


N. C. State Board of Health

192



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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through
the Legislative Session of 1949

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

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

Under the Direction of

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Volume 2A

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N. C. State Board of Health

THE GENERAL STATUTES OF
NORTH CAROLINA

Consolidated and Revised by the
Legislative Council of 1943

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Volume 2A

1

Scope of Volume

Statutes:

Full text of Chapters 28 through 52 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1949 heretofore contained in Volume 2 of the General Statutes of North Carolina and the 1949 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

- North Carolina Reports volumes 1-230 (p. 576).
- Federal Reporter volumes 1-300.
- Federal Reporter 2nd Series volumes 1-174.
- Federal Supplement volumes 1-83.
- United States Reports volumes 1-337.
- Supreme Court Reporter volumes 1-69.
- North Carolina Law Review volumes 1-27.

Abbreviations

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

- P. R. Potter's Revisal (1821, 1827)
- R. S. Revised Statutes (1837)
- R. C. Revised Code (1854)
- C. C. P. Code of Civil Procedure (1868)
- Code Code (1883)
- Rev. Revisal of 1905
- C. S. Consolidated Statutes (1919, 1924)

Preface

Volume 2 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 2A, 2B and 2C. These new volumes contain Chapters 28 through 105 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1949 Session. Chapters 28 through 52 appear in volume 2A, Chapters 53 through 82 in volume 2B, and Chapters 83 through 105 in volume 2C.

Both the statutes and the annotations in the recompiled volumes are in larger type and in more convenient form than in the original volume. The annotations in the new volumes comprise those which appeared in original volume 2 and the 1949 Cumulative Supplement thereto; however, they have been considerably revised, and it is believed that the present annotations are an improvement over the old.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5 read as follows: (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.) In this connection attention should be called to a peculiarity in the manner of citing the early acts in the historical references. The acts through the year 1825 are cited, not by the chapter numbers of the session laws of the particular years, but by the chapter numbers assigned to them in Potter's Revisal (published in 1821 and containing the acts from 1715 through 1820) or in Potter's Revisal continued (published in 1827 and containing the acts from 1821 through 1825). Thus, in the illustration set out above the citations "1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2" refer to the chapter numbers in Potter's Revisal and not to the chapter numbers of the Laws of 1784 and 1819, respectively. The chapter numbers in Potter's Revisal and Potter's Revisal continued run consecutively, and hence do not correspond, at least after 1715, to the chapter numbers in the session laws of the particular years. After 1825 the chapter numbers in the session laws are used.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMULLAN,
Attorney General.

November 30, 1950.

Table of Contents

VOLUME I.

- Division I. Constitutions.
- Division II. Courts and Civil Procedure.
- Division III. Criminal Law and Procedure.
- Division IV. Motor Vehicles.
- Division V. Commercial Law.

VOLUME II-A.

	PAGE
Division VI. Decedents' Estates	1
CHAP. 28. ADMINISTRATION	3
Art. 1. Probate Jurisdiction	6
Art. 2. Necessity for Letters and Their Form	9
Art. 3. Right to Administer	10
Art. 4. Public Administrator	17
Art. 5. Administrator with Will Annexed	19
Art. 6. Collectors	21
Art. 7. Appointment and Revocation	22
Art. 8. Bonds	26
Art. 9. Notice to Creditors	31
Art. 10. Inventory	32
Art. 11. Assets	34
Art. 12. Discovery of Assets	38
Art. 13. Sales of Personal Property	40
Art. 14. Sales of Real Property	43
Art. 15. Proof and Payment of Debts of Decedent	58
Art. 16. Accounts and Accounting	65
Art. 17. Distribution	76
Art. 17A. Uniform Simultaneous Death Act	84
Art. 18. Settlement	85
Art. 19. Actions by and against Representative	89
Art. 20. Representative's Powers, Duties and Liabilities	101
Art. 21. Construction and Application of Chapter	103
Art. 22. Estates of Missing Persons	103
CHAP. 29. DESCENTS	106
CHAP. 30. WIDOWS	117
Art. 1. Dissent from Will	117
Art. 2. Dower	120
Art. 3. Allotment of Dower	127
Art. 4. Year's Allowance	130
CHAP. 31. WILLS	137
Art. 1. Execution of Will	138
Art. 2. Revocation of Will	143
Art. 3. Witnesses to Will	146
Art. 4. Depository for Wills	147
Art. 5. Probate of Will	148
Art. 6. Caveat to Will	160
Art. 7. Construction of Will	166

	PAGE
Division VII. Fiduciaries	177
CHAP. 32. FIDUCIARIES	179
CHAP. 33. GUARDIAN AND WARD	183
Art. 1. Creation and Termination of Guardianship	184
Art. 2. Guardian's Bond	189
Art. 3. Powers and Duties of Guardian	194
Art. 4. Sales of Ward's Estate	197
Art. 4A. Guardians' Deeds Validated When Seal Omitted	202
Art. 5. Returns and Accounting	203
Art. 6. Public Guardians	207
Art. 7. Foreign Guardians	208
Art. 8. Estates without Guardian	210
Art. 9. Guardians of Estates of Missing Persons	212
Art. 10. Conservators of Estates of Missing Persons	213
Art. 11. Guardians of Children of Service Men	214
CHAP. 34. VETERANS' GUARDIANSHIP ACT	215
CHAP. 35. PERSONS WITH MENTAL DISEASES AND INCOMPETENTS	221
Art. 1. Definitions	222
Art. 2. Guardianship and Management of Estates of Incompetents ..	223
Art. 3. Sales of Estates	229
Art. 4. Mortgage or Sale of Estates Held by the Entireties	231
Art. 5. Surplus Income and Advancements	232
Art. 6. Detention, Treatment, and Cure of Inebriates	234
Art. 7. Sterilization of Persons Mentally Defective	236
Art. 8. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane	242
Art. 9. Mental Health Council	243
CHAP. 36. TRUSTS AND TRUSTEES	245
Art. 1. Investment and Deposit of Trust Funds	246
Art. 2. Removal of Trust Funds from State	248
Art. 3. Resignation of Trustee	249
Art. 4. Charitable Trusts	251
Art. 5. Uniform Trusts Act	254
Art. 6. Uniform Common Trust Fund Act	259
CHAP. 37. UNIFORM PRINCIPAL AND INCOME ACT	260
Division VIII. Real and Personal Property	265
CHAP. 38. BOUNDARIES	267
CHAP. 39. CONVEYANCES	271
Art. 1. Construction and Sufficiency	272
Art. 2. Conveyances by Husband and Wife	279
Art. 3. Fraudulent Conveyances	286
Art. 4. Voluntary Organizations and Associations	300
Art. 5. Sale of Building Lots in North Carolina	301
Art. 5A. Control Corners in Real Estate Developments	301
Art. 6. Power of Appointment	302
CHAP. 40. EMINENT DOMAIN	304
Art. 1. Right of Eminent Domain	304
Art. 2. Condemnation Proceedings	312
Art. 3. Public Works Eminent Domain Law	326
CHAP. 41. ESTATES	334
CHAP. 42. LANDLORD AND TENANT	368
Art. 1. General Provisions	368
Art. 2. Agricultural Tenancies	374
Art. 3. Summary Ejectment	385
Art. 4. Forms	394

	PAGE
CHAP. 43. LAND REGISTRATION	398
Art. 1. Nature of Proceeding	399
Art. 2. Officers and Fees	400
Art. 3. Procedure for Registration	400
Art. 4. Registration and Effect	404
Art. 5. Adverse Claims and Corrections after Registration	409
Art. 6. Method of Transfer	411
Art. 7. Liens upon Registered Lands	415
Art. 8. Assurance Fund	417
Art. 9. Removal of Land from Operation of Torrens Law	418
CHAP. 44. LIENS	419
Art. 1. Mechanics', Laborers' and Materialmen's Liens	420
Art. 2. Subcontractors', etc., Liens and Rights against Owners ..	429
Art. 3. Liens on Vessels	441
Art. 4. Warehouse Storage Liens	443
Art. 5. Liens of Hotel, Boarding and Lodginghouse Keeper	444
Art. 6. Liens of Livery Stable Keepers	445
Art. 7. Liens on Colts, Calves and Pigs	445
Art. 8. Perfecting, Recording, Enforcing and Discharging Liens ..	446
Art. 9. Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.	451
Art. 10. Agricultural Liens for Advances	452
Art. 11. Liens for Internal Revenue	459
Art. 12. Liens on Leaf Tobacco	460
Art. 13. Factors' Liens	460
Art. 14. Assignment of Accounts Receivable and Liens Thereon ..	462
CHAP. 45. MORTGAGES AND DEEDS OF TRUST	466
Art. 1. Chattel Mortgages: Form and Sufficiency	467
Art. 2. Right to Foreclose or Sell under Power	470
Art. 2A. Sales under Power of Sale	477
Art. 2B. Injunctions; Deficiency Judgments	492
Art. 2C. Validating Sections; Limitation of Time for Attacking Cer- tain Foreclosures	496
Art. 3. Mortgage Sales	498
Art. 4. Discharge and Release	499
Art. 5. Real Estate Mortgage Loans	505
CHAP. 46. PARTITION	507
Art. 1. Partition of Real Property	507
Art. 2. Partition Sales of Real Property	517
Art. 3. Partition of Lands in Two States	522
Art. 4. Partition of Personal Property	522
CHAP. 47. PROBATE AND REGISTRATION	523
Art. 1. Probate	525
Art. 2. Registration	534
Art. 3. Forms of Acknowledgment, Probate and Order of Registra- tion	560
Art. 4. Curative Statutes; Acknowledgments; Probates; Registration	567
Art. 5. Registration of Official Discharges from the Military and Naval Forces of the United States	584
Art. 6. Execution of Powers of Attorney	586
Art. 7. Private Examination of Married Women Abolished	586
Division IX. Domestic Relations	587
CHAP. 48. ADOPTION OF MINORS	589
CHAP. 49. BASTARDY	602
Art. 1. Support of Illegitimate Children	602
Art. 2. Legitimation of Illegitimate Children	610

	PAGE
CHAP. 50. DIVORCE AND ALIMONY	612
CHAP. 51. MARRIAGE	649
Art. 1. General Provisions	649
Art. 2. Marriage Licenses	653
CHAP. 52. MARRIED WOMEN	662
Art. 1. Powers and Liabilities of Married Women	662
Art. 2. Acts Barring Reciprocal Property Rights of Husband and Wife	681
Art. 3. Free Traders	683

VOLUME II-B.

- Division X. Corporations and Associations.
- Division XI. Police Regulations.

VOLUME II-C.

- Division XII. Occupations.
- Division XIII. Employer and Employee.
- Division XIV. Miscellaneous Provisions.
- Division XV. Taxation.

VOLUME III.

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

VOLUME IV.

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

Division VI. Decedents' Estates.

	PAGE
Chap. 28. Administration	3
29. Descents	106
30. Widows	117
31. Wills	137

Chapter 28. Administration.

Article 1.

Probate Jurisdiction.

- Sec.
28-1. Clerk of superior court has probate jurisdiction.
28-2. Exclusive in clerk who first gains jurisdiction.
28-2.1. Administrator for estates of persons missing for seven years.

Article 2.

Necessity for Letters and Their Form.

- 28-3. Letters must issue; immediate rights of family.
28-4. Executor de son tort.
28-5. Form of letters.

Article 3.

Right to Administer.

- 28-6. Order in which persons entitled; nomination by person renouncing right to administer.
28-7. Husband to administer wife's estate; right in surplus.
28-8. Disqualifications enumerated.
28-9. Effect of disqualification of person entitled.
28-10. Divorce a vinculo or felonious slaying is forfeiture.
28-11. Elopement and adultery of wife is forfeiture.
28-12. Husband's conduct forfeiting rights in wife's estate.
28-13. Executor may renounce.
28-14. Renunciation of prior right required.
28-15. Failure to apply as renunciation.
28-16. Person named as executor failing to qualify or renounce.

Article 4.

Public Administrator.

- 28-17. Appointment and term.
28-18. Oath.
28-19. Bond.
28-20. When to obtain letters.
28-21. Powers generally and on expiration of term.

Article 5.

Administrator with Will Annexed.

- 28-22. When letters cum testamento annexo issue.
28-23. Qualifications and bond.
28-24. Administrator cum testamento annexo must observe will.

Article 6.

Collectors.

- Sec.
28-25. Appointment of collectors.
28-26. Qualifications and bond.
28-27. Powers of collectors.
28-28. When collector's powers cease; duty to account.

Article 7.

Appointment and Revocation.

- 28-29. Facts to be shown on applying for administration.
28-30. Right to contest application for letters; proceedings.
28-31. Letters of administration revoked on proof of will.
28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default.
28-33. On revocation, successor appointed and estate secured.

Article 8.

Bonds.

- 28-34. Bond; approval; condition; penalty.
28-35. When executor to give bond.
28-36. When executor may give bond after one year.
28-37. No bond in certain cases of executor with power to convey.
28-38. No bond where will does not require bond and coexecutor a resident.
28-39. Certain executor's deeds without bond before 1911 validated.
28-39.1. Conveyances by foreign executors validated.
28-40. Oath and bond required before letters issue.
28-41. Oath before notary; curative statute.
28-42. Right of action on bond.
28-43. Rights of surety in danger of loss.
28-44. On revocation of letters, bond liable to successors.
28-45. When new bond or new sureties required.
28-46. On failure to give new bond, letters revoked.

Article 9.

Notice to Creditors.

- 28-47. Advertisement for claims.
28-48. Proof of advertisement.
28-49. Personal notice to creditor.

CHAPTER 28. ADMINISTRATION

Article 10. Inventory.

- Sec.
28-50. Inventory within three months.
28-51. Compelling the inventory.
28-52. New assets inventoried.
28-53. Trustees in wills to file inventories and accounts.

Article 11. Assets.

- 28-54. Distinction between legal and equitable assets abolished.
28-55. Trust estate in personalty.
28-56. Crops ungathered at death.
28-57. Proceeds of real estate sold to pay debts are personal assets.
28-58. Surplus of proceeds of realty sold for debts is real asset.
28-59. Personalty fraudulently conveyed recoverable.
28-60. Debt due from executor not discharged by appointment.
28-61. Joint liability of heirs, etc., for debts.
28-62. Extent of liability of heirs, etc.
28-63. Judgment against heirs, etc., apportioned; costs.
28-64. Persons liable for debts to observe priorities.
28-65. Existence of other debts of prior or equal class.
28-66. Debts paid taken as unpaid as against heirs, etc.
28-67. Compelling contribution among heirs, etc.
28-68. Payment to clerk of sums not exceeding \$500 due and owing intestates.

Article 12. Discovery of Assets.

- 28-69. Examination of persons or corporations believed to have possession of property of decedent.
28-70. Right of appeal.
28-71. Costs.
28-72. Remedies supplemental.

Article 13. Sales of Personal Property.

- 28-72.1. Procedure when no order of sale is obtained.
28-73. Executor or administrator may sell without court order.
28-74. Collector may sell or rent only on order of court.
28-75. Terms and notice of public sale.
28-76. Clerk may order private sale in certain cases.
28-77. Confirmation required on objection of interested party.

- Sec.
28-78. Security required; representative's liability for collection.
28-79. Hours of public sale; penalty.
28-80. Debts uncollected after year may be sold; list filed.

Article 14.

Sales of Real Property.

- 28-81. Sales of realty ordered, if personalty insufficient for debts.
28-82. When representatives authorized to rent, borrow or mortgage.
28-83. Conveyance of lands by heirs within two years voidable; judicial sale for partition.
28-84. Property subject to sale; conveyance by deceased in fraud of creditors.
28-85. Effect of bona fide purchase from fraudulent grantee.
28-86. Contents of petition for sale.
28-87. Heirs and devisees necessary parties.
28-88. Adverse claimant to be heard.
28-89. Upon issues joined, transferred to term.
28-90. Order granted, if petition not denied; procedure for sale.
28-91, 28-92. [Repealed.]
28-93. Court may authorize private sale.
28-94. Undevised realty first sold.
28-95. Specifically devised realty; contribution.
28-96. Under power in will, sales public or private.
28-97. Where executor with power dies, power executed by survivor, etc.
28-98. Death of vendor under contract; representative to convey.
28-99. Title in representative for estate; he or successor to convey.
28-100. Sales of realty devised upon contingent remainder, executory devise or other limitation validated.
28-101. Presumption; burden of proof.
28-102. Application of §§ 28-100 and 28-101.
28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.
28-104. Validation of sales of realty by administrators de bonis non of deceased trustees.

Article 15.

Proof and Payment of Debts of Decedent.

- 28-105. Order of payment of debts.
28-106. No preference within class.
28-107. When payment out of class held valid.
28-108. Debts due representative not preferred.

CHAPTER 28. ADMINISTRATION

- Sec.
28-109. Debts not due rebated.
28-110. Affidavit of debt may be required.
28-111. Disputed debt may be referred.
28-112. Disputed debt not referred, barred in six months.
28-113. If claim not presented in twelve months, representative discharged as to assets paid.
28-114. No lien by suit against representative.
28-115. When costs against representative allowed.
28-116. Obligations binding heirs collected as other debts.

Article 16.

Accounts and Accounting.

- 28-117. Annual accounts.
28-118. Clerk may compel account.
28-119. Vouchers presumptive evidence.
28-120. Gravestones authorized.
28-120.1. Perpetual care of cemetery lot.
28-121. Final accounts.
28-121.1. Final accounts; immediate settlement.
28-122. Creditor's proceeding for accounting.
28-123. Rules which govern creditor's proceeding.
28-124. When and where summons returnable.
28-125. Clerk to advertise for creditors.
28-126. Publication of advertisement.
28-127. Creditors to file claims and appoint agent.
28-128. Proof of claims.
28-129. Representative to file claims; notice to creditors.
28-130. Clerk to exhibit to representative claims filed.
28-131. If representative denies claim, creditor notified.
28-132. Issues joined; cause sent to superior court.
28-133. When representative personally liable for costs.
28-134. Court may permit representative to appear after return day.
28-135. Clerk to state account.
28-136. Exception to report; final report and judgment.
28-137. Appeal from judgment; security for costs.
28-138. Papers on appeal filed and cause docketed.
28-139. Prior creditors not affected by appeal may docket judgments.
28-140. Judgments where assets sufficient to pay a class.
28-141. Judgment where assets insufficient to pay a class.

- Sec.
28-142. Contents of judgment; execution.
28-143. When judgment to fix with assets.
28-144. Form and effect of execution.
28-145. Report is evidence of assets only at date.
28-146. Creditor giving security may show subsequent assets.
28-147. Suits for accounting at term.
28-148. Proceedings against land, if personal assets fail.

Article 17.

Distribution.

- 28-149. Order of distribution.
28-150. Advancements to be accounted for.
28-151. Children advanced to render inventory; effect of refusal.
28-152. Illegitimates next of kin to mother and to each other.
28-153. Allotment to after-born child in real estate.
28-154. Allotment to after-born child in personal property.
28-155. Allotment of personalty from proceeds of realty.
28-156. Effect of allotment of realty; contribution to equalize burden.
28-157. After-born child on allotment deemed devisee or legatee.
28-158. Before settlement executor may have claimants' shares in estate ascertained.
28-159. Legacy or distributive share recoverable after two years.
28-160. Payment to clerk after one year discharges representative pro tanto.
28-161. On payment clerk to sign receipt.

Article 17A.

Uniform Simultaneous Death Act.

- 28-161.1. Disposition of property where no sufficient evidence of survivorship.
28-161.2. Beneficiaries of another person's disposition of property.
28-161.3. Joint tenants or tenants by the entirety.
28-161.4. Insurance policies.
28-161.5. Article does not apply if decedent provides otherwise.
28-161.6. Uniformity of interpretation.
28-161.7. Short title.

Article 18.

Settlement.

- 28-162. Representative must settle after two years.
28-163. Extension of time for final accounts when funds are in closed banks.

- Sec.
 28-164. Retention of funds to satisfy claims not due or in litigation.
 28-165. After final account representative may petition for settlement.
 28-166. Payment into court of fund due absent defendant or infant.
 28-167. Procedure where person entitled unheard of for seven years.
 28-168. Parties to proceeding for settlement.
 28-169. When legacies may be paid in two years.
 28-170. Commissions allowed representatives.
 28-171. Liability and compensation of clerk.

Article 19.

Actions by and against Representative.

- 28-172. Action survives to and against representative.
 28-173. Death by wrongful act; recovery not assets; dying declarations.
 28-174. Damages recoverable for death by wrongful act.
 28-175. Actions which do not survive.
 28-176. To sue or defend in representative capacity.
 28-177. Service on or appearance by one binds all.
 28-178. When creditors may sue on claim; execution in such action.
 28-179. Service by publication on executor without bond.
 28-180. Execution by successor in office.
 28-181. Action to continue, though letters revoked.

Article 20.

Representative's Powers, Duties and Liabilities.

- 28-182. Representative may maintain appropriate suits and proceedings.
 28-183. Representative may purchase for estate to prevent loss.
 28-184. Representatives hold in joint tenancy.

- Sec.
 28-185. Representatives liable for devastavit.
 28-186. Nonresident executor or guardian to appoint process agent.
 28-187. Executor or guardian removing from State to appoint process agent.
 28-188. Nonresident's failure to obey process ground for removal.
 28-189. Power to renew obligation; no personal liability.
 28-190. Continuance of farming operations of deceased persons.

Article 21.

Construction and Application of Chapter.

- 28-191. Where no time specified, reasonable time allowed; extension.
 28-192. Powers under will not affected.

Article 22.

Estates of Missing Persons.

- 28-193. Petition for administration; service upon next of kin, etc.; notice to appear and answer.
 28-194. Appointment of guardian ad litem; notice to produce evidence that missing person, etc., alive; presumption and declaration of death; administration of estate.
 28-195. Findings of clerk as to spouse and issue of missing person.
 28-196. Effect of declaration and findings.
 28-197. Validity of conveyances of real property of missing persons.
 28-198. Distribution of property held by or in trust for missing person; bond of distributee.
 28-199. Limitation of action on bond; civil immunity of purchasers for value and fiduciaries.
 28-200. Action against distributee for recovery of property or its value.
 28-201. Jurisdiction of clerk of county of last known residence or where property located; publication of notices.

ARTICLE 1.

Probate Jurisdiction.

§ 28-1. **Clerk of superior court has probate jurisdiction.**—The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration, in cases of intestacy, in the following cases:

Character of Powers and Jurisdiction.—The powers and jurisdiction exercised by the clerk pursuant to this section are not those of a servant or ministerial offi-

cer or exercised as and for the superior court, but those of an independent tribunal of original jurisdiction. *Edwards v. Cobb*, 95 N. C. 4 (1886), followed in *In*

re *Styers*, 202 N. C. 715, 164 S. E. 123 (1932).

