shall be scheduled therein, but the commissioner may not accept any real estate bond unless it is first approved by the clerk of the superior court of county wherein the real estate is located. (1947, c. 1006, s. 34.)

§ 20-258. Conditions of bond to conform to those of motor vehicle liability policy.—The commissioner shall not accept any such bond unless it is conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy furnished by the person giving proof. (1947, c. 1006, s. 35.)

§ 20-259. Cancellation of bond; notice required.—No such bond shall be cancelled unless twenty days' prior written notice of cancellation is given the commissioner but cancellation of the bond shall not prevent recovery thereon with respect to any right or cause of action arising prior to the date of cancellation. (1947, c. 1006, s. 36.)

§ 20-260. Bond constitutes a lien in favor of state; notice of cancellation; recordation of bond.

—(a) A bond with individual sureties shall constitute a lien in favor of the state upon the real estate of any individual surety, which lien shall exist in favor of any holder of any final judgment against the principal on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of his, or any other, motor vehicle, upon the recording of the bond in the office of the register of deeds of the county where the real estate is located.

(b) Notice of cancellation is to be signed by the commissioner or by someone designated by him and the seal of the department placed thereon. Notwithstanding any other provision of law the register of deeds shall record the notice in the books kept for the recording of deeds and shall index the same in the indexes thereto for grantors and grantees, under the respective names of the individual sureties in the column for grantors, and the State of North Carolina in the column for grantees, for which he shall receive the sum of two dollars and fifty cents to be paid by the principal in full payment of all services in connection with the recordation and release of the bond. The register of deeds shall place on the notice a statement showing the time of recording and the book and page of recording and return the notice to the commissioner. (1947, c. 1006, s. 37.)

§ 20-261. Release of bond by commissioner; certificate of cancellation.—When a bond with individual sureties filed with the commissioner is no longer required under this article, the commissioner shall, upon request, cancel it as to liability for damage to property or injury to or death of any person or persons thereafter caused, and when a bond has been cancelled by the commissioner or otherwise he shall upon request furnish a certificate of the cancellation signed by him or by someone designated by him with the seal of the department thereon. The certificate, notwithstanding any other provision of law, may be recorded in the office of the register of deeds in which the bond was admitted to record. (1947, c. 1006, s. 38.)

§ 20-262. Discharge of lien of bond by order of court.—Upon satisfactory proof that the bond has been cancelled and that there are no claims or judgments against the principal in the bond on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of a motor vehicle of the principal caused while the bond was in effect, the clerk of the superior court in the county in which the bond was admitted to record, may enter an order discharging the lien of the bond on the real estate of the sureties thereon, upon their petition and at their proper cost. (1947, c. 1006, s. 39.)

§ 20-263. Judgment creditor may sue on bond or proceed against parties to bond, if judgment unsatisfied.—(a) If a final judgment rendered against the principal on the bond filed with the commissioner as provided in this article be not satisfied within sixty days after its rendition, the

judgment creditor may, for his own use and benefit and at his sole expense, bring an action on the bond in the name of the state against the company or persons executing the bond.

(b) When the sureties on the bond are individuals the judgment creditor may proceed against any or all parties to the bond at law for a judgment or for a decree and foreclosure of the lien on the real estate of the sureties. The proceeding may be against one, all or intermediate number of parties to the bond and when less than all are joined other or others may be impleaded in the same proceeding and after final judgment or decree other proceedings may be instituted until full satisfaction be obtained. (1947, c. 1006, s. 40.)

§ 20-264. Deposit of cash or securities as proof of financial responsibility.—A person may give proof of financial responsibility by delivering to the commissioner eleven thousand dollars in cash, or in securities, such as fiduciaries may invest in under General Statutes, chapter 36, as amended. (1947, c. 1006, s. 41.)

§ 20-265. State treasurer custodian of deposits; depletion of deposits; duties of treasurer.—(a) All money or securities so delivered to the commissioner shall be placed by him in the custody of the state treasurer and shall be subject to execution to satisfy any judgment within the limits on amounts required by this article for motor vehicle liability insurance policies.

(b) Whenever the moneys or securities are subjected to attachment, garnishment, execution, or other legal process, or are otherwise depleted or threatened with depletion or impairment in amount or value the depositor must immediately furnish additional moneys or securities, free from lien, claim, or threat of impairment, in sufficient amount or value fully to comply with the requirements of this article.

(c) The treasurer shall notify the commissioner promptly of any depletion, impairment, or decrease or of any legal threat of depletion, impairment, or decrease in the value of the securities or in the moneys on deposit with him under the provisions of this article. (1947, c. 1006, s. 42.)

§ 20-266. Cancellation or substitution of bond or certificate of insurance; legal determination of disputes as to ownership or liability.—(a) The commissioner may cancel any bond or return any certificate of insurance, and upon the substitution and acceptance by him of other adequate proof of financial responsibility, pursuant to this article, and upon his direction to such effect, the state treasurer shall return any money or securities on deposit with him to the person entitled thereto.

(b) The commissioner and the treasurer, or either, may proceed by bill of interpleader for the determination of any dispute as to ownership of or rights in any deposit, and may have recourse to any other appropriate proceeding for determination of any question that arises as to their rights or liabilities or as to the rights or liabilities of the state under this article. (1947, c. 1006, s. 43.)

§ 20-267. Commissioner must require replacement of unsatisfactory proof of financial responsibility.—Whenever any proof of financial responsibility filed by any person under the provisions of

this article no longer fulfills the purpose for which required the commissioner shall require other proof of financial responsibility as required by this article and shall suspend his operator's or chauffeur's license, registration certificate and registration plates pending the furnishing of proof as required. (1947, c. 1006, s. 44.)

§ 20-268. When commissioner may consent to cancellation or release of bonds, policies, funds or securities; waiver of requirement of proofs of financial responsibility.—The commissioner, upon request and subject to the provisions of the succeeding section, shall consent to the cancellation of any bond or insurance policy, or to the return to the person entitled thereto of any money or securities deposited pursuant to this article as proof of financial responsibility, or he shall waive the requirements of filing proof of financial responsibility, in the event (1) of the death of the person on whose behalf the proof was filed; or (2) of his permanent incapacity to operate a motor vehicle; or (3) that the person who has given proof of financial responsibility surrenders his operator's or chauffeur's license, and all of his registration certificates and registration plates to the commissioner. (1947, c. 1006, s. 45.)

§ 20-269. When commissioner may not release proof.—(a) Notwithstanding the provisions of the preceding section, the commissioner shall not release the proof in the event: (1) any action for damages upon a liability included in this article is then pending; or (2) any judgment upon any such liability is then outstanding and unsatisfied; or (3) the commissioner has received notice that the person involved has within the period of twelve months immediately preceding been involved as a driver in any motor vehicle accident.

(b) An affidavit of the applicant of the non-existence of these facts shall be sufficient evidence thereof in the absence of evidence in the records of the department to indicate the contrary. (1947, c. 1006, s. 46.)

§ 20-270. Re-establishment of proof as requisite to reissuance of license.—Whenever any person to whom proof has been surrendered as provided in § 20-268 applies for an operator's or chauffeur's license or the registration of a motor vehicle, the application shall be refused unless the applicant re-establishes proof as requisite. (1947, c. 1006, s. 47.)

§ 20-271. Commissioner to furnish abstract of record of licensee.—The commissioner upon request shall furnish any insurance carrier or any person or surety a certified abstract of the operating record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles, if any, registered in the name of the person, and if there exists no record of the conviction of the person of a violation of any provisions of any statute or ordinance relating to the operation of a motor vehicle or of any injury or damage caused by him as provided in this article the commissioner shall so certify, upon the payment to him of a fee of one dollar (\$1.00); provided further, however, that such certified abstract shall not be admissible in evidence in any court proceedings. (1947, c. 1006, s. 48.)

§ 20-272. Operation of motor vehicle while revo-

cation or suspension of license, etc., in effect; penalties.—Any person whose operator's or chauffeur's license or registration certificate or other privilege to operate a motor vehicle has been suspended or revoked, restoration thereof or the issuance of a new license or registration certificate being contingent upon the furnishing of proof of financial responsibility and who, during the period of suspension or while revocation is in effect, or in the absence of full authorization from the commissioner, drives any motor vehicle upon any highway, and any nonresident from whom the privilege of operating any motor vehicle on the highways of this state has been withdrawn as provided in this article who operates a motor vehicle in this state, shall be guilty of a misdemeanor. (1947, c. 1006, s. 49.)

§ 20-273. Forgery of evidence of ability to respond in damages; penalties.—Any person who forges or without authority signs any evidence of ability to respond in damages as required by the commissioner in the administration of this article shall be guilty of a misdemeanor. (1947, c. 1006, s. 50.)

§ 20-274. Additional penalties.—Any person who violates any provision of this article for which another penalty is not prescribed by law shall be guilty of a misdemeanor. (1947, c. 1006, s. 51.)

§ 20-275. Self-insurers.—(a) Any person may become a self-insurer who shall obtain from the commissioner a certificate of self-insurance as provided for in subsection (b) of this section; (b) the commissioner may, in his discretion and upon the application of such a person, issue a certificate of self-insurance when he is reasonably satisfied that such person is possessed and will continue to be possessed of financial ability to respond to judgment as hereinbefore described, obtained against such person arising out of the ownership, maintenance, use, or operation of any such person's motor vehicles; (c) upon the due notice and hearing, the commissioner may in his discretion and upon reasonable grounds cancel a certificate of self-insurance. (1947, c. 1006, s. 52.)

§ 20-276. Assignment of risk.—The commissioner of insurance, after consultation with representatives of the insurance carriers licensed to write motor vehicle liability insurance in this state, shall consider such reasonable plans and procedures as such insurance carriers may submit to him for the equitable apportionment among such insurance carriers of those applicants for motor vehicle liability insurance who are entitled to such coverage under this article but who are unable to secure such insurance through ordinary methods.

Upon the approval by the commissioner of insurance of any such plans and procedures thus submitted, all insurance carriers licensed to write motor vehicle liability insurance in this state as a prerequisite to further engaging in writing such insurance in this state shall formally subscribe to, and participate in, such plans and procedures so submitted.