The clerk of the superior court is an independent tribunal of original jurisdiction in the exercise of his probate jurisdiction. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

Jurisdiction Exclusive.—Jurisdiction to appoint an administrator of a deceased person, who has died intestate, and to issue letters for the administration of his estate is conferred by this section exclusively upon the clerk of the superior court of the county in which decedent was domiciled at or immediately previous to his death. *Bank v. Commissioners of Yancy*, 195 N. C. 678, 143 S. E. 252 (1928).

When Jurisdiction Presumed.—Where it is admitted that the plaintiff was regularly appointed administrator, it will be presumed that the clerk acted within his jurisdiction. *Vance v. Southern R. Co.*, 138 N. C. 460, 50 S. E. 860 (1905).

Summary Proceedings.—The proceedings of the clerk in respect to the exercise of his probate jurisdiction are summary in their nature. *Edwards v. Cobb*, 95 N. C. 4 (1886).

More than One Appointment.—When letters of administration are once issued to a person who qualified, the powers of the clerk in that respect are exhausted and the subsequent appointment of another person, before the first appointment is revoked, is void. In *re Bowman's Estate*, 121 N. C. 373, 28 S. E. 404 (1897).

Clerk May Vacate Order Admitting Will to Probate.—The clerk of the superior court, in his probate jurisdiction, has the power to vacate a previous order admitting a will to probate in common form on motion aptly made, when it is clearly made to appear that the order of probate was improvidently granted, or that the court had been imposed upon and misled as to the essential and true conditions of the case. In *re Smith's Will*, 218 N. C. 161, 10 S. E. (2d) 676 (1940).

May Adjudge Person Dead after Absence for Seven Years.—While the death or intestate must be established as a jurisdictional fact to empower the clerk of the superior court to issue letters of administration under this section and § 28-5, the clerk may, upon evidence that a person has been absent from his domicile for seven years without being heard from by those who would be expected to hear from

him if living, adjudge that such person is dead and appoint an administrator of his estate. *Carter v. Lilley*, 227 N. C. 435, 42 S. E. (2d) 310 (1947).

Collateral Attack.—When the clerk under this section has general jurisdiction of the subject matter of the inquiry, a decree appointing an executor or administrator may not be collaterally attacked. *Fann v. North Carolina R. Co.*, 155 N. C. 136, 71 S. E. 81 (1911); *Batchelor v. Overton*, 158 N. C. 395, 74 S. E. 20 (1912); *Tyer v. Blades Lumber Co.*, 188 N. C. 268, 124 S. E. 305 (1924). But where jurisdictional facts are lacking, it can be so attacked. *Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 99 S. E. 240 (1919). And see *Vance v. Southern R. Co.*, 138 N. C. 460, 50 S. E. 860 (1905).

The facts very generally recognized as jurisdictional are stated in this section, and where, on application for letters of administration, these facts appear of record, the question of the qualification of the appointee cannot be collaterally assailed. *Wharton v. Ins. Co.*, 178 N. C. 135, 100 S. E. 266 (1919). The only exception to this rule is that it may be shown collaterally that the person for whom an administrator has been appointed is not in fact dead, but is still living. *Hines v. Foundation Co.*, 196 N. C. 322, 145 S. E. 612 (1928). In such case, the order making the appointment being void, it may be attacked collaterally. *Holmes v. Wharton*, 194 N. C. 470, 140 S. E. 93 (1927), citing *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20 (1925).

A clerk has jurisdiction to appoint an administrator where the affidavit of the applicant presumes the death of the decedent from his absence of seven years and the lack of communication from him. The order and appointment can only be avoided by showing the person not to be in fact dead. *Chamblee v. Security Nat. Bank*, 211 N. C. 48, 188 S. E. 632 (1936).

Evidence that deceased was not domiciled in the county of the clerk, as required by subsection 1 of this section, was inadmissible in an action for wrongful death. *Holmes v. Wharton*, 194 N. C. 470, 140 S. E. 93 (1927).

The burden of proof to show jurisdictional facts rests upon the person applying for letters. *Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 99 S. E. 240 (1919).

1. Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

Grant in Any Other County Void.—Where the facts stated in this subsection exist, a grant in any county other than that prescribed by the subsection is

absolutely void. *Collins v. Turner*, 4 N. C. 541 (1817); *Johnson v. Corpenning*, 39 N. C. 216 (1845).

Domicile.—*Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 99 S. E. 240 (1919), contains an excellent discussion of “domicile” as distinguished from “residence,” “inhabiting,” etc.

2. Where the decedent at his death had places of residence in more than one county, the clerk of any such county has jurisdiction.

Editor’s Note.—The 1943 amendment substituted the words “places of resi-

Change of County Lines.—The county referred to in this subsection is the county at the time of the death of the decedent, and not the one subsequently formed by a change of county lines. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353 (1917).

dence” for the words “his fixed place of domicile.”

3. Where the decedent, not being domiciled in this State, died out of the State, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

Assets.—If the assets are bona notabilia (chattels or goods of sufficient value to be accounted for), they are sufficient to convey jurisdiction to the clerk. *Hyman v. Gaskins*, 27 N. C. 267 (1844).

assets into the jurisdiction are immaterial. *Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951 (1896).

Cited in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

The time and manner of bringing the

4. Where the decedent, not being domiciled in this State, died in the county of such clerk, leaving assets in the State, or assets of such decedent thereafter come into the State.

Provided, that in all cases where the clerk of the superior court is interested in an estate, the judge of the superior court resident in the district or the judge of the superior court holding the courts of the county by regular or special assignment shall have jurisdiction to take proof of wills and grant letters testamentary, letters of administration with the will annexed and letters of administration in cases of intestacy, to audit and approve the accounts of executors and administrators, to make orders and to do any and all things in connection with the administration of estates which the clerk of the superior court might or could have done, had he not been interested in the estate. (R. C., c. 46, s. 1; C. C. P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C. S., s. 1; 1931, c. 165; 1943, c. 543.)

Cross References.—As to jurisdiction when clerk is disqualified, see § 31-12 and note, and also §§ 2-17 through 2-21. As to clerk’s power to remove executors and administrators, see § 28-32 and note. As to probate of wills generally, see § 31-12 et seq.

re *Franks*, 220 N. C. 176, 16 S. E. (2d) 831 (1941).

Cause of Action for Death by Wrongful Act Sufficient Asset.—Where a non-resident is killed in this State the cause of action for death by wrongful act is sufficient under this section as a basis for the grant of letters in the county where the injury and death occurred. *Vance v. Southern R. Co.*, 138 N. C. 460, 50 S. E. 860 (1905); *Fann v. North Carolina Co.*, 155 N. C. 136, 71 S. E. 81 (1911). See notes to §§ 28-173, 28-174.

Editor’s Note.—The 1931 amendment added the proviso to this section.

Cited in *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

In General.—Where decedents were not domiciled in this State, but died intestate in Henderson County, leaving assets in the State, the clerk of the superior court of Henderson County had jurisdiction to grant letters of administration. In

§ 28-2. **Exclusive in clerk who first gains jurisdiction.**—The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent’s estate. (C. C. P., s. 434; Code, s. 1375; Rev., s. 17; C. S., s. 2.)

Domicile in Two Counties.—The provisions of this section apply even though the decedent at the time of his death was domiciled in two counties. And the juris-

diction first acquired cannot be collaterally impeached. *Tyer v. Blades Lumber Co.*, 188 N. C. 274, 124 S. E. 306 (1924).

Superior Court to Determine Proper

Grant.—Where two clerks of different counties have granted letters to different parties, and the judgments granting them have been respectively affirmed by the superior court, that court will determine which of the letters were properly granted. *Tyer v. Blades Lumber Co.*, 188 N. C. 274, 124 S. E. 306 (1924).

§ 28-2.1. Administrator for estates of persons missing for seven years.—When it shall be made to appear to the satisfaction of the clerk of the superior court, or a judge of the superior court, having jurisdiction of the appointment of executors and administrators, by special proceedings as prescribed in G. S. § 28-167, that any person has disappeared from the community of his residence, and his whereabouts remain unknown in such community for a period of seven years or more and cannot after diligent inquiry be ascertained by those most likely to have heard from or of him; and that such person has property or property rights within its jurisdiction, which may be affected by his absence or may need protection and administration, and that such person has made no provision for the management of his affairs or the administration of his estate in the event of his death; such clerk of the superior court, or judge of the superior court, may appoint an administrator of the estate and property, both real and personal, of such absent person, as may be done in the case of decedents, and with like powers and duties with respect to said estate, and shall include both real and personal property, and the laws of distribution and inheritance shall apply to the assets of the said estate to be administered under and by virtue of this statute.

The clerk of the superior court of the county of the last known residence of such absent person, shall have jurisdiction over such decedent's estate.

The administrator so appointed shall have all the powers and duties with respect to the property and estate of such missing person as are now or may be hereafter conferred by law upon administrators generally; and before entering upon the discharge of the duties of such administration he shall be required to enter into such bond as is now required by law in the matter of administration of estates of deceased persons, with the additional requirement that such bond shall include as a basis the value of all real estate or interest in real estate in addition to the value of the personal property of the estate committed to his charge.

The public laws relating to the administration of the estates of decedents, including the laws relating to the distribution of personal property and the devolution of real estate, shall apply to the estates of such missing persons.

No action shall be maintained against such administrator, or the sureties on his bond, by reason of his appointment and taking over the administration of such estate, or any of his acts with reference to said estate, where it appears they were done under authority of this section, except for failure to administer said estate as is now provided under G. S. chapter 28. (1947, c. 921.)

Editor's Note.—For discussion of section, see 25 N. C. Law Rev. 423.

ARTICLE 2.

Necessity for Letters and Their Form.

§ 28-3. Letters must issue; immediate rights of family.—No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the State; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law. (1868-9, c. 113, s. 93; Code, s. 1522; Rev., s. 1; C. S., s. 3.)

Penalty Not Incurred by Mere Possession.—To incur the penalty provided by this section, something more must be done than the mere taking of the property. Such taking may make the taker an executor de son tort, but it would not

make him incur the penalty unless he entered upon the administration of the estate without first obtaining letters therefor. Administration implies management,

not the mere holding the possession of property. *Currie v. Currie*, 90 N. C. 553 (1884).

§ 28-4. Executor de son tort.—Every person who receives goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as amounts to the value or thereabout, is chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy. (43 Eliz., c. 8; 1868-9, c. 113, s. 67; Code, s. 1494; Rev., s. 2; C. S., s. 4.)

Time of Intermeddling.—One who intermeddles with goods of a decedent may be subject to liability as an executor de son tort although letters of administration afterwards issue. If administration is committed to him it entitles him to retain. But an intermeddling after a grant of administration does not make an executor de son tort, because he is answerable to the administrator. *Norfleet v. Riddick*, 14 N. C. 221 (1831); *McMoline v. Storey*, 20 N. C. 83 (1838).

Character of Title.—It is not the paper title merely that makes one an executor of his own wrong; it is the disposition, or possession and occupation, of the effects. *Bailey v. Miller*, 27 N. C. 444 (1845).

Intermeddling under Colorable Right.—An intermeddling for which there is a colorable right will not make a wrongful executorship. *Turner v. Child*, 12 N. C. 25 (1826).

Claim under Fraudulent Conveyance.—One who sets up a claim to goods of an intestate under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor de son

tort. *Barnard v. Gregory*, 14 N. C. 223 (1831). But under such a conveyance, which is void as to creditors, he will be liable to the creditors of the estate as an executor de son tort. *Norfleet v. Riddick*, 14 N. C. 221 (1831); *McMoline v. Storey*, 20 N. C. 83 (1838).

A fraudulent donee of personalty, which he has in his possession after the donor's death, is answerable as executor de son tort. *Sturdivant v. Davis*, 31 N. C. 365 (1849).

Bailee, etc., of Fraudulent Donee.—If a fraudulent donee of goods disposes of them to another who accepts them bona fide upon a purchase, or even to keep for the donee, the vendee or bailee would not be an executor de son tort. *Bailey v. Miller*, 27 N. C. 444 (1845).

Purchaser of Exempt Property.—A purchaser of property exempt from execution under the Homestead Act cannot be held liable as executor de son tort. *Winchester v. Gaddy*, 72 N. C. 115 (1875).

An infant of tender years cannot be executor de son tort nor be sued as such. See *Bailey v. Miller*, 27 N. C. 444 (1845).

§ 28-5. Form of letters.—All letters must be issued in the name of the State, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of the section of this chapter requiring an inventory to be filed within three months, and of the section requiring annual accounts to be filed. (C. C. P., ss. 471, 478; 1871-2, c. 46; Code, ss. 1399, 2172; Rev., s. 36; C. S., s. 5.)

Cross Reference.—As to accounts to be filed, see § 28-117 and note.

ARTICLE 3.

Right to Administer.

§ 28-6. Order in which persons entitled; nomination by person renouncing right to administer.—(a) Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

Effect of Appointment Out of Order.—The appointment as administrator of a person other than the one designated by this section is not void, though the proper person has not renounced; but it may be

set aside in favor of such proper person provided he has not waived his right to administer. *Garrison v. Cox*, 95 N. C. 353 (1886).

Where the executor dies, the next of

kin, in the order named in the statute, or his appointee, is entitled to administration with the will annexed, in preference to the

highest creditor. *Little v. Berry*, 94 N. C. 433 (1886).

1. To the husband or widow, except as hereinafter provided.

Cross Reference.—For appointment of widow under twenty-one, see note to § 28-8, par. 1.

Estoppel against Widow.—Though the widow has a prior right to administration over a brother of the decedent, where it

appears that at the time the letters were duly granted to the brother she had shown no disposition to set up her right before the clerk, the appointment of the brother will stand. *Tyer v. Blades Lumber Co.*, 188 N. C. 268, 124 S. E. 305 (1924).

2. To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk.

Right Not Absolute or Exclusive.—The right of the next of kin to letters of administration is not absolute and exclusive; and if the next of kin do not apply for letters of administration or fail to give bond, some other person may be appointed. *Stoker v. Kendall*, 44 N. C. 242 (1853).

but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The court should select from the class, the person best qualified to take care of the estate. *Atkins v. McCormick*, 49 N. C. 274 (1857).

Clerk's Discretion.—Where there are several persons entitled in equal degree to administer, the clerk may select the one who, in his discretion, is most fit. *Garrison v. Cox*, 95 N. C. 353 (1886).

Between brothers, administration will be committed to the one most interested in executing it faithfully. *Moore v. Moore*, 12 N. C. 352 (1827).

Next of Kin Best Qualified Should Be Selected.—The next of kin of a deceased person, after the widow, have the right, amongst themselves, of administration;

Illiteracy of Next of Kin.—If none of the next of kin can read or write, it is proper for the clerk to refuse to appoint any one of them. *In re Saville*, 156 N. C. 172, 72 S. E. 220 (1911).

3. To the most competent creditor who resides within the State, and proves his debt on oath before the clerk.

Creditor Postponed to Next of Kin.—If, owing to some incapacity, administration cannot be granted to the nearest of kin, it shall be granted to the next after him, qualified to act, and the creditor shall be postponed, if such next of kin claims the right to administer within the time prescribed. *Carthey v. Webb*, 6 N. C. 268 (1813).

Assignee after Death Not a Creditor.—An assignment of debts of a person after his death does not make the assignee such a creditor as to entitle him to administer the estate of the deceased. *Pearce v. Castrix*, 53 N. C. 71 (1860).

Applied in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

4. To any other person legally competent.

Cross References.—As to corporation acting as executor or administrator, see § 55-117. As to who may act in the event the executor fails to apply to have the will proved, see § 31-13. As to public administrator, see § 28-20.

possession of a policy of life insurance authorizes the possessor to administer on the estate of the assured, a nonresident. *Page v. Life Ins. Co.*, 131 N. C. 115, 42 S. E. 543 (1902). See *Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951 (1896).

Possessor of Insurance Policy.—The

(b) Any person who renounces his right to qualify as administrator may at the same time nominate in writing some other qualified person to be named as administrator, and such designated person shall be entitled to the same priority of right to qualify as administrator as the person making the nomination. Provided, that the qualification of the appointee shall be within the discretion of the clerk of court. (R. C., c. 46, ss. 2, 3; C. C. P., s. 456; 1868-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C. S., s. 6; 1949, c. 22.)

Cross Reference.—As to waiver by legatee of right to nominate administrator c. t. a., see note to § 28-22.

Editor's Note.—The 1949 amendment designated the former section as subsection (a) and added subsection (b). For

brief comment on amendment, see 27 N. C. Law Rev. 413.

Right to Renounce and Nominate Another for Appointment Recognized before Amendment.—Before the 1949 amendment there was no express provision requiring the clerk to recognize the right of one belonging to a preferred class to renounce his right to qualify and at the same time nominate another for appointment in his stead, but this construction was uniformly applied by the courts and had become firmly embedded in the law of administration in North Carolina. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202 (1936).

Nominee of Next of Kin.—Before the

§ 28-7. **Husband to administer wife's estate; right in surplus.**—If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law. (1871-2, c. 193, s. 32; Code, s. 1479; Rev., s. 4; C. S., s. 7.)

This section and § 28-149 must be construed in *pari materia* as separate parts of a single scheme of devolution. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

Exclusive Right to Administer.—The statute of distribution does not apply to the estate of a feme covert dying intestate, and the husband is entitled to administer for his own benefit. Any other person administering is in equity considered as a trustee for the husband with respect to the residue after payment of debts. Hop-piss v. Eskridge, 37 N. C. 54 (1841).

Wife Intestate or Testate.—A husband has the right to administer the estate of his wife, whether she dies intestate or leaves a will without naming an executor. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689 (1893).

Transfer of Right.—He may transfer this right to another by appointment, or may cause another to be associated with him. And the right is not affected by the filing and probating in common form of a writing purporting to be the will of the wife. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689 (1893).

Death of Husband before Administering.—If the husband dies after his wife, without having administered, there is no authority to appoint an administrator upon her estate. In such a case the representative of the husband is to administer the wife's estate. Wooten v. Wooten, 123

1949 amendment the nominee of deceased's nearest of kin would be appointed administrator, if a fit and suitable person, as against those of lesser degree of kinship, provided that no person of the same class as the next of kin renouncing the right filed a personal application for appointment. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202 (1936).

Appointee of Next of Kin Residing Abroad.—Before the 1949 amendment it was held that when the next of kin resided abroad, it was in the power and was the duty of the court to grant administration to the appointee of such next of kin. Smith v. Munroe, 22 N. C. 345 (1840). See Ritchie v. McAuslin, 2 N. C. 220 (1795).

N. C. 219, 31 S. E. 491 (1898).

Husband's Administrator as against Wife's Administrator.—Where a legacy is given to a trustee for the use of a married woman who dies without receiving the same, the personal representative of the husband (the husband surviving the wife, but dying before receiving the legacy in his wife's favor) is entitled to the legacy as against the wife's administrator. Coleman v. Hollowell, 54 N. C. 204 (1854).

Husband Becoming Non Compos Mentis.—Where a husband has qualified as the administrator of his deceased wife but is removed on account of his since becoming non compos mentis, the administrator de bonis non, of the wife and guardian of the husband, is entitled to her assets, to be held by him for the benefit of the husband. Neill v. Wilson, 146 N. C. 242, 59 S. E. 674 (1907).

If there is no child, the husband takes the whole personal estate of his wife who dies intestate. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41 (1948). See § 28-149 and note.

Realty under Equitable Conversion.—Where a wife devised real property which by the doctrine of equitable conversion is reduced to personalty, her husband, after her death, is, under this section, entitled to the estate as personalty, subject to demands of creditors. McIver v. McKinney, 184 N. C. 393, 114 S. E. 399 (1922).

Wife's Estate in Remainder.—Where wife, a remainderman in personal property after a life estate, dies before the life tenant, her administrator upon the death of life tenant will be entitled to such property for the benefit of her husband. *Colson v. Martin*, 62 N. C. 125 (1867).

Annuity Payable to Wife.—Where the beneficiary of an annuity dies intestate before the death of the testator, leaving a husband, the bequest which vests an interest in such beneficiary shall be paid to her husband. *In re Shuford's Will*, 164 N. C. 133, 80 S. E. 420 (1913).

Insurance Policies upon Husband's Life.—Insured named his wife as beneficiary in policies of insurance on his life. His wife predeceased him. There were no children born to the marriage. Upon the wife's death the husband was entitled to the wife's vested interest in the policies, even before reducing same to possession by administration, the provision of this section not having been modified by § 28-149, par. 8, in cases in which there

are no surviving children; and upon the husband's death his heirs are entitled to the distribution of the proceeds of the policies. *Wilson v. Williams*, 215 N. C. 407, 2 S. E. (2d) 19 (1939).

Partial Intestacy as to Damages for Wrongful Death.—Where a wife dies by wrongful act the recovery therefor is not a part of her personal assets. And where she has left a will disposing of all her property and naming another executor, her husband may not administer upon the theory that the wife died "partially intestate" as to damages recoverable for wrongful death. *Hood v. American Tel., etc., Co.*, 162 N. C. 92, 77 S. E. 1094 (1913).

Applied in *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2 (1895), for the protection of creditors where there was an unfulfilled verbal executory contract that property was to be held in trust for children.

Cited in *In re Estate of Wallis*, 197 N. C. 334, 148 S. E. 455 (1929).

§ 28-8. **Disqualifications enumerated.**—The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

1. Is under the age of twenty-one years.

A widow under 21 is not eligible to appointment as administratrix. The court may, however, appoint an administrator during her minority and, on arriving at

full age, grant her the administration; or it may give the office to her appointee. *Wallis v. Wallis*, 60 N. C. 78 (1863).

2. Is a nonresident of this State; but a nonresident may qualify as executor.

Editor's Note.—Until the Revisal of 1905, this subsection disqualified "an alien who is a nonresident of this State." And prior to 1868 there was no disqualification imposed upon aliens or nonresidents. It was formally held that if a nonresident administrator took the oath and gave the bond required by law, he was not included in the disqualifications of this section. See *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471 (1888).

Nonresident Executor.—It is not a valid defense to a suit brought by an executor that such executor was a nonresident. *Batchelor v. Overton*, 158 N. C. 395, 74 S. E. 20 (1912).

Nonresident Disqualified as Administrator.—A nonresident cannot be appointed an administrator; nor, having been appointed in the state of his in-

testate's residence, can he sue in the courts of this State. *Hall v. Southern R. Co.*, 146 N. C. 345, 59 S. E. 879 (1907); *In re Estate of Banks*, 213 N. C. 382, 196 S. E. 351 (1938).

Appointee of Nonresident Kin.—But a nonresident next of kin may appoint a resident, and it is within the power as well as the duty of the court to grant administration to the appointee. *Smith v. Munroe*, 23 N. C. 345 (1840). See *Ritchie v. McAuslin*, 2 N. C. 220 (1795).

Public administrator cannot be removed at the instance of nonresidents who have no right of appointment as administrator in consequence of not having the right to administer upon the estate in this State. *Boynton v. Heartt*, 158 N. C. 488, 74 S. E. 470 (1912).