In the event the commissioner of insurance, in the exercise of his discretion, does not approve any plan so submitted, or should no such plan be submitted, then the commissioner of insurance

shall formulate and put into effect reasonable plans and procedures for the apportionment among such insurance carriers of all such applications for motor vehicle liability insurance submitted to him in accordance with the provisions of this article by persons entitled to coverage under this article but unable to obtain such coverage through ordinary methods.

Should no such plan be submitted by the insurance carriers and approved by the commissioner of insurance, then, as a prerequisite to further engaging in the selling of motor vehicle liability insurance in this state, every insurance carrier licensed to write motor vehicle liability insurance in this state shall formally subscribe to and participate in the plans and procedures formulated by the commissioner of insurance as provided in this section, and every such insurance carrier shall accept any and all risks assigned to it by the commissioner of insurance under such plan and shall upon payment of a proper premium issue a policy covering the same, such policy to meet at least the minimum requirements for establishing financial responsibility as provided in this article.

Every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods shall have the right to apply to the commissioner of insurance to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this state, and the insurance carrier shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article. In each instance where application is made to the commissioner of insurance to have a risk assigned to an insurance carrier, it shall be deemed that the applicant has been denied the issuance of a liability insurance policy, and the commissioner of insurance shall, upon receipt of such application, which shall have attached thereto a statement from the motor vehicles department that the suspension of the applicant's license will be no longer in effect after the date noted therein, immediately assign the risk to an insurance carrier which carrier shall be required, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this state, to issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article.

The power granted the commissioner of insurance under the provisions of this article to deny, directly or indirectly, insurance to any person applying for insurance hereunder, shall be restricted to persons whose license has been suspended and continues to be suspended by the department of motor vehicles under authority of section 20-16 or otherwise and the power of the commissioner of insurance to approve the revocation or cancellation of insurance under the provisions of this article shall be exercised only when the department of motor vehicles suspends the license of the insured under the authority granted to it under the motor vehicles act.

The commissioner of insurance shall have the authority to make reasonable rules and regulations for the assignment of risks to insurance carriers.

The commissioner of insurance shall establish, or cause to be established, such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk motor vehicle liability policies in accordance with this article, as appear to him to be proper.

In the establishment of rate classification, rating schedules, rates, rules and regulations, the commissioner of insurance shall be guided by such principles and practices as have been established under his statutory authority to regulate motor vehicle liability insurance rates, and he may act in conformity with his statutory discretionary authority in such matters, and may in his discretion assign to the North Carolina automobile rate administrative office, or other state bureau or agency any of the administrative duties imposed upon him by this article.

The commissioner of insurance is empowered, if in his judgment he deems such action to be justified after reviewing all information pertaining to the applicant or policyholder available from his records, the records of the department of motor vehicles, or from other sources—

(a) To refuse to assign an application.

(b) To approve the rejection of an application by an insurance carrier.

(c) To approve the cancellation of a motor vehicle liability policy by an insurance carrier; or

(d) To refuse to approve the renewal or the reassignment of an expiring policy.

The commissioner of insurance shall not be held liable for any act, or omission, in connection with the administration of the duties imposed upon him by the provisions of this article, except upon proof of actual malfeasance.

The provisions of this article relevant to assignment of risks shall be available to nonresidents who are unable to obtain a motor vehicle liability insurance policy with respect only to motor vehicles registered and used in this state. (1947, c. 1006, s. 53; 1949, c. 1209, ss. 1, 2.)

Editor's Note.—The 1949 amendment added the second sentence to the fifth paragraph and inserted the sixth paragraph.

For a brief discussion of the 1949 amendment, see 27 N. C. Law Rev. 459.

§ 20-277. Judgments subsequently obtained arising out of accidents prior to effective date of article unaffected.—Persons against whom judgments are obtained subsequent to the effective date of this article, as a result of an action for damages arising out of an accident involving the operation of a motor vehicle prior to the effective date of this article, are not subject to the provisions hereof. (1947, c. 1006, s. 54.)

§ 20-278. Clerk of court required to furnish abstract of convictions and judgments.—The clerk of the court, or the court when it has no clerk shall forward to the commissioner a certified copy or abstract of any conviction, and of any forfeiture of bail or collateral deposited to secure a defendant's appearance in court unless the forfeiture has been vacated, upon a charge of a violation of any of the offenses set forth in § 20-17 of the General Statutes, and any amendments thereto, and a certified copy or abstract of any judgment for damages, the rendering and non-payment of which judgment, under the terms of

this article, require the commissioner to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor. Every such copy or abstract of conviction or forfeiture shall be forwarded to the commissioner immediately upon the expiration of fifteen days after the conviction or forfeiture, and every such copy or abstract of judgment shall be forwarded to the commissioner immediately upon the expiration of sixty days after the judgment has become final by expiration without appeal or other action of the time within which appeal or other action might have been perfected, or has become final by affirmation on appeal, and has not been otherwise stayed or satisfied. (1947, c. 1006, s. 55.)