3. Has been convicted of a felony.

4. Is adjudged by the clerk incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.

Illiteracy as Incompetency.—Under this provision a person who cannot write or read, and has no experience in keeping

accounts or in settling estates, is "incompetent." *Stephenson v. Stephenson*, 49 N. C. 472 (1857).

5. Fails to take the oath or give the bond required by law.

Collateral Attack for Disregard of This Subsection.—When, in disregard of the requirements of this subsection, letters are issued to a foreign executor, this is a

mere irregularity and cannot be collaterally attacked in an action by the executor. *Batchelor v. Overton*, 153 N. C. 395, 74 S. E. 20 (1912).

6. Has renounced his right to qualify. (C. C. P., s. 457; Code, ss. 1377, 1378, 2162; Rev., s. 5; C. S., s. 8.)

§ 28-9. **Effect of disqualification of person entitled.**—Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the State, such person is entitled to six months, after coming of age or after his return to the State, in which to make application for letters testamentary, or letters of administration. (R. C., c. 46, s. 12; C. C. P., ss. 452, 460; Code, ss. 1379, 2165; Rev., s. 6; C. S., s. 9.)

Widow's Minority.—The court may appoint an administrator during a widow's minority and, on her arriving at full age, grant her the administration. *Wallis v. Wallis*, 60 N. C. 78 (1863).

Application after Lapse of Six Months.—If those entitled to administration ap-

ply for letters at any time prior to the appointment of a public administrator, even though six months' period has elapsed, they will have priority to administer unless otherwise disqualified. *In re Bailey's Will*, 141 N. C. 193, 53 S. E. 844 (1906).

§ 28-10. **Divorce a vinculo or felonious slaying is forfeiture.**—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other. (1871-2, c. 193, s. 42; Code, s. 1480; 1889, c. 499; Rev., s. 7; C. S., s. 10.)

Cross Reference.—As to acts barring reciprocal property rights of husband and wife, see §§ 52-19, 52-20, and 52-21.

Editor's Note.—In *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794 (1888), it was held that a widow convicted as accessory before the fact to her husband's murder and confined in prison was entitled to dower. But this rule has in terms been abrogated by the provisions of this section, as to the right of the wife to administer and obtain her distributive share.

Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section and §§ 28-149 and 52-19, his heirs may not claim under him the proceeds of the policy, since the law will not allow a

man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to the husband's heirs at law. *Parker v. Potter*, 200 N. C. 348, 157 S. E. 68 (1931).

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate.—The fact that this and other sections forfeiting a murderer's interest in the estate of his victim (§§ 30-4 and 52-19) apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845 (1948). For suggested revisal of this section and related statutes, see 26 N. C. Law Rev. 232.

§ 28-11. **Elopement and adultery of wife is forfeiture.**—If any married woman elopes with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate. (1871-2, c. 193, s. 44; Code, s. 1481; Rev., s. 8; C. S., s. 11.)

Cross Reference.—See § 52-20.

§ 28-12. **Husband's conduct forfeiting rights in wife's estate.**—If any husband shall separate himself from his wife, and be living in adultery at her

death, or if she has obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate. (1871-2, c. 193, s. 45; Code, s. 1482; Rev., s. 9; C. S., s. 12.)

Cross Reference.—See § 52-21.

Failure to Provide Support Tantamount to Abandonment.—Where the husband made his wife leave, or where she had to

leave because he would not give her anything to eat, it was held that his conduct amounted to abandonment. *High v. Bailey*, 107 N. C. 70, 12 S. E. 45 (1890).

§ 28-13. **Executor may renounce.**—Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed. (C. C. P., s. 450; Code, s. 2163; Rev., s. 10; C. S., s. 13.)

Cross Reference.—As to resignation of executor or administrator, see § 36-9 et seq.

Common Law and Present Rule.—At common law an administrator or executor who qualified and entered upon the performance of his duties had no right to resign his office at his own convenience. Nor can he resign now except for causes specified in the statute or for equivalent causes. *McIntyre v. Proctor*, 145 N. C. 288, 59 S. E. 39 (1907). See *Washington v. Blunt*, 43 N. C. 253 (1852).

Time of Renunciation.—An executor may, by permission of the superior court, renounce all right to the executorship and withdraw from a suit. *Sawyer v. Dozier*, 27 N. C. 97 (1844).

A court of probate may accept this renunciation at any time before the executor intermeddled with the effects of his testator, even after he has proved the will. *Mitchell v. Adams*, 23 N. C. 298 (1840).

The same rule applies to an executor of an executor under a prior will. *Mitchell v. Adams*, 23 N. C. 298 (1840).

But after probate an executor cannot renounce at his own pleasure, and must do so by leave of the court. *Mitchell v. Adams*, 23 N. C. 298 (1840).

Revocation of Letters for Cause Only.—The clerk should revoke letters testamentary, where the executor has entered upon performance of his duties, only by reason of some unfitness or unfaithfulness on the part of trustee, and never simply because the parties desire it. *McIntyre v. Proctor*,

§ 28-14. **Renunciation of prior right required.**—When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk. (C. C. P., s. 459; Code, s. 1378; Rev., s. 11; C. S., s. 14.)

Expression of Intent Insufficient.—The mere expressed intent of a person entitled to administration by prior right that he would not have anything to do with the

145 N. C. 288, 59 S. E. 39 (1907).

Renunciation Must Appear of Record.—Renunciation of the executor must appear of record to enable the court to appoint an administrator with the will annexed. *Springs v. Irwin*, 28 N. C. 27 (1845).

Renunciation by Some of Several.—Where there are several persons of the same class entitled to administer, renunciation by some of them does not affect the rights of those not renouncing to administer. In *re Jones' Estate*, 177 N. C. 357, 98 S. E. 827 (1919).

Retraction of Renunciation.—A renouncing executor may retract his renunciation at any time before administration granted, and then administer. Any intermeddling with the estate before qualifying is evidence of such retraction. *Davis v. Inscoe*, 84 N. C. 396 (1881).

Right of Reinstatement.—There are decisions that an executor who has renounced can, under some circumstances, come in and qualify. See *Davis v. Inscoe*, 84 N. C. 396 (1881). See *Wood v. Sparks*, 18 N. C. 389 (1835). But there is no case in which he has renounced with the formalities of this statute and afterwards has qualified, certainly not after the lapse of twenty years. *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508 (1917).

Powers of Administrator c. t. a.—After renunciation by the executor, the administrator with the will annexed is competent to exercise the executor's powers under the will. *Saunders v. Saunders*, 108 N. C. 327, 12 S. E. 909 (1891).

administration is no valid renunciation. *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240 (1891).

§ 28-15. **Failure to apply as renunciation.**—If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person. If no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate. (C. C. P., s. 460(a); 1868-9, c. 203; Code, s. 1380; Rev., s. 12; C. S., s. 15.)

Cross Reference.—See note to § 28-20.

In General.—The true intent and meaning of this and the previous section is that the persons primarily entitled to administration may have six months after the death of the intestate to assert their rights and comply with the law; and a party wishing to quicken their diligence within that time must do so by citation—he may not, by obtaining letters within six months, deprive the party primarily entitled to administration should such party apply for letters before the expiration of the six months' period. *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240 (1891).

Applicable to Intestacy Only.—The provisions of this section contemplate cases of intestacy. Hence in cases of testacy where no executor is appointed in the will, the rights of the parties to administer are governed by § 28-6, without reference to the six months' limitation contained in this section. *In re Jones' Estate*, 177 N. C. 337, 98 S. E. 827 (1919).

Right to Administer Not Absolute or Exclusive.—The right of next of kin to letters of administration is not absolute and exclusive, but dependent upon their proper and due application therefor and their giving bond and security as the law requires. *Stoker v. Kendall*, 44 N. C. 242 (1853).

Unreasonable Delay.—No one who has precedence in a claim for letters loses such rights by delay merely, but by unreasonable delay, which is a matter of law. *Hughes v. Pipkin*, 61 N. C. 4 (1866).

Renunciation Presumed after Six Months.—After the expiration of six months from the death of the decedent, those entitled to prior rights having failed

to apply, all rights of preference may be treated as renounced, and a suitable person to administer upon the estate may be appointed. *Hill v. Alspaugh*, 72 N. C. 402 (1875).

Appointment within Six Months.—If the next of kin, in answer to citation, names his appointee, and such person, after appointment, fails to qualify, then, though six months have not expired, the clerk is authorized to appoint another. *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240 (1891).

Effect of Appointment.—Where the clerk has appointed an administrator under this section, a debtor of the estate cannot maintain the position that the appointment of a public administrator was necessary to receive payment of the debt. *Brooks v. Clement Co.*, 201 N. C. 768, 161 S. E. 403 (1931).

Appointment Not Revoked after Six Months.—If the parties who have precedence to administer fail to apply within six months from death of the deceased, an appointment by the clerk of a proper person after that period will not be revoked. *Withrow v. DePriest*, 119 N. C. 541, 26 S. E. 110 (1896).

Failure to Apply within Six Months—Public Administrator.—Though it is the duty of the public administrator to apply after six months, if, before his appointment at any time, even after six months, persons prior in rights to administer apply, they are entitled to appointment. *In re Bailey's Will*, 141 N. C. 193, 53 S. E. 844 (1906).

Cited in *In re Estate of Loflin*, 224 N. C. 230, 29 S. E. (2d) 692 (1944).

§ 28-16. **Person named as executor failing to qualify or renounce.**—If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation,

an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Where more than one executor is appointed in any last will and testament duly probated in any court of this State, and one or more of such executors shall have qualified before the clerk of such court, and the other executor or executors shall have failed, within thirty days thereafter to qualify or shall have renounced in writing, then the qualifying executor or executors shall be clothed with all the powers, rights and duties, and be subject to all the obligations imposed upon all of said executors, in and by the terms of said will and the laws of this State, in like manner as if the nonqualifying executor or executors had not been named in said will. This paragraph shall apply to all wills heretofore or hereafter probated. (C. C. P., s. 451; Code, s. 2164; Rev., s. 13; C. S., s. 16; 1931, c. 183.)

Cross Reference.—See § 28-20 and note.

Editor's Note.—The 1931 amendment added the second paragraph.

Sale by One of Joint Executors.—If one of the joint executors fails to qualify, a

sale of lands by the one qualifying is sufficient to pass the estate, without its appearing that the other either has renounced the executorship or refused to join in the sale. *Wood v. Sparks*, 18 N. C. 389 (1835).

ARTICLE 4.

Public Administrator.

§ 28-17. **Appointment and term.**—There may be a public administrator in every county, appointed by the clerk of the superior court for the term of four years. (1868-9, c. 113; Code, s. 1389; Rev., s. 18; C. S., s. 17; 1925, c. 253.)

Editor's Note.—The 1925 amendment reduced the number of years, for which a public administrator could be appointed, from eight to four.

Property Right.—The public administrator's office is a property right which can not be divested without due process of law. *Trotter v. Mitchell*, 115 N. C. 199, 20 S. E. 386 (1894).

Not an Office within Constitutional Prohibition.—A public administrator is not a holder of a public office within the constitutional prohibition against holding more than one office, and hence a quo warranto

proceeding will not lie against him simply because he is also holding the office of recorder. *State v. Smith*, 145 N. C. 476, 59 S. E. 649 (1907).

Mistake of Clerk as to Term.—The appointment of a public administrator is for the time specified in the section, and is not affected by a mistake of the clerk in stating in the appointment that it was for the unexpired term of his predecessor, or fixing the term of the new appointee for less period. *Boynton v. Heartt*, 158 N. C. 488, 74 S. E. 470 (1912).

§ 28-18. **Oath.**—The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court. (1868-9, c. 113, ss. 2, 5; Code, s. 1393; Rev., s. 19; C. S., s. 18.)

Cross Reference.—As to form of oath, see § 11-11.

§ 28-19. **Bond.**—The public administrator shall enter into bond, payable to the State of North Carolina, with two or more sufficient sureties to be justified before and approved by the clerk, or with a duly authorized surety company, in the penal sum of four thousand dollars (\$4,000.00), conditioned upon the faithful performance of the duties of his office and obedience to all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands and such bonds, if executed by individual sureties, shall be renewed every two years. Whenever the aggregate value of the personal property belonging to the several estates in the hands of the public administrator exceeds one-half of his bond, if the bond is signed by personal sureties, or three-fourths of his bond, if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond in an

amount so as to cover at all times at least double the aggregate of the assets of the estates in the hands of said public administrator if the bond is signed by personal sureties or one and one-third times the assets if the bond shall be executed by a duly authorized surety company. If the personal property of any decedent is insufficient to pay his debts and the charges of administration and it becomes necessary for the said public administrator to apply for the sale of real estate for assets, upon the signing of a judgment ordering the said sale by the clerk of the superior court, or any other court, the clerk shall include the value of the real estate proposed to be sold in the aggregate value of the property belonging to the several estates in the hands of the public administrator. Whenever the aggregate value of the personal property and the real estate that the said administrator has been authorized to sell exceeds one-half of his bond, if the bond is executed by personal surety, or three-fourths of his bond if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond as hereinbefore provided as though the aggregate consisted only of personal property. (1868-9, c. 113, ss. 2, 3, 4; Code, ss. 1390, 1391, 1392; Rev., s. 320; 1915, c. 216; C. S., s. 19; 1941, c. 243.)

Local Modification.—Forsyth: 1945, c. 58.

Editor's Note.—The 1941 amendment made changes in the first two sentences with reference to the surety on the bond, and added the remainder of the section.

Removal for Failure to Renew Bond.—

A public administrator cannot be removed for failure to renew his bond without being notified to show cause. *Trotter v. Mitchell*, 115 N. C. 190, 20 S. E. 386 (1894).

Quoted in *In re Brinson*, 73 N. C. 278 (1875).

§ 28-20. When to obtain letters.—The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases:

1. When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person.

Due Qualification Prerequisite.—A public administrator acquires no rights or interest to administer an estate until he is qualified after the period allowed to the relatives to qualify in the order prescribed. *In re Neal's Will*, 182 N. C. 405, 109 S. E. 70 (1921).

Six Months Is Reasonable Time to Apply for Appointment of Administrator.—Construing this section and §§ 28-15 and 28-16 together, the legislative intent is manifest that six months after the death of testator is a reasonable time within which application should be made, in proper instances, for appointment of administrator c. t. a. *In re Estate of Smith*, 210 N. C. 622, 188 S. E. 202 (1936).

Prior Right of Others after Six Months.

—While after the expiration of six months prior rights to administration may be deemed renounced and a public administrator appointed, yet even after six months, if he is not as yet appointed, persons of prior right to administration may be appointed in preference to him. *In re Bailey's Will*, 141 N. C. 193, 53 S. E. 844 (1906). See *Hill v. Alspaugh*, 72 N. C. 402 (1875).

After the expiration of six months, should the public administrator fail to apply, the field is open to the clerk of the superior court to treat all right of preference as renounced and to appoint, in the exercise of his discretion, some suitable person to administer the estate. *Brooks v. Clement Co.*, 201 N. C. 768, 161 S. E. 403 (1931).

2. When any stranger, or person without known heirs, shall die intestate in any county.

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator. (1868-9, c. 113, s. 6; Code, s. 1394; Rev., s. 20; C. S., s. 20.)

Cited in *In re Estate of Loflin*, 224 N. C. 230, 29 S. E. (2d) 692 (1944).

§ 28-21. Powers generally and on expiration of term.—The public administrator shall have, in respect to the several estates in his hands, all the

rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he has fully administered the same, if he then enters into a bond as required by law for administrators. (1868-9, c. 113, s. 7; 1876-7, c. 239; Code, s. 1395; Rev., s. 21; C. S., s. 21.)

ARTICLE 5.

Administrator with Will Annexed.

§ 28-22. **When letters cum testamento annexo issue.**—If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court shall issue letters of administration with the will annexed to one or more of the legatees named in said will; but if no legatee qualifies, then letters may be issued to some suitable person or persons in the order prescribed in this chapter. (C. C. P., s. 453; Code, s. 2166; Rev., s. 14; C. S., s. 22; 1923, c. 63.)

Editor's Note.—The effect of the 1923 amendment was to give precedence, with respect to grant of letters c. t. a., to legatees named in the will over other persons entitled to administration under § 28-6. See 1 N. C. Law Rev. 315.

Appointment of Trustee Void.—The powers and duties (at least those personal) of an executor named in a will, devolve, upon his renunciation, on the administrator with the will annexed, and the appointment by the clerk of a trustee in place of the executor is void. *Clark v. Peebles*, 120 N. C. 31, 26 S. E. 924 (1897). See *Council v. Averett*, 95 N. C. 131 (1886). The administrator with the will annexed becomes a trustee for all trusts declared in the will as if he had been named executor. *Jones v. Jones*, 17 N. C. 387 (1833).

Powers of Administrator with the Will Annexed.—An administrator cum testamento annexo has the same rights and powers, and is subject to the same duties, as if he had been named as executor. *Smathers v. Moody*, 112 N. C. 791, 17 S. E. 532 (1893).

Appointment When There Is Executor.—An administrator cum testamento annexo cannot be appointed where there is an executor laboring under no disability,

until the renunciation by the latter. And an appointment in derogation of this rule is void, not merely voidable. *Springs v. Irwin*, 28 N. C. 27 (1845). See *Suttle v. Turner*, 53 N. C. 403 (1861).

Waiver of Right to Appointment.—Where a legatee entitled to preferential appointment as administrator c. t. a. fails to object to the appointment of an administrator c. t. a., but waits until after the death of the administrator appointed more than a year after testator's death before asserting his right and renouncing in favor of a third person, the legatee has waived his right, and his nominee is not entitled to appointment as against the nominee of the surviving sisters of testator. *In re Estate of Smith*, 210 N. C. 622, 188 S. E. 202 (1936).

Waiver of Right of Nomination and Substitution.—The right of nomination and substitution is confined to persons qualified for appointment, and where a legatee has waived his right to be appointed administrator c. t. a. by failing to apply within a reasonable time, he also waives his right of nomination and substitution. *In re Estate of Smith*, 210 N. C. 622, 188 S. E. 202 (1936). See § 28-6 and note.

§ 28-23. **Qualifications and bond.**—Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator. (C. C. P., s. 454; Code, s. 2167; 1905, c. 286; Rev., s. 15; C. S., s. 23.)

§ 28-24. **Administrator cum testamento annexo must observe will.**—Whenever letters of administration with the will annexed are issued, the will must be observed and performed by such administrator, both with respect to

real and personal property. Such administrator has all the rights and powers, discretionary or otherwise, unless a contrary intent clearly appears from the will, and is subject to the same duties, as if he had been named executor in the will. (C. C. P., s. 455; Code, s. 2168; Rev., s. 3146; C. S., s. 4170; 1945, c. 162.)

Editor's Note.—The 1945 amendment rewrote this section. For comment on the amendment, see 23 N. C. Law Rev. 362.

Administrator, d. b. n., c. t. a., Not on Same Footing with Executor in All Respects.—The administrator *de bonis non, cum testamento annexo*, although clothed with the power, and required to execute the will, according to its legal effect as if he were executor, does not stand upon the same footing in all respects with an executor. He derives his authority, not from the will simply, but from the statute (this section) and he would not be treated as an executor in another state, nor would he have the power to sue there as administrator, because his authority is conferred by the law, and not by the will. *Grant v. Reese*, 94 N. C. 720 (1886).

Duties and Liability of Administrator, c. t. a.—Ancillary Administration.—Where a testator died domiciled in this State, leaving debts due by parties in Virginia, the administrator *de bonis non, cum testamento annexo*, and the sureties on the bond, are not liable for a failure to return such notes on the inventory in this State and collect the same, when there is administration on the estate in Virginia. *Grant v. Reese*, 94 N. C. 720 (1886).

Personal Powers in Executor Extinct upon His Death.—Where the powers conferred upon the executor by a will are personal to and discretionary with the executor and become extinct at his death, they cannot be judicially prolonged and vested either in the administrator *c. t. a.* or in a substituted trustee. *Young v. Young*, 97 N. C. 132, 2 S. E. 78 (1887); *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032 (1890).

Under a will directing the executor therein named to continue testator's business as long as the executor should think it profitable, and such of the profits as the executor might think actually necessary for the support of testator's wife and children to be paid to the wife; also, to invest six thousand dollars, bequeathed by testator to his children, and apply the interest, annually, to the education of the children; also, to have entire control of testator's business, to continue or discontinue it all, or any department of it, at any time he might find it not yielding a reasonable profit, and out of the profits pay to testator's wife, from time to time, such amounts as he might consider actually necessary for

her support and the support of the children: *Held*, that upon the death of the executor and the appointment of an administrator *d. b. n., c. t. a.*, the trust in respect to the investment of six thousand dollars for the education of testator's children passed to the administrator; the other trusts were personal to and discretionary with the executor, and became extinct at his death. *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032 (1890).

Administrator c. t. a. as Trustee.—An administrator with the will annexed becomes a trustee for any trusts declared in the will which could pass and be transferred to anyone, as much as if he had been named executor. *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032 (1890).

Same—Recovery of Lands Held in Trust.—An administrator *cum testamento annexo* has all the rights and powers and is subject to the same duties as if he had been named as executor; therefore, where an executor was charged with the management of land, which implied the right of possession until the trust should be fully carried out, upon his death and the appointment of an administrator *de bonis non, cum testamento annexo*, the latter became entitled to the possession of the land, and could recover the same from those withholding it. *Smathers v. Moody*, 112 N. C. 791, 17 S. E. 532 (1893).

Will Presumed Executed in Contemplation of Section.—It will be presumed that a will is executed in contemplation of the statutes providing that an administrator *c. t. a.* succeeds to all the rights, powers and duties of the executor. *Wachovia Bank, etc., Co. v. King Drug Co.*, 217 N. C. 502, 8 S. E. (2d) 593 (1940).

Power to Sell Real Estate.—An administrator *c. t. a.* may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor *virtute officii* or *nominatim*, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude

the exercise of the power of sale by the administrator c. t. a. Wachovia Bank, etc., Co. v. King Drug Co., 217 N. C. 502, 8 S. E. (2d) 593 (1940).

Applied in Jones v. Warren, 213 N. C. 720, 197 S. E. 599 (1938).

Cited in Welch v. Wachovia Bank, etc., Co., 226 N. C. 357, 38 S. E. (2d) 197 (1946).

ARTICLE 6.

Collectors.

§ 28-25. **Appointment of collectors.**—When, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. When, for any reason, a delay is necessary in the production of positive proof of the death of anyone who may have disappeared under circumstances indicating death of such person, any person interested in the estate of such person so disappearing as heir at law, prospective heir at law, a creditor, a next friend, or any other person or persons interested, either directly or indirectly, in the estate of such person so disappearing, may file with the clerk of the superior court of the county in which the person so disappearing last resided, or in case such person so disappearing was at the time of his disappearance a nonresident of the State of North Carolina, with the clerk of the superior court of any county in which any property was or might have been located at the time of such disappearance, a petition for the appointment of a collector of the estate of such person so disappearing, or the property of such person so disappearing, located within the county of the clerk to whom application is made, which petition shall set forth the facts and circumstances surrounding the disappearance of such person, and which petition shall be duly verified and supported by affidavit of persons having knowledge of the circumstances under which such person so disappeared, and if from such petition and such affidavits it should appear to the clerk that the person so disappearing is probably dead, then it shall be the duty of the clerk to so find and to issue to some discreet person or persons, at his option, letters of collection authorizing the collection and the preservation of the property of such person so disappearing. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43.)

Editor's Note.—That part of this section which provides for the appointment of collectors in case of delay in the production of positive proof of the unknown death of any person was added by the 1924 amendment. As to effect of amendment, see 3 N. C. Law Rev. 14.

Appointment, When Proper.—A collector is appointed only when there is no one in rightful charge of the estate, and this section is applicable only to cases where there are difficulties in limine disconnected with controversy or contest over the will, preventing the admission of the will to probate or the issuing of letters testamentary, e. g., protracted absence of witnesses, illness of the executor, etc., also where a caveat is entered at the time the will is offered to probate. In re Palmer's Will, 117 N. C. 133, 23 S. E. 104 (1895).

Pending Probate and Filing of Will.—Pending the appointment and qualification of an administrator, or probate and filing

of a will, a collector may be appointed in order that action for wrongful death may be instituted within the statutory time. Harrison v. Carter, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946), citing In re Palmer's Will, 117 N. C. 133, 23 S. E. 104 (1895).

After Will Admitted to Probate.—After a will has been admitted to probate in common form and letters testamentary have been issued, the clerk cannot remove the executor and appoint a collector, without a hearing based on notice to show cause why the executor should not be removed. In re Palmer's Will, 117 N. C. 133, 23 S. E. 104 (1895).

Appointee in Discretion of Clerk.—It is discretionary with the clerk to appoint as collector either the person named as executor in the writing purporting to be the will, or some other person. In re Little's Will, 187 N. C. 177, 121 S. E. 453 (1924).

§ 28-26. **Qualifications and bond.**—Every collector shall have the qualifications and give the bond prescribed by law for an administrator. (C. C. P., s. 464; Code, s. 1384; Rev., s. 23; C. S., s. 25.)

§ 28-27. **Powers of collectors.**—Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts. (R. C., c. 46, s. 6; C. C. P., s. 465; 1868-9, c. 113, s. 115; Code, s. 1385; Rev., s. 24; C. S., s. 26.)

Power to Lease Land.—A collector has no power to enter upon and make leases of land. *Lee v. Lee*, 74 N. C. 70 (1876).

§ 28-28. **When collector's powers cease; duty to account.**—When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment. (R. C., c. 46, s. 7; C. C. P., s. 466; 1868-9, c. 113, s. 115; Code, s. 1386; Rev., s. 25; C. S., s. 27.)

Allowance of Counsel Fee.—A collector who resists the claim of the executor is not entitled to an allowance for counsel fees paid by him in such litigation, where the executor prevails in the litigation. *Johnson v. Marcom*, 121 N. C. 83, 28 S. E. 58 (1897).

ARTICLE 7.

Appointment and Revocation.

§ 28-29. **Facts to be shown on applying for administration.**—On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise—

1. The death of the decedent and his intestacy.

Administration of Living Person's Estate.—Grant of administration upon the estate of a living man and a decree for the sale of his lands are void for lack of jurisdiction. *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976 (1896).

Appointment Based on Legal Presumption of Death.—Upon an affidavit showing that a person had been absent for over seven years and had not been heard from

by relatives or friends, the fact that at the time of the appointment it was contemplated that an action should be brought to determine any question that might arise contrary to the legal presumption of death does not invalidate the appointment or nullify the proof afforded by the jurisdictional affidavit. *Chamblee v. Security Nat. Bank*, 211 N. C. 48, 188 S. E. 632 (1936).

2. That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.

3. The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same cannot, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit or other proof must be recorded and filed by the clerk. (C. C. P., s. 461; Code, s. 1381; Rev., s. 26; C. S., s. 28.)

§ 28-30. **Right to contest application for letters; proceedings.**—Any

person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings. (C. C. P., s. 462; Code, s. 1382; Rev., s. 27; C. S., s. 29.)

Cross Reference.—As to the running of the statute of limitations when there is contest, see § 1-24.

Title of Property Not Question of Fact.—A dispute as to the title of property of the decedent is not such an issue of fact as is contemplated by this section and required by this section to be transferred to the superior court for trial. *In re Tapp's Estate*, 114 N. C. 248, 19 S. E. 150 (1894).

Collateral Attack after Letters Issued.—

Once the letters are issued and appointment made, they cannot be collaterally attacked. Thus in an action by the administrator against defendant for damages for killing the decedent negligently, the legality of his appointment on the ground of residence cannot be raised. *Fann v. North Carolina R. Co.*, 155 N. C. 136, 71 S. E. 81 (1911); *Batchelor v. Overton*, 158 N. C. 385, 74 S. E. 20 (1912).

§ 28-31. Letters of administration revoked on proof of will.—If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or if, after letters testamentary are issued, a revocation of the will or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid. (C. C. P., s. 469; Code, s. 2170; Rev., s. 37; C. S., s. 30.)

Cross References.—As to action begun before revocation, see §§ 28-33 and 28-181. As to resignation of executor or administrator, see § 36-9 et seq.

This section does not empower the clerk to set aside probate in common form upon proffer of proof of a later will. *In re Will of Puett*, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

Applied in *Shober v. Wheeler*, 144 N. C. 403, 57 S. E. 152 (1907); *In re Estate of Suskins*, 214 N. C. 218, 198 S. E. 661 (1938).

Quoted in *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

Cited in *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

§ 28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default.—If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that the surviving husband or widow or next of kin in the order of priority set out in subsections one and two of § 28-6 applies for letters of administration on said estate, and notwithstanding said applicants may have renounced their right to administer, if otherwise qualified, or that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in due execution of his office, or that issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease. (C. C. P., s. 470; Code, s. 2171; Rev., s. 38; C. S., s. 31; 1921, c. 98.)

Editor's Note.—That part of this section which authorizes the revocation of letters upon the application of the surviving husband or widow or the next of kin, was added by the 1923 amendment. Prior to that, revocation was confined to causes of incompetency, default or misconduct of the representative in office.

Power to Revoke Imports Power to Refuse.—The power vested in the clerk under this section to revoke letters for good cause carries with it the power to refuse to grant letters for cause for which a revocation would be justified. *In re Will of Guley*, 186 N. C. 78, 118 S. E. 839 (1923).

Clerk Has Primary and Original Juris-

diction.—The clerk under this section has original and primary jurisdiction of a probate judge to revoke letters, subject to review upon appeal by either party, and to this end he may require issues of fact to be tried by a jury in the superior court. *Murrill v. Sandlin*, 86 N. C. 54 (1882).

Exercise of Discretion.—The exigencies of administration require the exercise of sound judgment, and this necessarily implies discretion in its supervision. Hence, the removal of administrators calls for the exercise of discretion by the clerk. *Jones v. Palmer*, 215 N. C. 696, 2 S. E. (2d) 850 (1939).

Discretion Reviewable on Appeal.—In revoking letters of administration under this section the clerk exercises a legal discretion which is reviewable on appeal. In *re Galloway's Estate*, 229 N. C. 547, 50 S. E. (2d) 563 (1948).

Revocation of Prior Appointment and Appointment of Widow's Nominee.—The appointment of one as administrator of an estate should be revoked upon renunciation of the widow, who has a prior right to administer the estate, and her nomination of another in her stead, and the clerk of the court has jurisdiction and should appoint on her request a fit and competent person nominated by her. In *re Estate of Lofin*, 224 N. C. 230, 29 S. E. (2d) 692 (1944).

Question Determinable by Clerk.—In a proceeding under this section for revocation of letters of administration, the question determinable by the clerk is solely whether the administrators have been guilty of default or misconduct in the due execution of their office, and the rights and liabilities of adverse parties in the estate may not be litigated in such proceeding. In *re Galloway's Estate*, 229 N. C. 547, 50 S. E. (2d) 563 (1948).

Failure to Discharge Duties as Ground of Removal.—Where the executor becomes bankrupt and is the owner of no property, and has neglected for six years to file an inventory or return of any sort, and has failed to convert the personal property into money, upon application of creditors he may be required to give bond or, in default, be removed. *Barnes v. Brown*, 79 N. C. 401 (1878). As to removal for failure to make statement of account, see *Armstrong v. Stowe*, 77 N. C. 360 (1877).

Refusal to Disclose Information.—Refusal on the part of the executor named in the will to disclose information as to the amount and nature of personalty coming into his possession, and as to other matters relative to his fitness, is a ground for withholding or revoking letters testamentary

and granting them to some other person. In *re Will of Gulley*, 186 N. C. 78, 118 S. E. 839 (1923).

Where heirs at law of an estate were appointed administrators, an order of the clerk revoking the letters of administration upon consideration of evidence of their failure to account for rents and profits from the realty is based upon a confusion of their duties, obligations and liabilities as administrators and their rights and liabilities as heirs at law, and the cause will be remanded in order that the evidence may be considered in its true legal light. In *re Galloway's Estate*, 229 N. C. 547, 50 S. E. (2d) 563 (1948).

Poverty of an executor is not of itself a reason for restraining him from administering the estate. There must be some maladministration or some danger of loss from his misconduct or negligence for which he will not be able to answer by reason of his insolvency. *Wilkins v. Harris*, 60 N. C. 592 (1864).

Nor is poverty a ground to require the representative to give bond as an alternative of giving up his office. *Fairbairn v. Fisher*, 57 N. C. 390 (1859).

Insolvency in Lifetime of Testator.—An executor will not be removed for insolvency, if such was his condition in the lifetime of his testator and to the knowledge of the testator, when there is no evidence of waste or misapplication of funds. In *re Knowles' Estate*, 148 N. C. 461, 62 S. E. 549 (1908).

Adverse Interest.—Where there is no evidence of bad faith or fraudulent concealment, a claim by the administrator that he owned jointly with the decedent a part of the personal estate of the latter is not such an adverse interest as to disqualify him in his office. *Morgan v. Morgan*, 156 N. C. 169, 72 S. E. 206 (1911).

Statement of Belief in Affidavit Is Insufficient.—A statement in an affidavit for the removal of executor of a mere belief that he will misapply the funds is not sufficient for removal. The affidavit should state the facts or reasons upon which such belief is based. *Neighbors v. Hamlin*, 78 N. C. 42 (1878).

Filing of "Final Report" Does Not Create Vacancy.—The filing of a "final report" by an executor does not have the effect of removing him from office if in fact the estate has not been fully settled, and therefore the filing of the report does not create a vacancy and does not give the clerk authority to appoint an administrator c. t. a., d. b. n. *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

Necessity for Order to Show Cause.—

The clerk cannot appoint a collector, when the will has been probated and executor qualified, and remove the executor, without a hearing based on notice to show cause why the executor should not be removed. *In re Palmer's Will*, 117 N. C. 133, 23 S. E. 104 (1895). Nor can he remove a public administrator without such notice. *Trotter v. Mitchell*, 115 N. C. 190, 20 S. E. 386 (1894).

The procedure to remove an executor or administrator for default or misconduct is by order issued by the clerk to the executor or administrator to show cause, and in such proceeding the respondent must be given notice and an opportunity to be heard, with right of appeal. *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

Pleading and Procedure.—The application to remove an executor may be made by any person rightfully interested, by petition or motion in writing, or formal complaint, setting forth the grounds of application supported by affidavit. The allegations thus made may be met by a demurrer in a proper case, or by answer. *Edwards v. Cobb*, 95 N. C. 4 (1886).

Appeal from Order of Clerk.—The powers of the clerk to remove executors

and administrators, conferred by this section, are reviewable on appeal to the judge of the superior court of the county. *Wright v. Ball*, 200 N. C. 620, 158 S. E. 192 (1931).

It is in the province of the clerk to pass upon the matter of qualification of an executor, subject to the right of review by the superior court judge, and as to matters of law by the Supreme Court on appeal. *In re Will of Gulley*, 186 N. C. 78, 118 S. E. 839 (1923). See *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430 (1889).

It is not required that the clerk transfer the cause to the superior court for the trial of the issue. *In re Battle's Estate*, 158 N. C. 388, 74 S. E. 23 (1912).

Superior Court May Retain Cause.—Where the superior court judge, upon appeal from the order of the clerk of the court removing executors or administrators of an estate, has exercised his discretion in retaining the cause in the superior court instead of remanding it to the clerk, the exercise of this discretion is not reviewable on appeal to the Supreme Court. *Wright v. Ball*, 200 N. C. 620, 158 S. E. 192 (1931).

Cited in *In re Estate of Suskin*, 214 N. C. 219, 198 S. E. 661 (1938).

§ 28-33. On revocation, successor appointed and estate secured.—In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate. (1868-9, c. 113, s. 92; Code, s. 1521; Rev., s. 35; C. S., s. 32.)

The clerk is required to immediately appoint some person to succeed in the administration of the estate, and it is immaterial so far as continuity of the succession is concerned whether the successor be administrator d. b. n., executor, administrator c. t. a., administrator c. t. a., d. b. n., or collector. *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

Successor Cannot Be Appointed until Vacancy Exists.—Since a person to whom letters testamentary have been issued has authority to represent the estate until his death, resignation or until he has been removed or the letters testamentary have been revoked in accordance with statutory procedure, the appointment by the clerk of an administrator c. t. a., d. b. n., upon petition of the residuary legatee alleging

failure of the executor to account to the estate for rents and profits, is void, the clerk being without jurisdiction to make the appointment. *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

Order to Make Return and Settlement.—The removed administrator may be ordered to make immediate return and settlement of the estate in his hands. Until that is done he is within the jurisdiction of the court. *In re Brinson*, 73 N. C. 278 (1875). See *Taylor v. Biddle*, 71 N. C. 1 (1874), where an administrator was removed and an administrator de bonis non appointed.

Order to Surrender Funds.—It is proper for the clerk to order the displaced representative to surrender the funds in his possession belonging to the estate. *Battle v. Duncan*, 90 N. C. 546 (1884).

ARTICLE 8.

Bonds.

§ 28-34. **Bond; approval; condition; penalty.**—Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the State, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. Where such bond is executed by personal sureties, the penalty of such bond must be, at least, double the value of all the personal property of the deceased, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. Notwithstanding the provisions of the preceding sentence, the clerk of the superior court may, when the value of the assets to be administered by the personal representative exceeds \$100,000.00, accept bond in an amount equal to the value of the assets plus ten per cent (10%) thereof. The value of said personal property shall be ascertained by the clerk by examination, on oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate. (C. C. P., s. 468; 1870-1, c. 93; Code, s. 1388; Rev., s. 319; C. S., s. 33; 1935, c. 386; 1949, c. 971.)

Cross Reference.—As to when evidence as to default of principal is admissible against sureties in actions on bonds of personal representatives, see § 109-38.

Editor's Note.—The 1935 amendment changed the penalty of the bond as formerly prescribed by the second sentence and added the proviso appearing at the end of the section.

The 1949 amendment inserted the third sentence. For brief comment thereon, see 27 N. C. Law Rev. 409.

When Bond Not Essential.—The execution of a bond, though incidental, is not an essential condition of an order admitting the plaintiff to prosecute an action as administrator. *Hughes v. Hodges*, 94 N. C. 56 (1886).

Nor is the giving of the bond essential to the efficiency of the act of appointment itself. *Howerton v. Sexton*, 104 N. C. 75, 16 S. E. 148 (1889). See *Hoskins v. Miller*, 13 N. C. 360 (1830); *Spencer v. Cahoon*, 15 N. C. 225 (1833); *Spencer v. Cahoon*, 18 N. C. 27 (1834); *Garrison v. Cox*, 95 N. C. 353 (1886).

Effect of Failure to Give Proper Bond.

—The mere fact that the bond of the representative is not justified before or approved by the clerk does not render the appointment void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. The only effect of noncompliance with these requirements is that the representative may be made to give the proper bond required. *Garrison v. Cox*, 95 N. C. 353 (1886).

Failure of Foreign Executor to Give Bond.

—When a foreign executor was regularly appointed and qualified his failure to give the bond specified by this section is only an irregularity and cannot be collaterally attacked. *Batchelor v. Overton*, 158 N. C. 395, 74 S. E. 20 (1912).

Amount of Bond.—The framers of this section must have contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Upon the examination the clerk may value the prop-

erty at a higher figure than he has previously valued it. *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240 (1891).

Money Received Covered by Bond.—Money applied for by an administrator, and paid to him as such, is received under color of his office and is covered by his bond. *Lafferty v. Young*, 125 N. C. 296, 34 S. E. 444 (1899).

Good faith and the exercise of ordinary care and reasonable diligence are all that is required of executors and administrators, and covered by their bond. *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471 (1888); *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849 (1902).

Action May Be Brought on Bond after Death or Removal of Administrator.—Where an administrator, who has not fully

administered the estate of his intestate has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator d. b. n. of his intestate. *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430 (1889). The failure to account for and to pay such amount is a breach of the statutory bond. *State v. Dunn*, 206 N. C. 373, 173 S. E. 900 (1934).

Applied in State v. Purvis, 208 N. C. 227, 180 S. E. 88 (1935).

Cited in Hicks v. Purvis, 208 N. C. 657, 182 S. E. 151 (1935).

§ 28-35. **When executor to give bond.**—Executors shall give bond as prescribed by law in the following cases:

Bankrupt Executor.—When an executor who is not the owner of property has become bankrupt and has failed to file an inventory or return, the court (now the clerk) upon application of creditors may require him to give bond or in default remove him. *Barnes v. Brown*, 79 N. C. 401 (1878).

Insolvency known to the testator is no ground for requiring bond. *Neighbors v.*

Hamlin, 78 N. C. 42 (1878).

Executor Converting His Property into Money and Notes.—Where an executor converts his real and personal estate into notes and money, so as to lead to a reasonable apprehension that the assets are not sufficiently secure in his hands, it becomes the duty of the court to order that he give bond for the protection of the assets. *Gray v. Gaither*, 74 N. C. 237 (1876).

1. Where the executor resides out of the State. Except in the cases otherwise provided in this chapter, no foreign executor has any authority to intermeddle with the estate, until he has entered into bond, and the bond must be given not later than one year after the death of the testator.

Local Modification.—*Buncombe, Madison, Yancey*: Pub. Loc. Ex. Sess. 1924, c. 202.

Foreign Executors.—Under this subsection a foreign executor must apply to the clerk of the superior court for ancillary letters of administration and give bond. *First Nat. Bank v. Pancake*, 172 N. C. 513, 90 S. E. 515 (1916).

Attacking Appointment for Failure to Give Bond.—Where a nonresident executor has been regularly appointed in all other respects, his failure to give bond under this subsection is only an irregularity and his appointment cannot be collaterally attacked in an action brought by him. *Batchelor v. Overton*, 158 N. C. 395, 74 S. E. 20 (1912).

“Estate” Includes Realty.—The use of the word “estate” in this subsection denotes real as well as personal estate. *Glascock v. Gray*, 148 N. C. 346, 62 S. E. 433

(1908).

Deeds Made by Foreign Executors.—Owing to the prohibition contained in this subsection, deeds made by foreign executors transferring lands situated in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with. *Glascock v. Gray*, 148 N. C. 346, 62 S. E. 433 (1908). But by § 28-39 of this chapter, (enacted subsequently) such conveyances executed under circumstances referred to prior to 1911 are validated by the express terms of that section.

Removal of Cause to Federal Court.—A foreign executor will be required to give the bond required by this section to remove a cause, instituted against his testate in his lifetime, to the federal court on the ground of diversity of citizenship. *First Nat. Bank v. Pancake*, 172 N. C. 513, 90 S. E. 515 (1916).

2. When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other

party interested in the estate, shall revoke the letters issued to the wife and grant letters of administration with the will annexed to some other person.

Executrix's Remarriage and Wasting the Assets.—Where it appeared that a wife, executrix of her first husband, remarried and was using the estate carelessly and without accounting therefor, it was held proper to require her to account and give bond. *Godwin v. Watford*, 107 N. C. 168, 11 S. E. 1051 (1890).

3. Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinafter provided, the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond. (R. C., c. 46, ss. 12, 13; Code, s. 1515; Rev., s. 28; C. S., s. 34.)

§ 28-36. **When executor may give bond after one year.**—Where a nonresident of the State by will sufficient according to the laws of the State, and duly probated and recorded in the proper county, devises real property situated in this State, the executor acting under the will, if he has not intermeddled with the property devised in the will, and if no letters of administration in this State on the estate have been issued subsequent to the probate of the will, may, after the expiration of one year from the testator's death, give bond in double the value of the property devised, and he shall then be entitled to all the rights, powers and privileges of a resident executor. (1909, c. 825; C. S., s. 35.)

§ 28-37. **No bond in certain cases of executor with power to convey.**—Where a citizen or subject of a foreign country, or of any other state of the United States, by will sufficient according to the laws of this State, and duly probated and recorded in the proper county, devises to his executor, with power to sell and convey, real property situated in this State in trust for a person named in the will, the power being vested in the executor as such trustee, the executor may execute the power without giving bond in this State. (1909, c. 901; C. S., s. 36; 1925, c. 284.)

Editor's Note.—By the 1925 amendment were brought into the operation of this section citizens of other states of the United States.

§ 28-38. **No bond where will does not require bond and coexecutor a resident.**—A nonresident executor appointed under a will which does not require the executor's bond shall not be required to give bond, if a resident of the State is appointed and qualifies as coexecutor, unless the clerk of the court of the county where the will is first probated shall, upon the petition of the creditors or beneficiaries of the estate, deem the bond of the nonresident executor necessary for the protection of the creditors or beneficiaries. This section applies to nonresident executors who qualified before its enactment as well as to those qualifying afterwards. (1911, c. 176; C. S., s. 37; Ex. Sess. 1920, c. 86.)

Editor's Note.—The only effect of the bond," near the beginning of this section, 1920 amendment was to substitute the for the original words "dispenses with the words "does not require the executor's executor's bond."

§ 28-39. **Certain executor's deeds without bond before 1911 validated.**—Where prior to January first, one thousand nine hundred and eleven, a nonresident executor has sold and conveyed lands in this State under a power in the will of a citizen of another state or of a foreign country, and the will was executed according to the laws of this State and was duly proved and recorded in the state or foreign country where the testator and his family and the executor resided, the sale and conveyance is valid although the executor prior to the execution of the deed had not given bond or obtained letters in this State. (1911, c. 90; C. S., s. 38.)

Constitutionality.—This section validating conveyances therein referred to is not unconstitutional as impairing a vested right. *Vaught v. Williams*, 177 N. C. 77, 97 S. E. 737 (1919).