§ 20-279. **Other remedies unaffected.**—This article shall not be construed to prevent the plaintiff in any action at law from relying for security upon any other remedy now or hereafter provided by law. (1947, c. 1006, s. 56.)

Art. 10. Financial Responsibility of Taxicab Operators.

§ 20-280. **Filing proof of financial responsibility with governing board of municipality or county.**—A. Within 30 days after March 27, 1951, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs within a municipality shall file with the governing board of the municipality in which such business is operated proof of financial responsibility as hereinafter defined.

No governing board of a municipality shall hereafter issue any certificate of convenience and necessity, franchise, license, permit or other privilege or authority to any person, firm or corporation authorizing such person, firm or corporation to engage in the business of operating a taxicab or taxicabs within the municipality unless such person, firm or corporation first files with said governing board proof of financial responsibility as hereinafter defined.

Within thirty days after the ratification of this section, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs without the corporate limits of a municipality or municipalities, shall file with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

No person, firm or corporation shall hereafter engage in the business of operating a taxicab or taxicabs without the corporate limits of a munic-

ipality or municipalities in any county unless such person, firm or corporation first files with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

B. As used in this section proof of financial responsibility shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: Five thousand dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, ten thousand dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident.

C. Every person, firm or corporation who engages in the taxicab business and who is a member of or participates in any trust fund or sinking fund, which said trust fund or sinking fund is for the sole purpose of paying claims, damages or judgments against persons, firms or corporations engaging in the taxicab business and which trust fund or sinking fund is approved by the governing body of any city or municipality with a population of over 50,000, shall be deemed a compliance with the financial responsibility provisions of this section.

Provided, however, that in the case of operators of 15 or more taxicabs, the limits (exclusive of interests and costs), with respect to each such motor vehicle shall be as follows: Ten thousand dollars (\$10,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, twenty thousand dollars (\$20,000.00) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident. (1951, c. 406.)

Chapter 22. Contracts Requiring Writing.

§ 22-1. Contracts charging representative personality; promise to answer for debt of another.

Section is Not Applicable to Action on Parol Trust.—The portion of this section providing in substance that an action on a promise to pay the debt of another may not be maintained unless the agreement upon which it is based shall be in writing, and signed by the party charged, or by some other person lawfully authorized, is not applicable to an action on a parol trust. *Cuthrell v. Greene*, 229 N. C. 475, 50 S. E. (2d) 525.

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the bal-

ance due on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. It was held that the action was one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore this section had no application. *Id.*

Or to Promise Creating Original Obligation.—Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, or is a promise to make good notes transferred in payment of property, the promise is valid although in parol. If, however, the promise does not create an original obligation, and it is collateral, and is merely super-added to the promise of another to pay the debt, he re-

maining liable, the promisor is not liable, unless there is a writing; and this is true whether the promise is made at the time the debt is created or not. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629.

An agreement by a mortgage company with a lumber dealer to pay for lumber to be used in the construction of a building on the mortgaged premises is an original promise which does not come within the purview of the statute of frauds and parol evidence of such agreement is competent. *Pegram-West v. Winston Mut. Life Ins. Co.*, 231 N. C. 277, 56 S. E. (2d) 607.

The following illustrates when a promise comes within the provisions of this section. If, for instance, two persons come into a store and one buys and the other, to gain him credit, promises the seller, "If he does not pay you, I will", this is a collateral undertaking and must be in writing; but if he says, "Let him have the goods and I will pay", or "I will see you paid", and credit is given to him alone, he is himself the buyer, and the undertaking is original. *Goldsmith v. Erwin*, 183 F. (2d) 432.

What Determines Nature of Promise.—

Whether a promise is an original one not coming within the statute of frauds, or a collateral one required by this section to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. *Goldsmith v. Erwin*, 183 F. (2d) 432.

A parol promise by owners of building to pay materialmen amount due them by contractor cannot form the basis of a claim of lien by virtue of this section. *Roberts, etc., Lbr. Co. v. Horton*, 232 N. C. 419, 61 S. E. (2d) 100.

The mere fact that there may be a new consideration for the oral promise of a defendant to pay the subsisting debt of another is not sufficient of itself to take the promise out of the prohibition of the statute of frauds. To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629.

Promise to Pay Out of Money Placed in Hands of Promisor by Debtor.—While the statute of frauds does not apply to an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying the debt, evidence tending to show that the debtor entrusted certain funds to the promisor for the purpose of carrying on the debtor's business, without evidence that he entrusted the funds for the specific purpose of paying debtor's debts, is insufficient to bring the promise within this rule. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629.

Anything which shows the intention or the actual contract of the parties is material, and any evidence which goes to show the real intention of the parties is admissible whether it be by way of conduct or documentary in nature in order to determine whether a promise is an original one not coming within the provisions of this section, or a superadded one barred by this section. *Goldsmith v. Erwin*, 183 F. (2d) 432.

Facts Showing Promise within Statute.—The evidence was to the effect that a check given by an automobile retailer to plaintiff in payment of a car was returned unpaid, that plaintiff went to the debtor's place of business and that defendant, who was the debtor's brother, and who was handling the business during debtor's illness, told plaintiff to redeposit the check in about two weeks and that if it were not then paid by the bank he would send plaintiff a cashier's check for part and a personal check for the balance. It was alleged that after the debtor's death the defendant and two others purchased the business, but it was not alleged that at the time of the promise defendant contemplated purchasing the business or any interest therein. Held: While the evidence is sufficient to justify a finding that defendant personally promised to pay the check if his brother's funds were insufficient, and plaintiff's forbearance to take any action on the check for a period of two weeks was sufficient consideration for the promise, there is no allegation that the defendant made the promise to obtain any personal advantage from such forbearance, and therefore the promise comes within the statute of frauds, and defendant's motion to nonsuit was properly allowed. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629.

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

Purpose to Prevent Fraud.—

A suitor will not be permitted to make use of the statute

of frauds, not to prevent a fraud upon himself, but to commit a fraud upon his adversary. *Johnson v. Noles*, 224 N. C. 542, 31 S. E. (2d) 637.

Who May Plead Statute.—Any person, plaintiff or defendant, against whom enforcement is sought may plead the statute of frauds against a contract voidable under the statute of frauds. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680.

Parol Trusts.—

This section has no application to parol trusts, and does not prohibit their establishment by parol evidence. *Thompson v. Davis*, 223 N. C. 792, 28 S. E. (2d) 556.

Where co-tenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other co-tenants refraining from bidding, and hold the same in trust for the benefit of all the co-tenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement was held not in violation of the statute of frauds. *Embler v. Embler*, 224 N. C. 811, 32 S. E. (2d) 619.

Effect of Noncompliance.—

Our statute of frauds affects not only the enforcement of contracts coming within its terms but also their validity. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561.

Rights of Vendee under Parol Contract.—

In accord with original. See *Dupree v. Moore*, 227 N. C. 626, 629, 44 S. E. (2d) 37.

Purchaser Takes with Notice of Enforceable Parol Lease.

—Purchaser of real property takes with notice that the premises may be under parol lease for a term not exceeding three years, but beyond that period he is protected by provision that the lease must have been in writing. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107, 108.

Recovery on Quantum Meruit for Services Rendered Pursuant to Parol Contract.—A parol contract to devise realty in consideration of personal services is unenforceable under the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon quantum meruit, the mainspring of the statute of frauds being to prevent frauds and not to promote them. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764.

As to recovery on quantum meruit for services rendered pursuant to oral contract to devise, see 26 N. C. Law Rev. 417.

A parol agreement of the grantee to revest title in the grantor by destroying his deed, comes within the statute of frauds and is voidable at the election of the grantee. *Walker v. Walker*, 231 N. C. 54, 55 S. E. (2d) 801.

Applied in *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22. Cited in *Buford v. Mochy*, 224 N. C. 235, 29 S. E. (2d) 729; *Williams v. Joines*, 228 N. C. 141, 44 S. E. (2d) 738.

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

Growing trees are a part of the land, and a contract for the sale thereof comes within the meaning and intent of the statute of frauds. *Johnson v. Wallin*, 227 N. C. 669, 44 S. E. (2d) 83.

A Contract to Devise Real Property.—

An oral contract to give or devise real estate is void by reason of the statute of frauds, and no action for a breach thereof can be maintained. *Daughtry v. Daughtry*, 223 N. C. 528, 27 S. E. (2d) 446. See *Neal v. Wachovia Bank and Trust Co.*, 224 N. C. 103, 29 S. E. (2d) 206.

A parol promise to devise land is not subject to specific enforcement. *Coley v. Dalrymple*, 225 N. C. 67, 69, 33 S. E. (2d) 477, citing *Daughtry v. Daughtry*, 223 N. C. 528, 27 S. E. (2d) 446.

An agreement to devise realty is within the statute of frauds, and an agreement to bequeath personality, simpliciter, is not. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764.

An indivisible contract to devise real and personal property comes within the statute of frauds. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561.

Mortgage Absolute in Form.—For discussion of effect of this section upon mortgage deeds absolute in form, see 26 N. C. Law Rev. 405.

Lease for One Year with Provision for Renewals.—An oral lease of realty for one year, together with provision for annual renewals for four successive years, is but a single contract, the agreement for renewal being a part of and inseparable from lease for the original term, and holding for extended term would be under the original oral lease, and contract may not be divided so as to validate it for the initial period and disregard the other por-

tion of the contract. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107, 108.

Parol Lease for Three Years.—

A parol lease agreement for more than three years is void. *Barbee v. Lamb*, 225 N. C. 211, 34 S. E. (2d) 65.

Lease for Duration of Life Estate.—An agreement by the remainderman to rent the locus in quo from the life tenant for the entire period of the life estate is for an indefinite term and one which may last beyond three years and therefore such agreement comes within this section. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

As to Seal.—

A seal is not necessary to the validity of a lease regardless of the length of the term, and the common law, which did not require leases to be in writing, is in full force and effect, modified only by the requirement of this section that a lease of more than three years be in writing. *Moche v. Leno*, 227 N. C. 159, 41 S. E. (2d) 369.