§ 28-39.1. **Conveyances by foreign executors validated.**—If any nonresident executor, acting under a power of sale contained in the last will and testament of a citizen and resident of another state or foreign country, executed according to the laws of this State and duly proven and recorded in the state or foreign country wherein the testator and his family and said executor resided, and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to January first, one thousand nine hundred and forty-five, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor had given bond and obtained letters of administration in this State prior to the execution of such deed. (1945, c. 652.)

§ 28-40. **Oath and bond required before letters issue.**—Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk, or before any other officer of any state or country authorized by the laws of North Carolina to administer oaths, that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk. (C. C. P., ss. 467, 468; 1870-1, c. 93; Code, ss. 1387, 1388, 2169; Rev., s. 29; C. S., s. 39; 1923, c. 56.)

Cross References.—As to form of oath, see § 11-11. As to effect of failure to give bond, see notes to §§ 28-34, 28-35. **Editor's Note.**—See 1 N. C. Law Rev. 315.

§ 28-41. **Oath before notary; curative statute.**—In all cases prior to January first, one thousand nine hundred and twenty-two, in which any foreign executor qualified or attempted to qualify as such executor by taking and subscribing the oath or affirmation required by law, before a notary public of this or any other state or territory of the United States, instead of taking and subscribing said oath or affirmation before the clerk, and having in all other respects complied with the laws of North Carolina prescribed for and pertaining to the qualification and appointment of foreign executors, such qualification and the letters testamentary issued in all such cases are hereby validated and made legal and binding. In all cases mentioned in this section, wherein such foreign executor has entered upon the discharge of the duties of such office and has performed any duty or exercised the powers and authority of such office regularly and according to law, except for the defect in the qualification and issuance of letters testamentary, then all such acts of any such foreign executor are validated and are declared to be legal and binding. (1925, c. 19.)

§ 28-42. **Right of action on bond.**—Every person injured by the breach of any bond given by an executor, administrator or collector may put the same in suit and recover such damages as he may have sustained. (1868-9, c. 113, s. 87; Code, s. 1516; Rev., s. 30; C. S., s. 40.)

Action Brought in Name of State.—Actions upon the bonds of guardians, administrators, executors and collectors must be brought in the name of the State. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468 (1888).

In fact actions on all bonds payable to the State must be brought in the name of the State. The statute requiring the real party in interest to prosecute does not apply to such actions. *Carmichael v. Moore*, 88 N. C. 29 (1883).

But the objection to the omission to bring in State's name may be obviated by a motion to amend. *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707 (1889). Amend-

ment will be allowed even in the Supreme Court. *Grant v. Rogers*, 94 N. C. 755 (1886).

When an administrator dies, no one but an administrator de bonis non of his intestate can call his representative to account for the assets or sue on his bond. *Merrill v. Merrill*, 92 N. C. 657 (1885). See *Carlton v. Byers*, 70 N. C. 691 (1874); *State v. Goodman*, 72 N. C. 508 (1875). And the next of kin cannot call for an account or settlement without having an administrator before the court. *Lansdell v. Winstead*, 76 N. C. 366 (1877). But see *Neal v. Becknell*, 85 N. C. 299 (1881), hold-

ing that the bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin.

Thus where an administrator sells lands for assets to pay debts, and expends only a part of the fund for that purpose, and dies before filing a final account, only an administrator de bonis non (not the next of kin) of his intestate can maintain an action on the bond to recover the unexpended balance. *Neagle v. Hall*, 115 N. C. 415, 20 S. E. 516 (1894). See *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430 (1889). But where the administrator refuses to sue, creditors may sue, making him a party defendant. *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707 (1889).

Action against Sureties.—An action can be maintained on an administration bond against the sureties before obtaining judgment against the administrator. *Williams v. Hicks*, 5 N. C. 437 (1810); *Strickland v. Murphy*, 52 N. C. 242 (1859); *Bratton v. Davidson*, 79 N. C. 423 (1878).

Venue of Suit.—An administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentary, provided he or any one of his sureties lives in that county, whether he is sued upon his bond or simply as administrator or executor. *Stanley v. Mason*, 69 N. C. 1 (1873); *Foy v. Morehead*, 69 N. C. 512 (1873).

Breach Not Merged in Judgment.—A judgment for damages on the breach of an administrator's bond does not merge the cause of action. The latter is satisfied only by actual payment. *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707 (1889).

Only Good Faith and Reasonable Care Guaranteed.—Bonds of administrators,

executors, etc., guarantee good faith and reasonable care only. *Atkinson v. Whitehead*, 66 N. C. 296 (1872); *Syme v. Badger*, 92 N. C. 706 (1885). Executors are not insurers. *Beall v. Darden*, 39 N. C. 76 (1845); *Nelson v. Hall*, 58 N. C. 32 (1859).

The bonds of administrators, executors, guardians, etc., guarantee only good faith. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849 (1902). See *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471 (1888).

An act of an administrator done with the concurrence of a creditor will not entitle the latter to charge the former with a devastavit. *Cain v. Hawkins*, 50 N. C. 192 (1857).

Improper Disbursements.—Where an administrator pays taxes out of the fund of the estate assessed against his intestate as guardian, it is an improper disbursement and his bond is liable therefor. So also where he pays inferior debts. *Worthy v. Brower*, 93 N. C. 344 (1885).

Refusal to Pay Claim.—It is not breach of an administrator's bond to refuse to pay a claim until the same is established by judgment. *Gill v. Cooper*, 111 N. C. 311, 16 S. E. 316 (1892).

Failure to Apply for License to Sell Land.—Where a devastavit is charged the primary liability rests upon the administration bond. But a failure to apply for license to sell land for assets is not of itself a breach of such bond. *Hawkins v. Carpenter*, 88 N. C. 403 (1883).

Failure to Exhibit Final Account.—Where an administrator fails to exhibit in court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond, alleging such failure as a breach of the bond. *Bratton v. Davidson*, 79 N. C. 423 (1878).

§ 28-43. Rights of surety in danger of loss.—Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against apprehended loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal. (1868-9, c. 113, s. 90; Code, s. 1519; Rev., s. 33; C. S., s. 41.)

§ 28-44. On revocation of letters, bond liable to successors.—When

the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them. (1868-9, c. 113, s. 88; Code, s. 1517; Rev., s. 31; C. S., s. 42.)

Cross Reference.—See annotations to § 28-42.

Administrator d. b. n. Must Sue.—The action on the bond of the removed representative must be brought by the administrator de bonis non, and not by the next of kin. *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430 (1889).

The administrator de bonis non must first sue on the bond of a defaulting executor who preceded him, before he can obtain

a license to sell the real estate for the payment of the debts. *Carlton v. Byers*, 70 N. C. 691 (1874). But where the preceding administrator is insolvent, his bond lost, and sureties unknown, the administrator de bonis non need not bring suit before he can obtain such license. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889).

Cited in *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

§ 28-45. **When new bond or new sureties required.**—If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this State, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time. (1868-9, c. 113, s. 89; Code, s. 1518; Rev., s. 32; C. S., s. 43.)

Mortgage Instead of Bond.—An administrator who is also the heir of the intestate cannot satisfy the requirement of an additional bond or security by mortgaging

lands of his intestate, as such lands are already liable for the debts. *In re Sellars*, 118 N. C. 573, 24 S. E. 430 (1896).

§ 28-46. **On failure to give new bond, letters revoked.**—If any person required to give a new bond, or further security, or security to indemnify, under §§ 28-43 and 28-45, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease. (1868-9, c. 113, s. 91; Code, s. 1520; Rev., s. 34; C. S., s. 44.)

Clerk Has Jurisdiction.—The clerks of the superior courts have jurisdiction of proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. C. 4 (1886).

Notice to Show Cause Essential.—A judgment removing a public administrator

for failure to renew his bond, without notice to show cause, is not only irregular but void. *Trotter v. Mitchell*, 115 N. C. 190, 20 S. E. 386 (1894).

Cited in *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

ARTICLE 9.

Notice to Creditors.

§ 28-47. **Advertisement for claims.**—Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, on or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in

the county. If there is no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish the notices herein provided for when the deceased person did not own any real property or any interest in real property at the time of his death and the only assets of the estate consist of proceeds received for wrongful death. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C. S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1.)

Local Modification.—Forsyth: 1949, c. 621, s. 4; Nash: 1931, c. 64.

Cross Reference.—As to cost of publication, see § 1-596.

Editor's Note.—The 1945 amendment substituted in the first sentence the words "on or before" for the words "at or before". The 1949 amendments rewrote the second sentence and added the last sentence. For brief comment on the 1949 amendments, see 27 N. C. Law Rev. 414.

Time of Presenting Claims.—Before distribution of the estate to the next of kin, it is the duty of the administrator to pay the debts of the estate, provided such debts are presented within twelve months next after publication under this section. As against claims presented after that period he will not be chargeable with any distribution he may have made in good faith. *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. 93 (1891).

Advertisement Essential to Bar Claims.—The mere lapse of time does not bar the creditors' claims against the estate. Only

where the advertisement provided under this section has been made does the statute of limitation begin to run. *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77 (1889). But see *Morissey v. Hill*, 142 N. C. 355, 55 S. E. 193 (1906), where it was held that this section was enacted more for the protection of the representative, and hence a claim would be barred independent of whether the advertisement provided by the section was published or not. To the same effect, see also, *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

Where the administrator neither avers nor proves that he gave the notice required by this section, the objection that the creditor has not shown that he ever presented his claim will not avail. *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74 (1900). See *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77 (1889). But see *Morissey v. Hill*, 142 N. C. 355, 55 S. E. 193 (1906).

Cited in *Park View Hospital Ass'n v. Peoples Bank, etc., Co.*, 211 N. C. 244, 189 S. E. 766 (1937).

§ 28-48. Proof of advertisement.—A copy of the advertisement directed to be posted or published in pursuance of § 28-47, with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C. S., s. 46.)

Necessity of Proof.—When an administrator pleads to a bill the provision of law which prescribes the time of bringing suits

against him, he is bound to show by proof that he advertised as required by the statute. *Gilliam v. Willey*, 54 N. C. 128 (1853).

§ 28-49. Personal notice to creditor.—The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon. (1868-9, c. 113, s. 32; Code, s. 1424; 1885, c. 96; Rev., s. 41; C. S., s. 47.)

Cross Reference.—See note to § 28-47.

ARTICLE 10.

Inventory.

§ 28-50. Inventory within three months.—Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods

and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk. (R. C., c. 46, s. 16; 1868-9, c. 113, s. 8; Code, s. 1396; Rev., s. 42; C. S., s. 48.)

An inventory is but prima facie evidence to charge the executor with assets, so as to call on him for proof to rebut it. *Hoover v. Miller*, 51 N. C. 79 (1858). It is prima facie evidence of the solvency of persons owing debts to the estate and described in the inventory. It may be shown that the personal representative made errors in describing and noting the debts. And it seems that the inventory is not evidence against an administrator de bonis non. *Grant v. Reese*, 94 N. C. 720 (1886).

Statement of Doubtful Debts.—Where an executor returns an inventory of debts without stating that some of the debts are doubtful, he will be held responsible for them, unless he can show that there were set-offs against them, or that the debtors were insolvent. *Graham v. Davidson*, 22 N. C. 155 (1838). But where he inventories them as "doubtful," prima facie he will not be chargeable with them. *Gay v. Grant*, 101 N. C. 206, 8 S. E. 99 (1888).

Return of Joint Executors.—Either one of joint executors making a joint return of inventory is answerable for what appears thereon, if it does not show what came to the hand of the other alone. *Graham v. Davidson*, 22 N. C. 155 (1838).

Transfer of Funds to Another Jurisdic-

§ 28-51. Compelling the inventory.—If the inventory and account of sale specified in § 28-50 are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator, or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector. And under all proceedings provided for in this section, the defaulting executor, administrator or collector shall be personally liable for the costs of such proceeding to be taxed against him by the clerk of the superior court, or deducted from any commissions which may be found due such executor, administrator or collector upon final settlement of the estate. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (1868-9, c. 113, s. 9; Code, s. 1397; Rev., s. 43; C. S., s. 49; 1929, c. 9, s. 1; 1933, c. 100.)

Cross Reference.—See note to § 28-50.

Editor's Note.—The 1929 amendment added the next to the last sentence to this section; and the 1933 amendment added the last sentence as it now reads.

Clerk's Original Jurisdiction.—Under

tion.—The inventory required by this section must be filed before the transfer of moneys to another jurisdiction. *Grant v. Rogers*, 94 N. C. 755 (1886).

Representative May Be Compelled to Account or File Inventory.—If the personal representative has failed to file his inventory or his accounts, he can be compelled to do so upon application to the clerk of the superior court. *Atkinson v. Ricks*, 140 N. C. 418, 53 S. E. 230 (1906). See § 28-51.

Failure to File May Bar Commissions.—Failure to file an inventory, coupled with acts of gross negligence and want of care in the management of the estate, was held to deprive the personal representative of his right to commissions. *Grant v. Reese*, 94 N. C. 720 (1886); *Stonestreet v. Frost*, 125 N. C. 640, 31 S. E. 836 (1899).

Or Be Grounds for Removal.—Where the executor failed to file the inventory required and was also guilty of other acts of mismanagement it was held that he could be required to give bond or be removed from his office. *Barnes v. Brown*, 79 N. C. 401 (1878). See § 28-51.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345 (1934).

this section the clerk has original jurisdiction to remove the representative for not filing the inventory required. *Edwards v. Cobb*, 95 N. C. 4 (1886).

Clerk Has Power to Remove Independent of Statute.—The clerk has power of re-

removal for the failure of the administrator to discharge the duties of his office as prescribed by law. And even without invoking the aid of statute the power of removal is inherent in the office at common law,

and must of necessity be so to prevent a failure of justice. *Taylor v. Biddle*, 71 N. C. 1 (1874).

Cited in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

§ 28-52. **New assets inventoried.**—When further property of any kind, not included in any previous return, comes to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory. (1868-9, c. 113, s. 10; Code, s. 1398; Rev., s. 44; C. S., s. 50.)

§ 28-53. **Trustees in wills to file inventories and accounts.**—Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall file in the office of the clerk of the county where the will is probated inventories of the assets and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to any will in which a different provision is made for filing inventories and accounts. (1907, c. 804; C. S., s. 51.)

ARTICLE 11.

Assets.

§ 28-54. **Distinction between legal and equitable assets abolished.**—The distinction between legal and equitable assets is abolished, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter. (1868-9, c. 113, s. 14; Code, s. 1406; Rev., s. 45; C. S., s. 52.)

All the chattels of an intestate are assets, if the administrator by reasonable diligence might have possessed himself of them. *Gray v. Swain*, 9 N. C. 15 (1822).

Lands as Assets.—Land is not an asset until it is sold and the proceeds received by the personal representative. *Fike v. Green*, 64 N. C. 665 (1870); *Edenton v. Wool*, 65 N. C. 379 (1871); *Hawkins v. Carpenter*, 88 N. C. 403 (1883); *Wilson v. Bynum*, 92 N. C. 718 (1885).

Rents Liable for Debts.—The rents on devised land may be subjected by the personal representative to the payment of the debts of deceased. *Shell v. West*, 130 N. C. 171, 41 S. E. 65 (1902).

Rent Accruing before and after Death.—Rent due for the occupation of an equitable estate in land, in the lifetime of the cestui que trust, goes to his personal representative, that accruing after his death goes to his heirs. *Fleming v. Chunn*, 57 N. C. 422 (1859); *Rogers v. McKenzie*, 65 N. C. 218 (1871).

§ 28-55. **Trust estate in personalty.**—If any trustee, or any person interested in any trust estate, dies leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets. (1868-9, c. 113, s. 11; Code, s. 1403; Rev., s. 46; C. S., s. 53.)

Warrant for Pension Is Not Asset.—A warrant for a pension issued after the death of the pensioner does not become a part of his assets, but must be returned to the State for cancellation. *In re Smith*, 130 N. C. 638, 41 S. E. 802 (1902).

Nor Is Recovery for Death by Wrongful Act.—The right to recover damages for wrongful death rests entirely on statute, and when a recovery is had therefor it is not a part of the personal assets of the deceased. *Hood v. American Tel., etc., Co.*, 162 N. C. 92, 77 S. E. 1094 (1913).

Such damages when recovered are not assets of the estate available to creditors. *Hines v. Foundation Co.*, 196 N. C. 322, 145 S. E. 612 (1928).

Homestead Exemptions.—The personal exemptions in Art. X of the Constitution exist only during the life of the "homesteader," and after his death pass to his personal representative, to be disposed of in due course of administration. *Johnson v. Cross*, 66 N. C. 167 (1872).

§ 28-56. **Crops ungathered at death.**—The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (1868-9, c. 113, s. 15; Code, s. 1407; Rev., s. 47; C. S., s. 54.)

The Principle Is Declaratory of the Common Law.—Flynt v. Conrad, 61 N. C. 190 (1867).

This section does not control the title to crops not planted at the time of the death of the testator or deviser. Manifestly, in the forum of common sense, a crop could not be a crop until the seed were in the soil. The statute uses the expression,

“crops . . . remaining ungathered at his death,” etc. An ungathered crop is certainly not an unplanted crop. Carr v. Carr, 208 N. C. 246, 180 S. E. 82 (1935).

Upon the death of a cropper his personal representative is entitled to his share of the crop. Parker v. Brown, 136 N. C. 280, 48 S. E. 657 (1904). See Thomas v. Lines, 83 N. C. 191 (1880).

§ 28-57. **Proceeds of real estate sold to pay debts are personal assets.**—All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate. (1868-9, c. 113, s. 12; Code, s. 1404; Rev., s. 48; C. S., s. 55.)

Stamped with Character of Realty.—Proceeds of sale of realty are in fact personalty, although they are stamped with the character of realty to indicate the chan-

nel in which they shall go. Lafferty v. Young, 125 N. C. 296, 34 S. E. 444 (1899).

Applied in Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938).

§ 28-58. **Surplus of proceeds of realty sold for debts is real asset.**—All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold. (1868-9, c. 113, s. 13; Code, s. 1405; Rev., s. 49; C. S., s. 56.)

Cross Reference.—See note to § 28-57.

Recovering Surplus Proceeds from Representative of Deceased Administrator.—Proceeds of sale of real estate in the hands of an administrator are held, after payment of debts, for the heirs, who upon the death of the administrator may alone proceed against his personal representative. Alexander v. Wolfe, 88 N. C. 398 (1883).

But where he also holds other proceeds than from the sale of realty, the administrator de bonis non of the estate must join with such heirs in proceeding against the

personal representative of the deceased administrator. Alexander v. Wolfe, 88 N. C. 398 (1883). But see Neagle v. Hall, 115 N. C. 415, 20 S. E. 516 (1894), where it was held that only the administrator de bonis non of the estate can sue for the unexpended proceeds of realty sold.

Such proceeds may not be applied to a judgment for a widow's year's allowance. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116 (1896).

Applied in Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938).

§ 28-59. **Personalty fraudulently conveyed recoverable.**—If there are not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in anywise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the

debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns. (Rev., s. 50; C. S., s. 57.)

Cross References.—As to realty, see § 28-84. As to fraudulent conveyances, see § 39-15 et seq.

§ 28-60. **Debt due from executor not discharged by appointment.**—The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator. (1868-9, c. 113, s. 40; Code, s. 1431; Rev., s. 51; C. S., s. 58.)

Applies to Executor Whether He Acts or Not.—This section applies to an executor who acts as well as to one who does

not act under the appointment. *Moore v. Miller*, 62 N. C. 359 (1868).

§ 28-61. **Joint liability of heirs, etc., for debts.**—All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent. (1868-9, c. 113, s. 99; Code, s. 1528; Rev., s. 52; C. S., s. 59.)

Cross Reference.—As to liability of third persons who purchase the property, see § 28-83.

Purpose of Section.—This and the following sections are intended to limit the liability of heirs, devisees and distributees. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

Claim for Unliquidated Damages Not a "Debt."—An action based on a claim for unliquidated damages, until reduced to judgment liquidating the amount of the claim, is not a debt under this section. *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938).

In a stockholders' derivative suit to recover from the directors and officers the damages which they caused a corporation to suffer by unlawfully distributing a portion of the corporation's profits under a bylaw alleged to be illegal, the action for unliquidated damages was not a debt within this section. *Healey v. Reynolds Tobacco Co.*, 48 F. Supp. 207 (1942).

Proportion of Devisee's Liability.—The whole debt, not exceeding the value of the devise, may be collected from a devisee; but in such a case he is entitled to contribution from the other devisees. That is, each devisee, heir, etc., is, to the extent of his share, a surety. *Badger v. Daniel*, 79 N. C. 372 (1878). See *Hinton v. Whitehurst*, 71 N. C. 66 (1874).

Liability as between Legatees and Devisees.—See *Badger v. Daniel*, 79 N. C. 372 (1878).

Executor as Sole Devisee and Legatee.—Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff insti-

tuted an action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action was not against defendant as executrix but against her individually on a liability imposed upon her by this section as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix, was properly denied. *Rose v. Patterson*, 218 N. C. 212, 10 S. E. (2d) 678 (1940).

Pleading.—Where the complaint alleged a cause against defendant as devisee for personal enrichment at the expense of creditors of the estate, and not against her in her capacity as executrix, her motion to remove to the county of her qualification was properly denied, notwithstanding that plaintiff's evidence tended to show devastavit, since an action is governed by the pleadings. *Rose v. Patterson*, 220 N. C. 60, 16 S. E. (2d) 458 (1941).

Variance.—Where the complaint alleged that defendant, as executrix, turned over to herself as legatee, personalty of the estate of plaintiff's debtor, and thus obtained personal enrichment at the expense of creditors of the estate, but the evidence tended to show, at most, devastavit, defendant's motion to nonsuit was properly allowed on the ground of variance between the allegation and the proof, since the burden was on plaintiff to prove the cause alleged in the complaint. *Rose v. Patterson*, 220 N. C. 60, 16 S. E. (2d) 458 (1941).

Applied in *Moffitt v. Davis*, 205 N. C. 565, 172 S. E. 317 (1934); *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

§ 28-62. **Extent of liability of heirs, etc.**—No person shall be liable,

under § 28-61, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable. (1868-9, c. 113, s. 100; Code, s. 1529; Rev., s. 53; C. S., s. 60.)

Cross Reference.—See note to § 28-61.

The provisions of this section are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after a reasonable time, to give quiet and repose to the estates of dead men. *Moffitt v. Davis*, 205 N. C. 565, 172 S. E. 317 (1934).

There is no personal liability on the heirs at law, devisees or distributees. Their liability for the debts of a decedent extends only to the value of the property of the decedent. *Moffitt v. Davis*, 205 N. C. 565, 172 S. E. 317 (1934); *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

Hence the heirs, by making personal appearance in an action against the estate for the recovery of money, in which attachment was issued against the lands of the estate, were not estopped to deny plaintiff's contention that the attachment gave priority to his judgment. *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

Devisee's Liability.—In an action under this section judgment can be entered against the devisee only to the extent of the property received under the will; no personal judgment can be entered against him. *Moffitt v. Davis*, 205 N. C. 565, 172 S. E. 317 (1934).

§ 28-63. Judgment against heirs, etc., apportioned; costs.—In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them. (1868-9, c. 113, s. 101; Code, s. 1530; Rev., s. 54; C. S., s. 61.)

Cross Reference.—As to provision prohibiting creation of lien by suit against representative, see §§ 28-114 et seq.

§ 28-64. Persons liable for debts to observe priorities.—Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (1868-9, c. 113, s. 102; Code, s. 1531; Rev., s. 55; C. S., s. 62.)

Cited in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

§ 28-65. Existence of other debts of prior or equal class.—The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit. (1868-9, c. 113, s. 103; Code, s. 1532; Rev., s. 56; C. S., s. 63.)

Who Are Defendants.—Debts against deceased persons must be sued by civil action against the personal representative. Hence the "defendants" referred to in this section are the executors and administra-

tors. The phrase "the value of property acquired by them," refers to assets in the hands of the representative. *Heilig v. Foard*, 64 N. C. 710 (1870).

§ 28-66. Debts paid taken as unpaid as against heirs, etc.—If any debts of a prior class to that in which the suit is brought, or of the same class, have been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such

debts were outstanding and unpaid, as prescribed in § 28-65. (1868-9, c. 113, s. 104; Code, s. 1533; Rev., s. 57; C. S., s. 64.)

§ 28-67. Compelling contribution among heirs, etc.—The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees, and heirs also of the decedent if any part of the real estate be undeviseed, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court. (1868-9, c. 113, s. 106; Code, s. 1534; Rev., s. 58; C. S., s. 65.)

Section an Exception to Certain Rule.—The remedy given by this section is an exception to the rule that in actions for contribution, when the amount exceeds \$200, the superior court in term has exclusive cognizance. *Wharton v. Wilkerson*, 92 N. C. 408 (1885).

Application to Tenants in Common.—

This section applies only to contributions sought to be enforced among devisees, and heirs to whom undeviseed land has descended. It has no application to contributions among tenants in common who claim by descent. *Wharton v. Wilkerson*, 92 N. C. 408 (1885).

§ 28-68. Payment to clerk of sums not exceeding \$500 due and owing intestates.—Where any person dies intestate and at the time of his or her death there are sums of money owing to the said intestate not in excess of five hundred dollars (\$500), such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. (1921, c. 93; Ex. Sess. 1921, c. 65; C. S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762.)

Local Modification.—Pitt: 1937, c. 336; 1939, cc. 169, 383, 384.

Editor's Note.—The 1943 amendments made this section applicable to Caswell, Yancey, Wilkes and Lenoir counties.

The 1945 amendments made this section applicable to the counties of Madison, Washington and Chatham, respectively.

The 1947 amendments made this section applicable to Scotland and Northampton counties, respectively.

The first, second and fourth 1949 amendments made this section applicable to Carteret, Richmond and Sampson counties, respectively. The third 1949 amendment rewrote the section, making it applicable throughout the State, and increasing the

maximum amount involved from three hundred to five hundred dollars.

This section provides the debtor a permissive right, and is in nowise mandatory upon him; such right as is given is alternative and not exclusive. In *re Franks*, 220 N. C. 176, 16 S. E. (2d) 831 (1941).

Effect on Jurisdiction to Appoint Administrator.—This section does not have the effect of fixing the sum of \$300 (now \$500) as bona notabilia in determining jurisdiction of the clerk of the superior court to appoint an administrator for a person not domiciled in this State who dies leaving assets herein. In *re Franks*, 220 N. C. 176, 16 S. E. (2d) 831 (1941).

ARTICLE 12.

Discovery of Assets.

§ 28-69. Examination of persons or corporations believed to have possession of property of decedent.—Whenever an executor or administrator makes oath before the clerk of the superior court of the county where

the party to be examined resides or does business that he has reasonable ground to believe, setting forth the grounds of his belief, that any person, firm or corporation has in his or its possession any property of any kind belonging to the estate of his decedent, said clerk shall issue a notice to said person or the member of the firm or officer, agent or employee of the firm or corporation designated in the affidavit, to appear before said clerk at his office at a time fixed in said notice, not less than three days after the issuance of said notice, and be examined under oath by said executor or administrator or his attorney concerning the possession of said property. If upon such examination the person examined admits that he or the firm or corporation for which he works has in his or its possession any property belonging solely to the decedent, and fails to show any satisfactory reason for retaining possession of said property, the clerk of the superior court shall issue an order requiring said person, firm or corporation forthwith to deliver said property to said executor or administrator, and may enforce compliance with said order by an attachment for contempt of court, and commit said person to jail until he shall deliver said property to said executor or administrator: Provided, that in the case of a firm or corporation, whenever any person other than a partner or executive officer of such firm or corporation is examined, no such order shall be made until at least three days after service of notice upon a partner or executive officer of such firm or corporation to show cause why such order should not be made. (1937, c. 209, s. 1.)

Editor's Note.—The purpose of this section is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate through and upon the authority of the probate court without having to resort, independently, to the rather slow and expensive proceeding of claim and delivery. However, since the section seems to provide only for the situation where a party "admits" that the property held belongs to

the decedent's estate and refuses for an inadequate reason to give it up, it would seem that the representative would still have to utilize claim and delivery proceedings in the case where the party in possession of the property denies that it belongs to the estate of the deceased. It is doubtful that the section would, by inference, authorize the clerk to try the title to such property. 15 N. C. Law Rev. 352.

§ 28-70. **Right of appeal.**—Any person aggrieved by the order of the clerk of the superior court may, within five days, appeal to the judge holding the next term of the superior court of the county after said order is made or to the resident judge of the district, but as a condition precedent to his appeal he shall give a justified bond in a sum at least double the value of the property in question, conditioned upon the safe delivery of the property and the payment of damages for its detention, to the executor or administrator in the event that the order of the clerk should be finally sustained. When said bond is executed and delivered to the court no attachment shall be served upon the appealing party, or, if he has already been committed, he shall be released pending the final determination of the appeal. If the appellant fails to have his appeal heard at the next term of the superior court held in his county, or by the resident judge of the district, within thirty days after giving notice of appeal, the clerk of the court may recommit the appellant to jail until he shall deliver the property to the executor or administrator as aforesaid. (1937, c. 209, s. 2.)

§ 28-71. **Costs.**—The party against whom the final judgment is rendered shall be adjudged to pay the costs of the proceedings hereunder. (1937, c. 209, s. 3.)

§ 28-72. **Remedies supplemental.**—The remedies provided in this article shall not be exclusive, but shall be in addition to any remedies which are now or may hereafter be provided. (1937, c. 209, s. 4.)

ARTICLE 13.

Sales of Personal Property.

§ 28-72.1. **Procedure when no order of sale is obtained.**—The procedure set out in this article is applicable when an order of sale is not obtained, but when an order of sale is obtained, the procedure for the sale shall be as provided in article 29A of chapter 1 of the General Statutes. (1949, c. 719, s. 2.)

§ 28-73. **Executor or administrator may sell without court order.**—Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent. (1868-9, c. 113, s. 16; Code, s. 1408; Rev., s. 62; C. S., s. 66.)

Cross Reference.—As to sale of property by a guardian, see §§ 33-31 and 33-32.

Purchaser Not Responsible for Application of Proceeds.—A purchaser of personalty from a personal representative does not, by virtue of the latter's absolute power to dispose of the personalty, have to see to the proper application of the purchase price. This is so although decedent has created a particular separate fund for the payment of his debts. But if the purchase be tainted with collusion, the purchaser will be held responsible for the proper application of the proceeds. *Tyrell v. Morris*, 21 N. C. 559 (1837); *Gray v.*

Armistead, 41 N. C. 74 (1849); *Bradshaw v. Simpson*, 41 N. C. 243 (1849); *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22 (1896).

The purchaser gets good title, unless he purchased mala fide and for the purpose of devastavit. *Wilson v. Doster*, 42 N. C. 231 (1851); *Polk v. Robinson*, 42 N. C. 235 (1851). Where he receives the property in payment of the fiduciary's personal debt, the transaction is presumptively mala fide. *Latham v. Moore*, 59 N. C. 167 (1860); *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455 (1887); *Hendrick v. Gidney*, 114 N. C. 543, 19 S. E. 598 (1894).

§ 28-74. **Collector may sell or rent only on order of court.**—All sales or rentals of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court. (1868-9, c. 113, s. 17; Code, s. 1409; Rev., s. 61; C. S., s. 67; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, made this section applicable to rentals, and struck out the words "who shall specify in his order a de-

scriptive list of the property to be sold" formerly appearing after the word "court" at the end of the section.

§ 28-75. **Terms and notice of public sale.**—All public sales of personal estate by executors or administrators shall be made on credit or for cash after twenty days' notification posted at the courthouse and four public places in the county. (1868-9, c. 113, ss. 18, 19; Code, ss. 1410, 1411; Rev., s. 63; C. S., s. 68; 1949, c. 719, s. 2.)

Editor's Note.—This section was rewritten by the codifiers and, as rewritten, adopted by the General Assembly of 1943. As formerly written, it seemed to require that all sales of personal property should be publicly made. The view expressed in *Pate v. Kennedy*, 104 N. C. 234, 10 S. E. 188 (1889), that this statute, as formerly written, was mandatory, has not found acceptance in later cases, and it is now well established that a personal representative may sell at private sale under certain prescribed conditions. *Felton v. Felton*, 213 N. C. 194, 195 S. E. 533 (1938). See § 28-76.

The case of *Wynns v. Alexander*, 22 N. C. 58 (1838), held that the common-law rule on this point is not repealed by this section and that the section is merely

directory. See *Dickson v. Crawley*, 112 N. C. 629, 17 S. E. 158 (1893); *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22 (1896); *Odell v. House*, 144 N. C. 647, 57 S. E. 395 (1907).

Prior to the 1949 amendment, effective Jan. 1, 1950, this section also applied to sales by collectors.

What Constitutes Sale Other than Public.—Giving a part of the standing crop for hauling the remainder does not, within the meaning of this section, constitute selling otherwise than at public auction. *McDaniel v. Johns*, 53 N. C. 414 (1861).

Effect of Private Sale.—If the fiduciary sells at public sale, the price actually obtained is his justification. But if he sells at a private sale, he is liable for the true

value without reference to the price obtained. *Cannon v. Jenkins*, 16 N. C. 422 (1830). See § 28-76.

It seems that a private sale of a chose in action if made in good faith, is valid; though it is safer to follow the direction of this section to avoid any personal liability in case the fiduciary fails to obtain as much from the private sale as he would have obtained had he sold at public sale.

§ 28-76. Clerk may order private sale in certain cases.—Whenever the executor or administrator of any estate shall be of the opinion that the interests of said estate will be promoted and conserved by selling the personal property belongings to it at private sale instead of selling same at public sale, such executor or administrator may, upon a duly verified application to the clerk of the superior court, obtain an order to sell, and may sell, such personal property at private sale. (1893, c. 346; Rev., s. 64; 1919, c. 66; C. S., s. 69; 1925, c. 267; 1939, c. 167; 1947, c. 468; 1949, c. 719, s. 2.)

Cross Reference.—See note to § 28-75.

Editor's Note.—The 1925 amendment rewrote this section. The 1949 amendment, effective Jan. 1, 1950, struck out much of the section, including the paragraphs added by the 1939 and 1947 amendments. See 4 N. C. Law Rev. 19.

This section was enacted for the protection of administrators in making private sales, a course which an administrator may, but is not required to, pursue. *Felton v. Felton*, 213 N. C. 194, 195 S. E. 533 (1938).

Effect of Section upon Discretion of Judge and Clerk.—The provisions of this section do not take away from the clerk, or the judge on appeal, the sound discretionary power of determining whether a public or a private sale would best subserve the interests of the parties, or prevent the clerk or judge from authorizing a private sale in proper cases. The section is permissive and not mandatory upon

§ 28-77. Confirmation required on objection of interested party.—When any person interested, either as creditor, distributee or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk. (1868-9, c. 113, s. 19; Code, s. 1411; Rev., s. 63; C. S., s. 70; 1945, c. 635.)

Editor's Note.—The 1945 amendment inserted the word "distributee".

Fair Sale at Inadequate Price.—In the absence of objection, where the sale is perfected in all fairness and in compliance with the law, the mere fact that the property was sold to the widow of the decedent at a nominal price, where the public would

Dickson v. Crawley, 112 N. C. 629, 17 S. E. 158 (1893). See *Wynns v. Alexander*, 22 N. C. 58 (1838); *Gray v. Armistead*, 41 N. C. 74 (1849).

Thus, in the absence of fraud or collusion, notes may be sold at private sale. But the burden of proof of fair and full price, in such a case, rests upon the representative. *Odell v. House*, 144 N. C. 647, 57 S. E. 395 (1907).

them. In *re Brown's Estate*, 185 N. C. 398, 117 S. E. 291 (1923); *Felton v. Felton*, 213 N. C. 194, 195 S. E. 533 (1938).

Presumption as to Refusal to Confirm.—In an appeal upon refusal to confirm the sale under this section as it stood before the 1949 amendment, the presumption was that there was sufficient evidence to sustain the findings of fact upon which the refusal was based. In *re Brown's Estate*, 185 N. C. 398, 117 S. E. 291 (1923).

Review by Federal Court.—Where the clerk of the superior court of a county, upon a petition by the executors, authorized and approved a sale of certain shares of stock, bequeathed to the trustees of a church, to pay the debts of the estate, the court had jurisdiction of the parties and the subject matter, and the sale of stock under its order was not subject to review by the federal district court, as the sale was authorized by this section. *King v. Richardson*, 46 F. Supp. 510 (1942).

not bid, does not render the administrator liable for the inadequacy of the price. *Woody v. Smith*, 65 N. C. 116 (1871).

Creditor Consenting Estopped.—Where the creditor consents to the sale at an inadequate price at the time of the sale, he cannot thereafter raise the question. *Cain v. Hawkins*, 50 N. C. 192 (1857).

§ 28-78. Security required; representative's liability for collection.—The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security, and such proceeds shall be collected as soon as practicable; otherwise the executor

or administrator shall be answerable for the same. (1868-9, c. 113, s. 21; Code, s. 1413; 1893, c. 346, s. 2; Rev., s. 65; C. S., s. 71; 1949, c. 719, s. 2.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section also applied to collectors.

Provisions Peremptory.—The provisions of this section are peremptory, and leave no discretion in the representative. Hence a noncompliance with them renders him liable. *Pate v. Kennedy*, 104 N. C. 234, 10 S. E. 188 (1889).

What "Real Estate" Includes.—"Real estate", which the representative is authorized to lease under this section, has reference to leasehold estates which belonged

to the decedent. *Reeves v. McMillan*, 101 N. C. 479, 7 S. E. 906 (1888). See *Lee v. Lee*, 74 N. C. 70 (1876).

The amount and kind of security to constitute "good security" within the meaning of this section differ in selling on short credit and in making a permanent investment. *Camp v. Smith*, 68 N. C. 537 (1873).

Mere Bond Not Sufficient.—Taking no other security than the bond of the purchaser constitutes gross laches on the part of the representative. *Roseman v. Pless*, 65 N. C. 374 (1871).

§ 28-79. **Hours of public sale; penalty.**—All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales; and every executor or administrator who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same. (1868-9, c. 113, s. 22; Code, s. 1414; 1893, c. 346, s. 3; Rev., s. 66; C. S., s. 72; 1927, c. 19, s. 2; 1949, c. 719, s. 2.)

Editor's Note.—The proviso as to the hour designated for sales was added by the 1927 amendment. Prior to the 1949 amendment, effective Jan. 1, 1950, the section also applied to collectors.

Provisions Peremptory.—The provisions of this section are peremptory, and leave no discretion in the representative. *Pate v. Kennedy*, 104 N. C. 234, 10 S. E. 188 (1889). But for qualification to this rule, see note to § 28-75.

Not Applicable to Private Sales.—The provisions of this section do not apply to

private sales. *Odell v. House*, 144 N. C. 647, 57 S. E. 395 (1907).

Strict Construction of Forfeiture Provision.—The part of this section which provides for forfeiture must be construed strictly in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act to be penalized does not clearly fall within the spirit and letter thereof. See *Alexander v. Atlantic, etc., R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907).

§ 28-80. **Debts uncollected after year may be sold; list filed.**—Every executor, administrator and collector, at any time after one year from the grant of letters, is authorized to sell in accordance with the provisions of article 29A of chapter 1 of the General Statutes, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets. (1868-9, c. 113, s. 20; Code, s. 1412; Rev., s. 67; C. S., s. 73; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out in the first sentence the words "at public auction, in the manner prescribed in this chapter," and inserted in lieu thereof the words "in accordance with the provisions of article 29A of chapter 1 of the General Statutes."

This section is merely directory in two respects: (1) in that the representative

under it is merely empowered and not directed to sell; (2) in that a purchaser from the representative at a sale made not in compliance with the terms of the statute, e. g., a private sale, nevertheless gets good title. See *Odell v. House*, 144 N. C. 647, 57 S. E. 395 (1907); *Felton v. Felton*, 213 N. C. 194, 195 S. E. 533 (1938).

Purpose of Statute.—This section was

enacted to provide a way for the administrator to relieve himself of liability and at the same time realize something from choses in action which are not collectible but which might have some prospective value. *Odell v. House*, 144 N. C. 647, 57 S. E. 395 (1907).

Good Faith as to Insolvency.—A finding that the representative sold some of the assets belonging to the estate believing them to be insolvent will discharge him from liability although they were in fact collectible assets. *Weisel v. Cobb*, 118 N. C. 11, 24 S. E. 782 (1896).

ARTICLE 14.

Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts.

—When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent. When there is dower or rights of dower in the land petitioned to be sold as aforesaid, the person entitled thereto shall be made a party to said proceeding, and upon the consummation of sale pursuant to decree of confirmation, the fiduciary shall, based on the completed age of the person so entitled on such day of consummation, compute the value of her annuity at six per cent (6%) on one-third of the net sale price during her probable life or expectancy, and shall pay same to her absolutely out of the proceeds; or in lieu of such payment of the value of her annuity of six per cent (6%) on such one-third of the net sale price, at her election, one-third of the net proceeds shall be paid into the office of the clerk of the superior court and the income on said one-third shall be paid to her annually: Provided, that nothing herein contained shall be construed to deprive the widow from claiming her dower right by metes and bounds in her husband's land: Provided, further, if the person entitled to said dower shall not claim the same by metes and bounds in her husband's lands, or elect to receive the income from one-third of the net proceeds of said sale, within the time allowed by law for filing pleadings in such special proceeding, such person shall be presumed to have elected to receive said dower interest in cash as provided in this section.

Where land is sold as provided in this section, and in lieu of paying cash therefor the purchaser executes a note or notes secured by a mortgage or deed of trust, and there are insufficient funds from said sale with which to pay the person entitled to dower her interest in full as provided in this section, said person shall be entitled to the legal rate of interest on the unpaid balance of her dower interest until same is paid in full. (1868-9, c. 113, s. 42; Code, s. 1436; Rev., s. 68; C. S., s. 74; 1923, c. 55; 1935, s. 43; 1937, c. 70; 1943, c. 637; 1949, c. 719, s. 2.)

Editor's Note.—The provisions relating to the widow's dower were inserted by the 1923 amendment.

The 1943 amendment rewrote the second sentence of the first paragraph and inserted the second paragraph.

The 1949 amendment, effective Jan. 1, 1950, struck out the former third paragraph, which was added by the 1935 amendment and amended by the 1937 amendment. For comment on the 1937 amendment, see 15 N. C. Law Rev. 352.

Section Not Applicable to Executor Authorized to Sell.—The provisions of this section do not apply where the executor has, under the will, full power to sell

the realty. They apply only to cases where otherwise the creditor would be compelled to resort to a scire facias against the heirs. *Wiley v. Wiley*, 61 N. C. 131 (1867). See § 28-96.

Land Not Assets until Sold.—Lands are not assets for the payment of the debts until they are sold and the proceeds received by the administrator. *Wilson v. Bynum*, 92 N. C. 718 (1885).

Who May Sell.—The personal representative is the proper party to sell the homestead of deceased for distribution. *Tarboro v. Pender*, 153 N. C. 427, 69 S. E. 425 (1910).

He has, however, no concern with the

realty until a situation justifying a sale thereof under this section exists. *Gilchrist v. Middleton*, 108 N. C. 705, 13 S. E. 227 (1891); *Coggins v. Flythe*, 113 N. C. 102, 18 S. E. 96 (1893).

Nature of Authority.—The authority of the representative under this section is a naked power without title or interest in the estate. He is a mere agent of the court. *Floyd v. Herring*, 64 N. C. 409 (1870).

Enforcement of Sale by Creditor.—It is only after the personal representative fails to perform his duty to sell the land under this section that the creditor can enforce the sale. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

After the docketing of a judgment the judgment debtor conveyed real property. After the death of the judgment debtor, execution was issued, and the judgment creditor instituted this action to compel the sheriff to sell the land under the execution, the judgment debtor having left no estate, real or personal, and therefore no administrator having been appointed. It was held that the execution issued after the death of the judgment debtor was not warranted by law, and a sale thereunder would be void. *Flynn v. Rumley*, 212 N. C. 25, 192 S. E. 868 (1937).

Representative May Be Compelled to Sell.—Upon failure of a personal representative to apply for the sale of the lands for the payment of debts, he may either be compelled by the clerk to do so or a creditor may file a creditor's bill. Whether the representative will be held liable on his bond for such failure, *quaere*. *Pelletier v. Saunders*, 67 N. C. 261 (1872); *Wilson v. Bynum*, 92 N. C. 718 (1885); *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891); *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896); *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763 (1909); *Hobbs v. Cashwell*, 152 N. C. 183, 67 S. E. 495 (1910).

Amount of Realty Which May Be Sold.—This section authorizing the sale of the lands of a decedent is in derogation of the common law, and hence the courts will not deny to an administrator the discretion of selling less land than is ordered to be sold, if necessity should not arise for such sale; and, conversely, the administrator will be allowed to continue to sell lands embraced in the license so long as the necessity to raise assets exists. *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797 (1895).

Personalty Must Be First Applied.—Under this section an administrator has the right, and it becomes his duty under

certain conditions, to apply for license to sell the real estate of his intestate to make assets with which to pay debts, but it is necessary that the personal property shall first be exhausted. When this has been done and it has been ascertained that the personalty is insufficient to discharge the debts, resort may be had to the realty. The personalty, however, is always the primary fund for the payment of debts. *Parker v. Porter*, 208 N. C. 31, 179 S. E. 28 (1935).