Receipts for principal and interest and for taxes, in which no mention is made of any agreement by the person signing same to sell or convey land, are insufficient under the provisions of this section. *Chason v. Marley*, 224 N. C. 844, 32 S. E. (2d) 652.

Mere Recital of Agreement in Pleading Is Not Waiver of Statute.—A party is not estopped by his pleading from asserting the defense of the statute of frauds unless the pleading asserts the voidable contract as a necessary basis for the relief sought, and the mere recital of the parol agreement in the pleading does not adopt it or ratify it or waive the right to thereafter assert the statute in subsequent pleadings. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680.

Writing Must Describe Subject Matter.—In order to take an agreement relating to land out of the statute of frauds, the writing must describe the subject matter with certainty or refer to matters aliunde from which the description can be made certain. *Searcy v. Logan*, 226 N. C. 562, 39 S. E. (2d) 593.

Sufficiency of Description.—

A memorandum "Received of C. L. \$50.00 for home place where he now lives which he has no deed for" dated and signed by the owner of land is sufficiently definite to admit of parol evidence for the purpose of identifying the land, and memorandum being sufficient under statute of frauds, purchaser may introduce another receipt executed by owner, even though it does not purport to identify the land, and show by parol that it was part of the consideration for the land contracted to be conveyed. *Searcy v. Logan*, 226 N. C. 562, 39 S. E. (2d) 593.

C. Statement of Consideration.

Contract Must Fix the Price.—A contract for the sale of land or any interest therein, must fix the price, and where it does not, plaintiff cannot establish by parol evidence a change as to one of the essential terms of the contract as this would open the door to "all the mischiefs which the statute was intended to prevent." *Harvey v. Linker*, 226 N. C. 711, 713, 40 S. E. (2d) 202.

Change of Purchase Price in Option.—Where purchase price of land was changed in an option it constituted a new contract, unenforceable unless signed by the parties

to be charged. *Harvey v. Linker*, 226 N. C. 711, 712, 40 S. E. (2d) 202.

V. PLEADING AND PRACTICE.

Estoppel by Pleading.—See *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680.

When Statute Is Pleaded, Parol Evidence Is Incompetent.

—When the statute of frauds is specifically pleaded, testimony of a contract or promise to lease land exceeding in duration three years from making thereof, resting entirely in parol, is incompetent. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107.

Defendant's failure to object to parol evidence offered to show the existence of the contract is not a waiver of his defense of the statute of frauds, a fortiori if the evidence admitted without objection does not tend to show the existence of the contract but tends only to support a recovery on implied assumption, since the denial of the contract casts the burden on plaintiff to establish his cause of action by legal evidence. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561.

Complaint Good in Ejectment Independent of Contract.

—Where plaintiff alleged that he was life tenant of realty and defendant, remainderman, was in possession under parol agreement to pay a stipulated sum yearly rental to the life tenant, with proviso that the amount should be increased as his necessities might require, that he had demanded an increased rental which defendant had refused to pay, and that he had thereupon demanded possession and defendant admitted allegations except increase of rental, it was held that complaint was good in action in ejectment independently of rental contract, and plaintiff was not estopped from pleading the statute of frauds in his reply. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680.

General Issue or General Denial.—In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds. *Grad v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760.

In an action on a contract to convey land, the defense being that the contract is not in writing as required by this section the parties sought to be charged may simply deny the contract or plead the statute of frauds, or they may do both, and if either plea is made good the contract cannot be enforced. *Chason v. Marley*, 224 N. C. 844, 32 S. E. (2d) 652.

Denial of the contract as alleged is sufficient to raise the defense of the statute of frauds, since it places the burden upon plaintiff of establishing the contract by competent evidence, and if the contract be within the statute, the writing itself is the only competent evidence to prove its existence. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561.

Demurrer.—

The provisions of this section may not be taken advantage of by demurrer. *McCampbell v. Valdese Bldg., etc., Ass'n*, 231 N. C. 647, 58 S. E. (2d) 617.

Procedurally, the defense of the statute of frauds cannot be taken advantage of by demurrer; it can only be raised by answer. This may be done in either of two ways: The defendant may plead the statute, in which case when it develops on the trial that the contract is in parol, it must be declared invalid; or the defendant may enter a general denial, and on trial may object to the parol evidence to establish the contract, which will be equally fatal to the maintenance of the action. *Embler v. Embler*, 224 N. C. 811, 815, 32 S. E. (2d) 619.

Chapter 23. Debtor and Creditor.

Art. 1. Assignments for Benefit of Creditors.

§ 23-2. Trustee to file schedule of property.

Editor's Note.—In line six of this section in the original volume the word "and" should read "an."

Chapter 24. Interest.

§ 24-1. Legal rate is six per cent.

Applied in *White v. Disher*, 232 N. C. 260, 59 S. E. (2d) 798.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.

I. GENERAL CONSIDERATION.

Intent to Charge Usurious Interest.—

To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element. *Bailey v. Inman*, 224 N. C. 571, 573, 31 S. E. (2d) 769.