Though Debts Secured by Mortgage on Land.—While the lands may be sold where the personal estate is insufficient, the general rule is that the personalty must be first applied before resorting to the realty; and this, even though the debts are secured by mortgage on the realty. *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384 (1898); *Mosely v. Mosely*, 192 N. C. 243, 134 S. E. 645 (1926); *Wadford v. Davis*, 192 N. C. 484, 135 S. E. 353 (1926); *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844 (1937).

Even though the debts are secured by a mortgage upon land, they must be paid out of personalty first; and only in the event this latter proves insufficient is a sale of the land under this section authorized. *Moseley v. Moseley*, 192 N. C. 243, 134 S. E. 645 (1926).

The creditor who has a judgment against the debtor which constitutes a lien upon the land is not, after the death of the latter, permitted to sell the land under execution. Personalty is the primary source to satisfy the debt, and in case of its insufficiency the sale of the land may be effected by the procedure prescribed in this section. *Tuck v. Walker*, 106 N. C. 285, 11 S. E. 183 (1890); *Baker v. Carter*, 127 N. C. 92, 37 S. E. 81 (1900).

If the personalty has been wasted by the representative, his successor must first resort to his bond before proceeding against the lands. *Lilly v. Wooley*, 94 N. C. 412 (1886); *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890). But this does not apply where the representative is insolvent, his bond lost, and sureties unknown. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889).

Sale May Be Decreed on Mere Showing That Personalty Insufficient.—This section, construed in connection with the second clause of § 28-86, confers upon the representative the duty and the power to apply for license whenever the insufficiency of personalty, whether before or after an actual application thereof, can be shown. *Shields v. McDowell*, 82 N. C. 137 (1880); *Blount v. Pritchard*, 88 N. C.

445 (1883); *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890). See annotations to § 28-86.

The cases of *Wiley v. Wiley*, 63 N. C. 182 (1869), and *Bland v. Hartsoe*, 65 N. C. 204 (1871), which contain expressions that no authority exists to decree a sale until the personal estate is actually exhausted, are distinguished in *Shields v. McDowell*, 82 N. C. 137 (1880), and the true rule is announced to be that the mere showing of the insufficiency of the personal estate without showing its actual application is sufficient.

The application may be filed at any time after the administrator ascertains that there is an insufficiency of assets, even before he can possibly convert the personal estate into money and make an application of it to the debt. *Blount v. Pritchard*, 88 N. C. 445 (1883).

"At Any Time."—The phrase "at any time" presupposes an application without undue delay. *Pelletier v. Saunders*, 67 N. C. 261 (1872); *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891); *Creech v. Wilder*, 212 N. C. 162, 193 S. E. 281 (1937).

Statute of Limitations Does Not Bar Right or Duty to Sell Realty.—As long as the estate remained unsettled, and real property of the decedent remained subject to sale, the administrator could unquestionably proceed by proper petition in the original proceeding to have the real property sold for the payment of outstanding debts and for the final settlement of the estate. No statute of limitations barred that right or the performance of that duty. *Rocky Mount Savings, etc., Co. v. McDearman*, 213 N. C. 141, 195 S. E. 531 (1938).

As long as the estate remains unsettled no statute of limitations bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate. *Gibbs v. Smith*, 218 N. C. 382, 11 S. E. (2d) 140 (1940).

But a representative cannot sell land to pay debts barred, *Robinson v. McDowell*, 133 N. C. 182, 45 S. E. 545 (1903); and, to an application for license to sell for payment of debts on which no judgment is obtained the heirs or devisees may plead the statute of limitations or any other defense. *Beyers v. Park*, 88 N. C. 456 (1883); *Syme v. Riddle*, 88 N. C. 463 (1883); *Speer v. James*, 94 N. C. 417 (1886); *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036 (1890); *Person v. Montgomery*, 120 N. C. 111, 26 S. E. 645 (1897).

Unless Judgment Has Been Obtained.—If a judgment has been previously ob-

tained for the debt the heirs or devisees are concluded thereby (except where fraud and collusion can be shown) and they cannot now plead any defense which could have been, but was not, pleaded by the representative. *Long v. Oxford*, 108 N. C. 280, 13 S. E. 112 (1891). See also, *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890 (1888); *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889); *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036 (1890); *Lassiter v. Upchurch*, 107 N. C. 411, 12 S. E. 63 (1890); *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891). But see *Tilley v. Bivins*, 112 N. C. 348, 16 S. E. 759 (1893); *Person v. Montgomery*, 120 N. C. 111, 26 S. E. 645 (1897).

Even in such a case, however, the heirs or devisees may show that the personalty has not been administered, or remedies against the representative's bond for devastavit have not been exhausted. *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890 (1888).

"May Apply to Superior Court, etc."—The phrase "may *** apply to the superior court" as used in this section means "shall apply to the clerk of that court." *Pelletier v. Saunders*, 67 N. C. 261 (1872). It is the duty of the representative to apply. *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891). But the jurisdiction of the clerk is not exclusive. The order of sale may be obtained from the judge of the superior court. *Johnson v. Futrell*, 86 N. C. 122 (1882). Doubtful expression of the soundness of this last announced rule is found in *Moore v. Ingram*, 91 N. C. 376 (1884); *Creech v. Wilder*, 212 N. C. 162, 193 S. E. 281 (1937).

Special Proceeding before Clerk.—A proceeding to sell the land under this section is a special proceeding before the clerk, who has original and exclusive jurisdiction of the matter. If, however, equities are involved in the case upon which the superior court acquires jurisdiction of a part, it will determine the whole matter. *Baker v. Carter*, 127 N. C. 92, 37 S. E. 81 (1900).

Bill by United States.—The federal district court has jurisdiction of a bill in equity by the United States to subject to payment of a judgment land situated in this State which had descended to the heirs of the judgment debtor, there being no personal assets. *United States v. Minor*, 254 F. 57 (1918).

Venue.—The proper venue to make the application provided by this section is the superior court of the county where the land or some part thereof is situated. *Ellis v. Adderton*, 88 N. C. 472 (1883).

It is in the superior court of the county where the land or some part thereof lies, and not in the superior court of the county where the decedent was domiciled and administration granted, that the application for sale must be filed, though formerly it could be filed in the county last referred to. *Ellis v. Adderton*, 88 N. C. 472 (1883).

Removal to Proper County.—A petition filed in the wrong county may, upon application, be removed to the proper county. See *Manufacturing Co. v. Brower*, 105 N. C. 440, 11 S. E. 313 (1890).

Allotment of Dower in Lands in Another County Invalid.—Deceased died seized of lands lying in two counties, and an administrator, appointed in the county of his residence, instituted proceedings in the other county to sell lands to make assets. The widow appeared therein asking that the lands be sold subject to dower and averring that she would later institute proceedings for the allotment of dower by metes and bounds. The clerk, with the widow's consent, ordered that the widow's dower be allotted and that the remaining lands be sold to make assets, and a sheriff and jury from that county went into the county of deceased's residence and allotted dower by metes and bounds. It was held that the allotment was invalid, that the clerk of the other county was without authority to enter the order for the allotment of dower notwithstanding he had jurisdiction of the proceedings to sell lands to make assets, and might have ordered the lands sold subject to dower, that the only provisions of this section giving the clerk jurisdiction in regard to dower in lands outside his county was where the widow consents that the lands be sold clear of dower and that a certain part of the proceeds of sale be set apart to her in commutation of dower. *High v. Pearce*, 220 N. C. 266, 17 S. E. (2d) 108 (1941).

Contents of Petition.—In proceedings to sell lands to make assets the petition should set forth, inter alia, as required by § 28-86, the value of the personal estate, as near as may be ascertained, and the application thereof; an allegation merely that the personalty is insufficient is defective. *Neighbors v. Evans*, 210 N. C. 550, 187 S. E. 796 (1936).

Notice to Creditors Unnecessary.—No notice to creditors is required to be given under this section. *Thompson v. Cox*, 53 N. C. 311 (1860).

Parties and Their Defenses.—In proceedings to sell land heirs and devisees are necessary parties. They may resist the sale by showing sufficient personal assets,

or that the debts are not due by the estate. In such a case the usual course is to refer the matter for determination. *Person v. Montgomery*, 120 N. C. 111, 26 S. E. 645 (1897). See § 28-87.

Claimant of Sole Seizin May Have Claim Adjudicated and Pay Debts to Prevent Sale of Lands.—While under this section an administrator is entitled to sell lands of the deceased to make assets to pay debts of the estate when the personalty is insufficient, when a person claims sole seizin under a contract to devise as against the heirs of intestate, such person is entitled to adjudication of her claim of sole seizin before a sale of the property to make assets is ordered, since she may elect to discharge the debts of the estate and the costs of administration to prevent a sale of the lands. *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398 (1938).

Creditor Attacking Debt as Fraudulent.—A judgment creditor of a devisee desiring to attack a debt set forth in the petition to sell land as being fraudulent must do so in the same proceedings, and not by independent action. *Wadford v. Davis*, 192 N. C. 484, 135 S. E. 353 (1926).

Sale though Parties Not in Esse.—The application for sale may be made notwithstanding the existence of devisees to parties not in esse. *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968 (1905).

Homestead of Minor.—The homestead of a minor child of a testator cannot be sold during the minority of such child. *Bruton v. McRea*, 125 N. C. 206, 34 S. E. 397 (1899). See *Hinsdale v. Williams*, 75 N. C. 430 (1876). The child, however, who was made a party must have claimed homestead rights, otherwise he cannot subsequently claim as against the purchaser of the land. *Dickens v. Long*, 112 N. C. 311, 17 S. E. 150 (1893).

Effect of Judgment Quando.—Before the enactment of this section the lands of the decedent could not be sold for the payment of debts upon which a judgment quando had been rendered against the administrator. But this section changed this rule. *Wilson v. Bynum*, 92 N. C. 718 (1885).

Converting into Creditor's Suit.—When proceedings for the sale of land are instituted under this section by the representative, they cannot be converted into a creditor's suit. *Brittain v. Dickson*, 111 N. C. 529, 16 S. E. 326 (1892).

Presumption of Regularity.—The regularity of the proceedings under this section will be presumed. *Wadford v. Davis*, 192 N. C. 484, 135 S. E. 353 (1926).

Applied in *Odom v. Palmer*, 209 N. C.

93, 182 S. E. 741 (1935); *Caffey v. Osborne*, 210 N. C. 252, 186 S. E. 364 (1936); *Toms v. Brown*, 213 N. C. 295, 195 S. E. 781 (1938).

Cited in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873 (1938); *In re Daniel's Estate*, 225 N. C. 18, 33 S. E. (2d) 126 (1945).

§ 28-82. When representatives authorized to rent, borrow or mortgage.—Such executor, administrator or collector, in lieu of asking for an order for the immediate sale of real estate, may ask for an order authorizing him to rent out the same for a term of not exceeding three years, and if it appears to the court that the best interests of the heirs at law and devisees of the deceased will be promoted by granting such order and that it is probable that the rents derived from the real estate during the term will be sufficient to pay off and discharge the debts and the costs of the administration, the superior court may, with the consent of the creditors, make such order upon such terms as may be best for the heirs at law, devisees and creditors of the estate; or if it is made to appear to the court that such executor, administrator or collector is able to borrow sufficient money with which to pay off and discharge all valid and just claims against the estate of the deceased, then the court shall have the power to authorize said executor or administrator to borrow money for the purpose of paying off and discharging such claims and authorizing him to rent the real estate for a term not exceeding three years and to apply the rents to the repayment of the money thus borrowed, and the said estate shall be and remain liable for the payment of such sums as may be borrowed under such order of the court to the same extent and no further as the estate was liable for the indebtedness of the deceased to pay off and discharge the debt for which the said sums were borrowed. All orders made by the court pursuant to this section shall be approved by the judge residing in or holding the courts of the district in which such county is situated.

In lieu of renting said property or borrowing on the general credit of the estate, as hereinbefore authorized, the said executor or administrator, may apply by petition, verified by oath, to the superior court, showing that the interest of the beneficiaries of the estate, for which he is executor or administrator, would be materially promoted by mortgaging the said estate, in whole or in part to secure funds to be used for the benefit of said estate, setting out the application to be made of the proceeds of said loan and if all or a part of its creditors have agreed to accept an amount less than the full amount of their debt that fact shall appear, which proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition having been ascertained by satisfactory proof, a decree may thereupon be made that a mortgage be made by such executor, or administrator, in his representative capacity, in such way and on such terms as may be most advantageous to the interest of said estate; but no mortgage shall be made until approved by the judge of the court, nor shall the same be valid unless the order or decree therefor is confirmed and directed by the judge and the proceeds of the mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify: Provided, the proceeds from said sale shall be used exclusively for the discharge of all existing creditors, except such as shall file a writing in said cause agreeing to other terms set out in said writing.

The said executor or administrator shall not mortgage the property of said estate for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" wherever used herein, shall be construed to include "deeds of trust." (1913, c. 49, s. 1; C. S., s. 75; 1927, c. 222, s. 1.)

Subrogation of Representative Who Personally Pays Debts.—Where an administrator, in good faith pending the mortgaging of property of the estate to pay debts, personally pays the debts of

the estate, he is entitled to be subrogated to the rights of the creditors whose debts he had paid, and upon the execution of the mortgage, upon order of court, is entitled to repay himself from the pro-

ceeds of the loan. *Caffey v. Osborne*, 210 N. C. 252, 186 S. E. 364 (1936).

Cited in *Pearson v. Pearson*, 227 N. C. 31, 40 S. E. (2d) 477 (1946).

§ 28-83. Conveyance of lands by heirs within two years voidable; judicial sale for partition.—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent, except as hereinafter provided, but such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, or if made after the filing of the final account by the duly authorized executor or administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate, shall be valid even as against creditors: Provided, that if the decedent was a nonresident, such conveyances shall not be valid unless made after two years from the grant of letters. But such conveyances shall be valid, if made five years from the death of a nonresident decedent, notwithstanding no letters testamentary or letters of administration shall have been granted. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid as against creditors, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime an action or proceeding shall have been instituted in the proper court to subject the land therein described to payment of the decedent's debts.

A judicial sale of real property of a decedent hereafter made under order of a court of competent jurisdiction for partition shall be valid as to creditors, executors, administrators and collectors of such decedent irrespective of the time made. If such sale is made within two years of death of such decedent or before the estate shall have been fully administered, the personal representative of such decedent must be joined as plaintiff or made a party defendant. The court shall in the order of confirmation of any sale made within two years of the death of a decedent set aside such part of the proceeds of sale representing the interest of such decedent for application upon the debts, if any, of the decedent by requiring payment of the same into the hands of such personal representative or of the court itself, to be held by such personal representative or the court subject to claims of creditors for a period of two years from date of death of decedent, or until such estate is fully administered. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into their hands, as may be necessary to discharge the claims of creditors. (1868-9, c. 113, s. 105; Code, s. 1442; Rev., s. 70; C. S., s. 76; 1935, c. 355; 1939, c. 16; 1943, cc. 411, 763; 1947, c. 112.)

Editor's Note.—The 1935 amendment made the limitation begin to run from the death of the decedent rather than from the grant of letters, and added the proviso to the first sentence.

The 1939 amendment inserted the second sentence of the first paragraph. For comment thereon, see 17 N. C. Law Rev. 359.

The first 1943 amendment inserted in the first sentence the words "except as hereinafter provided." It also added the last sentence of the first paragraph. The second 1943 amendment added the second paragraph. For comment on the 1943 amendments, see 21 N. C. Law Rev. 359.

The 1947 amendment inserted in the first sentence the words "or if made after the filing of the final account by the duly

authorized executor or administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate."

Many of the following cases were decided prior to the 1935 amendment, which fact accounts for the references to two years from grant of letters rather than two years from death of decedent.

Only Purchaser without Notice Protected.—Prior to 1869, a purchaser from the heirs after two years from the grant of letters, even though with notice of the existence of the debts, obtained a good title under this section. *Brandon v. Phelps*, 77 N. C. 44 (1877). It is noteworthy that under the present section he must be a bona fide purchaser without notice. *Hooker v. Yellowley*, 128 N. C. 297, 38

S. E. 889 (1901). For example, actual notice of insolvency was held to invalidate purchaser's title. But a judgment against the representative is not notice of insolvency. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894). Nor are proceedings for dower alleging insolvency such notice. *Lee v. Giles*, 161 N. C. 541, 77 S. E. 852 (1913).

Of course, even a purchaser with notice from a purchaser without notice will be protected. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Heirs Liable for the Price.—The heirs having sold the land, even after two years of the grant of letters, are liable to the creditor for the price received, and for the whole price, not for aliquot shares of the debt. *Hinton v. Whitehurst*, 71 N. C. 66 (1874); *Davis v. Perry*, 96 N. C. 260, 1 S. E. 610 (1887); *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

Conveyances Only Conditionally Void.—The conveyances under this section are only conditionally void, i. e., void contingent upon the personal estate proving insufficient to pay the debts. *Davis v. Perry*, 96 N. C. 260, 1 S. E. 610 (1887). See also, *First Nat. Bank v. Zollicoffer*, 199 N. C. 620, 155 S. E. 449 (1930).

Voidable Merely.—A conveyance to a purchaser not for value is not, under this section, ipso facto void, but at the most merely voidable. *Gilbert v. Hopkins*, 204 F. 196 (1913).

As to Creditors and Personal Representatives.—Conveyances of real property within two years from the grant of letters are only void as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void and they never cease to operate as to the parties to them. *Jefferson Standard Life Ins. Co. v. Buckner*, 201 N. C. 78, 159 S. E. 1 (1931). See also, *Cox v. Wright*, 218 N. C. 342, 11 S. E. (2d) 158 (1940).

To What Extent Purchaser Protected.—The purchaser for value contemplated by this section is, with respect to consideration paid by him, to be assimilated to a purchaser for value under the statute of 13 Eliz., viz.: he need not have paid all of the purchase money. The test of "purchaser for value" is not the same under this section with the test in certain equity cases where the purchaser is protected pro tanto, i. e., to the extent of his payment before he receives notice. Hence even a purchaser upon credit is a "purchaser for value." *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894). See

Beasley v. Bray, 98 N. C. 266, 3 S. E. 497 (1887).

A deed of trust creditor is a purchaser for value within the meaning of this section. *Francis v. Reeves*, 137 N. C. 269, 49 S. E. 213 (1904).

Mortgage after Two Years Followed by Sale Is Valid.—Where an heir executed a deed of trust more than two years after the granting of letters testamentary, and it was foreclosed, and the purchaser at the sale transferred title to a bona fide purchaser who had no actual knowledge that the personal assets were insufficient to pay debts of the estate, it was held that the fact that it appeared from the records that the estate had not been settled does not amount to notice that the personalty was insufficient, and the purchaser was a bona fide purchaser without notice, and the land is not subject to sale. *Johnson v. Barefoot*, 208 N. C. 796, 182 S. E. 471 (1935).

Purchaser from Vendee after Expiration of Two Years.—If the land is sold within the two years, and after the two years have expired resold by the vendee to a purchaser for value without notice, the latter gets good title. *Murchison v. Whitted*, 87 N. C. 465 (1882).

Agreement Consummated after Two Years.—An agreement by the heir for the sale of land, though entered into before the expiration of two years, if consummated after such time is valid as against creditors of the estate. *Donoho v. Patterson*, 70 N. C. 649 (1874).

A deed conveying the timber on the land descended falls within the purview of this section. *Camp Mfg. Co. v. Liverman*, 128 N. C. 52, 38 S. E. 27 (1901).

Admissibility of Evidence.—In proceedings for partition, defendants claimed sole seizin. The evidence tended to show that defendants' grantor owned an undivided interest in the locus in quo as tenant in common with her brother, that defendants' grantor was the sole heir at law of her brother and executed a deed to defendants purporting to convey the entire tract of land less than two months after her brother's death. Plaintiff introduced in evidence testimony of the brother's administrator that he had sold the brother's interest in the land to make assets to pay debts of the estate, and offered in evidence court records of the summons, pleadings, judgment and confirmation, and deed executed by the commissioner to plaintiff in the proceeding to sell lands to make assets, and the judgment in plaintiff's favor against the estate of the brother. Held: Since a deed by an heir executed within two years of the

intestate's death is ineffective as against creditors of intestate's estate, the record evidence, properly authenticated, was competent to prove plaintiff's title as

tenant in common. *Cox v. Wright*, 218 N. C. 342, 11 S. E. (2d) 158 (1940).

Cited in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

§ 28-84. Property subject to sale; conveyance by deceased in fraud of creditors.—The real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interest in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from anyone who purchased them for a valuable consideration and without a knowledge of the fraud. (1868-9, c. 113, s. 51; Code, s. 1446; Rev., s. 72; C. S., s. 77.)

Cross References.—As to personalty, see § 28-59. As to fraudulent conveyances, see §§ 39-15 et seq.

The provisions of this and section 28-81 hinge together. Hence a compliance with both is necessary. *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890).

Salable Interest.—Every interest in real estate, whether legal or equitable, is subject to sale. *Waugh v. Blevins*, 68 N. C. 167 (1873); *Mannix v. Ihrrie*, 76 N. C. 299 (1877).

Only Debtor's Interest Is Subject to Sale.—Under this section only the interest of the deceased debtor in land which he may have conveyed in fraud of creditors is subject to sale. *Heck v. Williams*, 79 N. C. 437 (1878); *Egerton v. Jones*, 107 N. C. 284, 12 S. E. 434 (1890).

Conveyance Must Be by the Deceased.—Where A, being in embarrassed circumstances, purchased land from B, and caused B to convey to his (A's) son, it was held that the land could not be sold for the payment of A's debts. *Rhem v. Tull*, 35 N. C. 57 (1851).

Conveyance Must Be in Fraud of Creditors.—Under this section lands conveyed cannot be sold unless it can be shown that they were conveyed in fraud of creditors. *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264 (1897).

§ 28-85. Effect of bona fide purchase from fraudulent grantee.—When an executor, administrator or collector files his petition to sell lands which have been fraudulently conveyed, and of which there has been a subsequent bona fide sale, whereby he cannot have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery is not necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made. (1868-9, c. 113, s. 52; Code, s. 1447; Rev., s. 73; C. S., s. 78.)

§ 28-86. Contents of petition for sale.—The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained:

1. The amount of debts outstanding against the estate.
2. The value of the personal estate, and the application thereof.

Innocent Purchasers Protected.—Under this section an administrator cannot be compelled to sell property fraudulently conveyed but in the hands of an innocent purchaser. *Harrington v. Hatton*, 129 N. C. 146, 39 S. E. 780 (1901). See § 28-85.

Conveyance to Wife and Children.—Property conveyed by the decedent to his wife and children without consideration in fraud of his creditors while insolvent may, under this section, be recovered and sold by the administrator on behalf of the creditors. *Webb v. Atkinson*, 122 N. C. 683, 29 S. E. 949 (1898); *Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737 (1899).