Where Person Is Not Entitled to Statutory Penalty.—

In accord with 1st paragraph in original. See *Bailey v. Inman*, 224 N. C. 571, 573, 31 S. E. (2d) 769.

Applied in *White v. Disher*, 232 N. C. 260, 59 S. E. (2d) 798.

Cited in *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751.

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

Assessments against Policyholder in Mutual Insurance Company.—In *Miller v. Barnwell Bros.*, 137 F. (2d) 257, 263, it was held that under this section interest should be allowed on assessments against policyholder in mutual insurance company under policies in suit from the dates of the respective demands by the receiver.

Chapter 25. Negotiable Instruments.

Sec. Art. 11. Acceptance.

25-144. Liability of drawee retaining or destroying bill; conditional payment of checks by drawee banks.

Art. 1. General Provisions.

§ 25-3. What constitutes reasonable time.

Cross Reference.—

The cross reference under this section in the original volume should be to § 25-151 instead of to § 25-48.

Art. 2. Form and Interpretation.

§ 25-15. When payable to bearer.—The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexistent or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last endorsement is an endorsement in blank. (Rev., s. 2159; 1899, c. 733, s. 9; 1949, c. 953; C. S. 2990.)

Editor's Note.—The 1949 amendment rewrote this section. For comment on the 1949 amendment, see 27 N. C. Law Rev. 427.

Art. 3. Consideration.

§ 25-29. Presumption of consideration.

Burden of Proof.—

When plaintiff declares on a past-due negotiable note, regular in form, and offers evidence of its execution by defendants, a prima facie case is made out, which imposes upon defendant the burden of going forward with evidence to rebut the presumption created by this section, or incur the risk of an adverse verdict. *Beam v. Wright*, 224 N. C. 677, 32 S. E. (2d) 213.

§ 25-30. What constitutes consideration.

A person who accepts a check for a pre-existing debt owed him by the maker is a purchaser for value. *National Bank v. Marshburn*, 229 N. C. 104, 47 S. E. (2d) 793.

Art. 4. Negotiation.

§ 25-35. What constitutes negotiation.

Delivery May Be Actual or Constructive.—

In accord with 2nd paragraph in original. See *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394.

What Constitutes Delivery.—To constitute delivery of a negotiable note there must be a parting with the possession and with power and control over it by the maker or endorser for the benefit of the payee or endorsee. To constitute delivery the note must be put out of possession of

the endorser. *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394.

A letter written by the payee in transmitting to the maker a note for execution, declaring that the payee had and does will the indebtedness thereby evidenced to his grandchildren, the children of the maker, so that in case of his previous death the notes would be the property of his grandchildren, was insufficient to constitute a gift inter vivos to his grandchildren, there being nothing in the language to show present donative intent, and there being neither actual nor constructive delivery of the notes to them. *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394.

Art. 5. Rights of Holder.

§ 25-65. Who deemed holder in due course.

Defective Title—Holder's Burden of Proof.—

Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614.

Art. 6. Liabilities of Parties.

§ 25-69. When person deemed indorser.

Indorsement by Board of Directors.—Where a resolution, by the board of directors of a corporation, authorized two of their number, by their signatures, to bind each of the directors individually on any notes due by the company or renews thereof, the indorsement of such notes, by the two directors so authorized, binds the other directors as indorsers only and not as principals. *Hertford Bkg. Co. v. Stokes*, 224 N. C. 83, 29 S. E. (2d) 24.

Art. 11. Acceptance.

§ 25-144. Liability of drawee retaining or destroying bill; conditional payment of checks by drawee banks.—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

Any payment made by a drawee bank for a check presented to it shall be conditional, subject to revocation, unless the bank accepts or certifies the check; but such conditional payment shall become unconditional at midnight of the next business day following the presentment of the check unless prior to such time the check is returned by the drawee bank, either by delivery, or by deposit in the mails, to the bank or person presenting it; provided, that this section shall not prevent the presentment and payment of checks on other terms, in accordance with clearing house rules or practices, or pursuant to spec-

ial collection agreements, and shall not apply to checks presented over the counter otherwise than for credit to a depositor's account. (Rev., s. 2287; 1899, c. 733, s. 137; 1949, c. 954; C. S. 3119.)

Editor's Note.—The 1949 amendment added the second paragraph.

Art. 17. Promissory Notes and Checks.

§ 25-192. Check defined.

Stated in *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795.

Cited in *National Bank v. Marshburn*, 229 N. C. 104, 47 S. E. (2d) 793.

§ 25-197. Check not assignment of funds.

In General.—

A check is a bill of exchange drawn on a bank and does not operate as an assignment of any part of the funds to the credit of the drawer until the check is presented to and accepted by the bank, and the drawer at any time prior to acceptance is at liberty to stop payment and to withdraw his funds from the bank. *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795.

The payee of an unaccepted, uncertified check has no right of action against the bank upon which the check is drawn, for he is in no position to allege a breach of legal duty and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. *General American Life Ins. Co. v. Stadium*, 223 N. C. 49, 25 S. E. (2d) 202.

Chapter 26. Suretyship.

Sec.

26-7. Surety, indorser, or grantor may notify creditor to take action.

26-8. Notice; how given; prima facie evidence thereof.

26-9. Effect of failure of creditor to take action.

§ 26-7. Surety, indorser, or guarantor may notify creditor to take action.—(a) After any note, bill, bond, or other obligation becomes due and payable, any surety, indorser, or guarantor thereof may give written notice to the holder or owner of the obligation requiring him to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation.

(b) The surety, indorser or guarantor who gives notice to the holder or owner of the obligation as provided by subsection (a) shall forthwith give written notice to all co-sureties, co-indorsers and co-guarantors of the fact that such notice is being given to the holder or owner of the obligation, and such co-sureties, co-indorsers and co-guarantors shall have ten days after receipt of the notice in which themselves to give written notice to the holder or owner of the obligation and to their co-sureties, co-indorsers, and co-guarantors, that they join in or adopt the notice given pursuant to subsection (a). Failure of such surety, indorser or guarantor to give the required notice to co-sureties, co-indorsers or co-guarantors whose names and residences are known to him or can be obtained by due diligence bars such surety indorser or guarantor from any of the benefits of G. S. 26-9.

(c) The holder or owner of the obligation shall on demand disclose to any surety, indorser, or guarantor of the obligation the names and addresses of all other sureties, indorsers and guarantors which appear on the obligation or of which he has knowledge.

(d) Nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity. (Rev., s. 2846; Code, s. 2097; 1868-9, c. 232, s. 1; 1951, c. 763, s. 1; C. S. 3967.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 26-8. Notice; how given; prima facie evidence thereof.—(a) Any notice authorized or required to be given by G. S. 26-7 shall—

(1) Be served by the sheriff by delivering a copy thereof to the person entitled to the notice, or

(2) Be sent by the person giving notice, by registered mail, with return receipt requested, to the last known address of the person being notified.

(b) Upon serving the notice, the sheriff shall return the original thereof, with his return thereon, to the person who caused the notice to be given.

(c) The sheriff's return, when the notice is served by the sheriff, or the return receipt, when the notice is sent by registered mail, shall be prima facie evidence of the giving of the notice. (Rev., s. 2848; Code, s. 2099; 1868-9, c. 232, s. 3; 1951, c. 763, s. 2; C. S. 3968.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 26-9. Effect of failure of creditor to take action.

—(a) If the holder or owner of the obligation refuses or fails, within 30 days from the service or receipt of such notice, to take appropriate action pursuant thereto, the following persons shall be discharged on any such note, bond, bill or other obligation to the extent that they are prejudiced thereby:

(1) The surety, indorser or guarantor giving such notice, and

(2) All co-sureties, co-indorsers or co-guarantors joining therein or adopting such notice as provided by G. S. 26-7, and

(3) All the co-sureties, co-indorsers, or co-guarantors whose names or addresses such holder or owner of the obligation failed to disclose on demand as required by subsection (c) of G. S. 26-7.

(b) The fact that an instrument contains a provision waiving any defense of any surety, indorser or guarantor by reason of the extension of the time for payment does not prevent the operation of this section. Any such notice to the holder or owner of the obligation as is authorized by G. S. 26-7 may be given at or subsequent to the time such obligation is due or at or subsequent to the termination of a period of extension.

(c) The failure of any co-surety, co-indorser or co-guarantor to join in or adopt a notice to the holder or owner of the obligation as authorized by subsection (b) of G. S. 26-7 does not prevent such co-surety, co-indorser or co-guarantor from giving a separate notice as authorized by subsection (a) of G. S. 26-7. (Rev., s. 2847; Code, s. 2098; 1868-9, c. 232, s. 2; 1951, c. 763, s. 3; C. S. 3969.)

Editor's Note.—The 1951 amendment rewrote this section.

Chapter 27. Warehouse Receipts.

Art. 1. General Provisions.

§ 27-2. Terms defined.

Cited in *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570.

Art. 2. Issue of Warehouse Receipts.

§ 27-10. Negotiable receipts.

Cited in *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570.

Art. 4. Negotiation and Transfer of Receipts.

§ 27-51. Rights of bona fide holder not affected by fraud.

The negotiation of a warehouse receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation if the person to whom the receipt was negotiated took same for value, in

good faith, and without notice of the breach of duty. *Harris v. Fairley*, 232 N. C. 551, 61 S. E. (2d) 616.

In order for the transferee of warehouse receipts to be a bona fide holder within the meaning of this section it is necessary not only that he acquire same before maturity for value and without notice of fraud but also that he take same in good faith, which means honestly and without knowledge of facts which would negative good faith, particularly where he knows his transferrer occupied a relationship of trust. *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570.

Erroneous Instructions.—An instruction to the effect that the burden is upon the transferee to show that he took the warehouse receipts in controversy for value and without notice of any defect, must be held for reversible error for omitting the element of good faith, notwithstanding a prior correct instruction, when the question of good faith is the focal point of the controversy upon plaintiff's evidence that the transferrer was its agent and transferred the receipts in discharge of his personal liability to the transferee on an unpaid check. *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

July 30, 1951

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing 1951 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMULLAN,
Attorney General of North Carolina

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