Fraudulent Grantee's Rights as Creditor.—Where the wife is the fraudulent grantee and the creditor of her husband, in proceedings to set aside the conveyance to her, under this section, she is entitled to her pro rata claim out of the proceeds of the land the same as the other creditors are. *Nadal v. Britton*, 112 N. C. 188, 16 S. E. 915 (1893).

Burden of proof that the conveyance was fair and for a full consideration was upon the grantees, where the decedent, while insolvent, had conveyed real property to his wife and children. *Webb v. Atkinson*, 122 N. C. 683, 29 S. E. 949 (1898).

3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.

4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent. (1868-9, c. 113, s. 43; Code, s. 1437; Rev., s. 77; C. S., s. 79.)

Cross Reference.—As to necessity for actual application of personalty to payment of debts, see note to § 28-81.

Purpose of Requisites in Application.—The personal estate, in law, is the primary fund, and land is the secondary fund, for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands, in the requisites prescribed to a petition for a license to sell, evidently is to inform the court of the condition of the estate with reference to its debts and the value and application of the personal estate, so that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity to resort to the real estate to supply the deficiency will then be apparent. *Shields v. McDowell*, 82 N. C. 137 (1880); *Neighbors v. Evans*, 210 N. C. 550, 187 S. E. 796 (1936). See *Barkley v. Thomas*, 220 N. C. 341, 17 S. E. (2d) 482 (1941).

The petition must show by a direct allegation or by implication the requirements of this section. *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890). See *Shields v. McDowell*, 82 N. C. 137 (1880).

"As Far as Can Be Ascertained."—The main and essential fact to be stated in the petition is that there is an insufficiency of assets to pay the debts, and in order that the court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "as far as can be ascertained," for these quoted words, according to grammatical construction, qualify each of the subdivisions of this section. *Blount v. Pritchard*, 88 N. C. 446 (1883).

Indebtedness Must Be Ascertained.—The fact that this section requires an oath to be made implies that the indebtedness ought to be ascertained, approximately at least, to show the necessity of a resort to the land. *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131 (1887).

Petition Should Set Forth Value of Personalty and Application Thereof.—In a proceeding to sell lands to make assets

to pay debts of the estate, an averment that insufficient personalty remained in the hands of the petitioner to pay debts and legacies is insufficient, and the petition is demurrable, since this section prescribes that the petition shall set forth the value of the personal estate and the application thereof. *Watson v. Peterson*, 216 N. C. 343, 4 S. E. (2d) 881 (1939).

A petition which fails to state the value of the personal estate and the application thereof is defective and demurrable. *McNeill v. McBryde*, 112 N. C. 408, 16 S. E. 841 (1893). See *Blount v. Pritchard*, 88 N. C. 445 (1883), where it is said that license may be granted even where there has been no application of the personalty, though where there has been an application the petition must so state.

Petition Stating Merely That Personalty Is Insufficient.—As the purpose of this section is to enable the court to see whether a sale is necessary, a petition which simply states that the personal estate "is wholly insufficient to pay intestate's debts," without setting forth the value of the personal estate, is defective. *McNeill v. McBryde*, 112 N. C. 408, 16 S. E. 841 (1893). See *Barkley v. Thomas*, 220 N. C. 341, 17 S. E. (2d) 482 (1941).

But an allegation that the assets of the decedent were insufficient to pay the debts, and that a sale of property fraudulently conveyed was necessary, was held sufficient in *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735 (1896).

The petition need not show that the bond of the former administrator was sued on and exhausted. *Monger v. Kelly*, 115 N. C. 294, 20 S. E. 374 (1894). But see *Lilly v. Wolley*, 94 N. C. 412 (1886); and *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890), which declare that such bond must have been exhausted.

Verification of Application.—In *Stradley v. King*, 84 N. C. 635 (1881), where the application for the sale of land was not verified by the administrator's oath, and the guardian for the infant defendant had not answered, the court said with regard to verification: "While we consider the statutory requirement that the petition for an order of sale of the decedent's lands shall be supported by oath and that an answer be put in on behalf of infant defendants, directors, and its nonobservance not

fatal to the validity of the decree of sale made without, yet this departure from the statute, followed by the precipitate action of the court in confirming the sale on the very day when it was reported and with-

out opportunity afforded for objection, in our opinion warrants the order which re-opens the case for such defenses as the infant defendants may be able to set up."

§ 28-87. **Heirs and devisees necessary parties.**—No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: Provided, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made parties defendant in the same as the unknown heirs of said decedent naming him, and as thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for the service of summons by publication in the superior court, and upon such service being had, the court shall appoint some discreet person as guardian ad litem, for said unknown heirs, and summons shall issue to him as such. Said guardian ad litem shall file answer for said unknown heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons by name, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to actions now pending, and all proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated. (1868-9, c. 113, s. 44; Code, s. 1438; Rev., s. 74; C. S., s. 80; Ex. Sess. 1924, c. 3, s. 1.)

Cross Reference.—As to joinder of beneficiary when the executor or administrator institutes an action, see § 1-63.

Editor's Note.—The proviso with regard to the method of service of process upon unknown heirs, and the appointment of a guardian ad litem to represent them, was introduced by the 1924 amendment. For comment on the 1924 amendment, see 3 N. C. Law Rev. 15.

Heirs at law of intestate are necessary parties to an action by an administrator to subject an interest in lands of his intestate to the payment of debts of the estate. In re Daniel's Estate, 225 N. C. 18, 33 S. E. (2d) 126 (1945).

Section Applies to Infants.—This section applies to making heirs and devisees parties, whether infants or adults. Perry v. Adams, 98 N. C. 167, 3 S. E. 729 (1887); Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356 (1890).

Heir Not Made Party May Attack Decree.—An heir who was not made a party, or served, may subsequently assail the validity of the decree and proceed against the purchaser. Dickens v. Long, 109 N. C. 165, 13 S. E. 841 (1891). See also, Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949 (1898).

As to Such Heir, Decree Is Void.—As to an heir not made a party or served, whether he be an adult or an infant, the decree is absolutely void, not merely voidable, and can be collaterally attacked. Nor would the fact that he had knowledge of the sale and took no steps to prevent it cure the lack of service. Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356 (1890); Card v. Finch, 142 N. C. 140, 54 S. E. 1009 (1906).

Cited in Barkley v. Thomas, 220 N. C. 341, 17 S. E. (2d) 482 (1941).

§ 28-88. **Adverse claimant to be heard.**—When the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have

his writ of possession and order of sale accordingly. (1868-9, c. 113, s. 47; Code, s. 1441; Rev., s. 76; C. S., s. 81.)

Any person who claims to be the owner of the land has the right to be made a party and to have an inquiry made as to his title. *Gibson v. Pitts*, 69 N. C. 155 (1873).

Where land is claimed by another, such claimant may be admitted to be heard as a party to a proceeding to sell lands of intestate to make assets to pay debts, or may be brought in as a party thereto. In *re Daniel's Estate*, 225 N. C. 18, 33 S. E. (2d) 126 (1945).

Claims of Undivided Interest.—One

§ 28-89. **Upon issues joined, transferred to term.**—When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings. (1868-9, c. 113, s. 46; Code, s. 1440; Rev., s. 78; C. S., s. 82.)

Issue of Law Submitted to Judge.—Where a demurrer is filed to the petition filed before the clerk, the issue of law thereby raised must, under this section, be certified to the judge at chambers. Then the judge must transmit his decision thereon to the clerk; it is error for him to direct an order of sale after overruling the demurrer. *Jones v. Hemphill*, 77 N. C. 42 (1877).

Procedure.—The rulings or decisions of the clerk must be transferred for trial to the next succeeding term of the superior

court, if determinative issues arise on the pleadings; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers on appeal properly taken. In passing upon these questions of facts, the court may act on the evidence already received, or may require the production of other evidence. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551 (1912).

Failure to Determine Issue of Title.—Where the order of sale is granted without determining an issue of title raised under this section, the order is void, and the title of the purchaser with notice of such issue is voidable. *Perry v. Peterson*, 98 N. C. 63, 3 S. E. 834 (1887).

Cited in *In re Daniel's Estate*, 225 N. C. 18, 33 S. E. (2d) 126 (1945).

§ 28-90. **Order granted, if petition not denied; procedure for sale.**—As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily and to decree a sale. The procedure for the sale shall be as is provided in article 29A of chapter 1 of the General Statutes. (1868-9, c. 113, s. 48; Code, s. 1443; Rev., s. 79; C. S., s. 83; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

Capacity of the Clerk.—The clerk of the superior court, for the purpose of de-

termining a sale in case provided by this section, represents and is the court, and has authority to exercise the discretionary powers conferred. *Tillett v. Aydlett*, 90 N. C. 551 (1884).

§§ 28-91, 28-92: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 28-93. **Court may authorize private sale.**—If it is made to appear to the court by petition and by satisfactory proof that it will be more for the interest of said estate to sell such real estate by private sale, the court may authorize said petitioner, or any commissioner appointed by the court, to sell the same at private sale in accordance with the provisions of G. S., § 1-339.34 through G. S., § 1-339.40. (1917, c. 127, s. 2; C. S., s. 86; 1927, c. 16; 1949, c. 719, ss. 2, 3.)

Cross Reference.—As to proceeds of realty sold to pay debts, see §§ 28-57 and 28-58.

Editor's Note.—The 1927 amendment

eliminated a former restriction on deferred payments, and added certain provisions as to the manner of sale.

The 1949 amendment, effective Jan 1,

1950, rewrote this section, after striking out the former second sentence and re-writing the former third sentence to appear as § 1-339.76.

For decision under this section as it

stood before the 1949 amendment, see *Howard v. Ray*, 222 N. C. 710, 24 S. E. (2d) 529 (1943).

Cited in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873 (1938).

§ 28-94. Undevised realty first sold.—When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator. (1868-9, c. 113, s. 39; Code, s. 1430; Rev., s. 69; C. S., s. 87.)

Cross Reference.—As to proceeds of realty sold to pay debts, see §§ 28-57 and 28-58.

Will Not to Be Disturbed.—By virtue of this section a decree for the sale of the land should direct a sale in such a way as to disturb as little as practicable the will

of the testator. *Tillett v. Aydlett*, 90 N. C. 551 (1884).

Applied in *Camp Mfg. Co. v. Liverman*, 123 N. C. 7, 31 S. E. 346 (1898).

Cited in *Anderson v. Bridgers*, 209 N. C. 456, 184 S. E. 78 (1936).

§ 28-95. Specifically devised realty; contribution.—If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution. (1868-9, c. 113, s. 107; Code, s. 1535; Rev., s. 86; C. S., s. 88.)

Cited in *Anderson v. Bridgers*, 209 N. C. 456, 184 S. E. 78 (1936).

§ 28-96. Under power in will, sales public or private.—Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein. (1868-9, c. 113, s. 75; Code, s. 1503; Rev., s. 84; C. S., s. 89.)

§ 28-97. Where executor with power dies, power executed by survivor, etc.—When any or all of the executors of a person making a will of lands to be sold by his executors die, fail or for any cause refuse to take upon them the administration; or, after having qualified, shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with the will annexed, or the administrator de bonis non, may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold. (Code, s. 1493; 1889, c. 461; Rev., s. 82; C. S., s. 90.)

Effect of Section on Common-Law Rule.—At common law an executor had no control over realty, and hence a power conferred upon him by the will to sell the realty did not pass upon his death to the administrator d. b. n., c. t. a. But this section has changed the common-law rule in this respect. *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032 (1890).

Sale by Administrator c. t. a.—The case of an administration with the will annexed

where no executors were appointed is both within the letter and the spirit of this section. Hence where a testator empowers his executor to sell lands, but fails to designate any executor, the administrator c. t. a. can, under this section, exercise that right. *Hester v. Hester*, 37 N. C. 330 (1842).

Upon the death or removal of the executors named in the will, the administrator c. t. a. succeeds to all rights, powers

and duties of the executors, and he may exercise all powers of sale granted the executors by the will, regardless of whether they are given the executor *virtute officii* or *nominatim*, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude the exercise of the power of sale by the administrator *c. t. a.* Wachovia Bank, etc., *Co. v. King Drug Co.*, 217 N. C. 502, 8 S. E. (2d) 593 (1940).

It will be presumed that a will is executed in contemplation of the statutes

providing that an administrator *c. t. a.* succeeds to all the rights, powers and duties of the executor. *Wachovia Bank, etc., Co. v. King Drug Co.*, 217 N. C. 502, 8 S. E. (2d) 593 (1940).

Action by One of Two Executors.—Under this section, one of the two executors may not, in the absence of express power, waive the condition of time of an option given by them for the purchase of lands. *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865 (1907).

Applied in Orreder v. Call, 101 N. C. 399, 7 S. E. 878 (1888); as to sale by surviving executor in *Simpson v. Simpson*, 93 N. C. 373 (1885); as to sale by administrator *c. t. a.*, and administrator *d. b. n.*, *c. t. a.* in *Saunders v. Saunders*, 108 N. C. 327, 12 S. E. 909 (1891).

Cited in Welch v. Wachovia Bank, etc., Co., 226 N. C. 357, 38 S. E. (2d) 197 (1946).

§ 28-98. Death of vendor under contract; representative to convey.—When any deceased person has bona fide sold any lands, and has given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract has been duly proved and registered in the county where the lands are situated, if within the State, or, if not in the State, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract. (1868-9, c. 113, s. 65; 1874-5, c. 251; Code, s. 1492; Rev., s. 83; C. S., s. 91.)

Editor's Note.—Before the enactment of this section, the heirs of the vendor were the proper persons on whom the purchaser had the right to call for the conveyance. See *Earle v. McDowell*, 12 N. C. 16 (1826); *Osborne v. McMillan*, 50 N. C. 109 (1857); *Twitty v. Lovelace*, 97 N. C. 54, 2 S. E. 661 (1887).

Formerly this section applied only to cases where the vendor had executed a bond. It did not extend to agreements to convey made upon other considerations. *Hodges v. Hodges*, 22 N. C. 72 (1838).

Bilateral Contracts Contemplated.—This section contemplates only contracts of conveyance of a bilateral nature. Hence where the optionee of a vendor dies before the option is exercised the representative has, under this section, no power to convey; and the optionee's remedy is against the heir of the devisees. *Mizell v. Dennis Simmons Lumber Co.*, 174 N. C. 68, 93 S. E. 436 (1917).

Section Not Applicable to Restore Lost Deeds.—This section does not apply to

cases where a deed is executed in performance of the condition of the bond to convey, but is lost after the death of the vendor and before its registration. *Hodges v. Hodges*, 22 N. C. 72 (1838).

Registration and Payment Prerequisites.—Unless the contract for the sale is proved and registered and the purchase money is paid in full, a deed made by the representative is inoperative. *Taylor v. Hargrove*, 101 N. C. 145, 7 S. E. 647 (1888).

Showing of Consideration.—The person claiming under the contract must, under this section, show that there was a valuable consideration thereof, and such other circumstances as would be equivalent to a payment of that consideration. *Lindsay v. Coble*, 37 N. C. 602 (1843).

Deed Inoperative.—A deed executed by the representative before the contract for sale has been proven and registered, and the purchase money paid in full, is inoperative. *Taylor v. Hargrove*, 101 N. C. 145, 7 S. E. 647 (1888).

Warranty of Title.—This section empowers the representative to convey only such interest as the vendor could sell. Hence where the vendor contracts to sell his interest in the land, the representative cannot be expected to warrant the title of the land. *Twitty v. Lovelace*, 97 N. C. 54, 2 S. E. 661 (1887).

Equitable Defense against Bond.—Where the representative in compliance with this section executes the deed to the purchaser, any equitable defense against the bond may be set up against such deed. *McCraw v. Gwin*, 42 N. C. 55 (1850).

Remedy of Heirs for Purchase Money.—It was formerly held that the heirs might not enjoin the representative from making a deed, upon the ground that the purchase money had not been paid. Their

remedy was to call the representative to account for the money, or call for specific performance of the contract. *White v. Hooper*, 59 N. C. 152 (1860). (But now see the proviso at the end of the section.)

Heirs as Necessary Parties to Suit by Representative.—In an action brought by the personal representative of an obligor in a bond for title to subject the land to the payment of the purchase money, the heirs of the obligor are necessary parties. But if the bond is proved and registered and the section has been complied with, in proceedings for the sale of such land, the presence of the heirs is perhaps not necessary. *Grubb v. Lookabill*, 100 N. C. 271, 6 S. E. 390 (1888).

Cited in *Sears v. Braswell*, 197 N. C. 515, 149 S. E. 846 (1929).

§ 28-99. **Title in representative for estate; he or successor to convey.**—When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; the procedure for the sale shall be as is provided in article 29A of chapter 1 of the General Statutes, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price. (1905, c. 342; Rev., s. 71; C. S., s. 92; 1949, c. 719, s. 2.)

Local Modification.—Forsyth: 1947, c. 359; Surry: 1947, c. 359. effective Jan. 1, 1950, rewrote that part of the first sentence appearing after the

Editor's Note.—The 1949 amendment, semicolon.

§ 28-100. **Sales of realty devised upon contingent remainder, executory devise or other limitation validated.**—In all cases where real property devised upon contingent remainder, executory devise, or other limitation, shall have been sold and conveyed for a fair price in good faith by the executor named in said will, or by an administrator with the will annexed, for the purpose of making assets with which to pay the debts of said estate, under the mistaken belief that said will authorized such sale, and the proceeds of such sale shall have been applied to the payment of the indebtedness of such estate, and it shall be made to appear in any action brought by the purchaser of said land, or those claiming under such purchaser, that such executor, or other personal representative would have been entitled in a proper proceeding brought for that purpose to an order of court to sell said land for the purpose of making assets with which to pay the indebtedness of such estate, then such sale so made by such executor, or other representative, shall be valid and binding upon all such contingent remaindermen, executory devisees, or other person, who would have taken such property under said will upon the contingency or contingencies therein mentioned, notwithstanding said sale shall have been made by such executor or other personal representative without obtaining such order of the court. And in any such action instituted by the purchaser of such land, or those claiming under him, for the purpose of removing a cloud from the title thereto all contingent remaindermen, executory devisees, or other persons entitled to claim under any limitation in said will, if in being, and known to be residents of this State, shall be made parties defendant to such action, and served with summons as in other civil actions; all nonresidents, or persons whose names and

residences are unknown, shall be served with summons by publication as now required by law, or such service in lieu of publication as now provided by law. In cases where the contingent remainder, executory devise, or other limitation will, or may, go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the superior court shall, in any such action brought for the purpose aforesaid, after due inquiry of persons who are in no way interested in or connected with such proceedings, designate and appoint some discreet person as guardian ad litem to represent such contingent remaindermen, or executory devisees, upon whom summons shall be served in such action as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such action, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. And all contingent remaindermen, executory devisees, or other persons, who may be entitled to claim a contingent interest in said land, whether known or unknown, in being or not in being, shall be conclusively bound by any final judgment entered in such action, if made parties thereto, and represented therein in the manner hereinbefore provided: Provided, however, that this law shall not apply to any sale of land made in which the executor or other personal representative shall have been either directly or indirectly the purchaser thereof. (1923, c. 70, s. 1; C. S., s. 92(a).)

Editor's Note.—This section is confined in application to sales occurring prior to January 1, 1925. See § 28-102. For a review of the 1923 act, see 1 N. C. Law Rev. 315.

Validity, Operation and Effect.—This statute is curative and retrospective, and is constitutional and legal, and does not interfere with or destroy vested rights. A

retrospective law, as in the case of this statute, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the legislature originally had authority to confer the power or to authorize the act. *Charlotte Consol. Const. Co. v. Brockenbrough*, 187 N. C. 65, 121 S. E. 7 (1924).

§ 28-101. Presumption; burden of proof.—Where the purchaser of any lands made under the circumstances narrated in § 28-100, or any person holding or claiming the same under or through such purchaser, shall have been in the peaceable possession thereof for more than twenty years without any adverse claim having been asserted to the same by any person claiming under such will, and the records of the administration of the said estate do not affirmatively show what disposition has been made of the proceeds of the sale of such land, then it shall be presumed, prima facie, that the proceeds of the sale of the said land have been applied to the payment of the necessary indebtedness of the said estate and the cost of the administration thereof, and the burden of proof to the contrary shall be upon the defendants in said action. (1923, c. 70, s. 2; C. S., s. 92(b).)

Cross Reference.—See note under § 28-100. in application to sales occurring prior to January 1, 1925. See § 28-102.

Editor's Note.—This section is confined

§ 28-102. Application of §§ 28-100 and 28-101.—Sections 28-100 and 28-101 shall apply only to sales of lands made under the circumstances narrated in those sections, occurring prior to January 1, 1925. (1923, c. 70, s. 3; C. S., s. 92(c); 1925, c. 48.)

Cross Reference.—See note under § 28-100. amendment, the application of the two preceding sections was confined to sales occurring prior to February 24, 1923.

Editor's Note.—Prior to the 1925

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.—In all cases where sales of real estate have been made by administrators of deceased persons, in good faith and

upon a valuable consideration, to obtain assets to pay debts of the estate, and deeds have been executed by such administrators to the purchasers, who have paid the purchase price thereof, and no action has been taken by the heirs of such deceased persons to annul such sales by litigation or otherwise, such sales are hereby validated. The recitals contained in such a deed that the sale was made under order or license of the court for the purpose of obtaining assets to pay debts of the estate and that the proceeds of sale of said land have been applied to the payment of the necessary indebtedness of the estate and the cost of administration thereof shall be presumed to be prima facie correct: Provided, however, that this section shall not apply to any sale of land in which the administrator of such deceased person shall have been directly or indirectly the purchaser thereof, and nothing herein shall prevent such sale from being impeached for fraud.

This section shall only apply to sales by administrators made prior to January 1, 1920. (1931, c. 146; 1935, c. 31.)

Local Modification.—Alexander: 1945, c. 950.

Editor's Note.—By the 1935 amendment the section was made applicable to sales prior to 1920 rather than prior to 1900, as formerly provided.

As stated in 9 N. C. Law Rev. 404, the preamble of the act indicates that it is to apply where no order of court was obtained or where the court proceedings au-

thorizing and confirming the sales have been lost without being recorded. As to its constitutionality against the charge of disturbing vested rights, see *Charlotte Consol. Const. Co. v. Brockenbrough*, 187 N. C. 65, 121 S. E. 7 (1924). As to validation of sales of real estate devised upon limitation made prior to January 1, 1925, see §§ 28-100 to 28-102.

§ 28-104. **Validation of sales of realty by administrators de bonis non of deceased trustees.**—In all cases, prior to January first, nineteen hundred thirty-one, where a sale of real estate has been made by an administrator de bonis non of a deceased trustee in a deed in trust, and such administrator de bonis non advertised and conducted such sale prior to his qualification as administrator de bonis non of the deceased trustee, but qualified as such before the execution of the trustee's deed made pursuant to such sale, said sale and deed shall be valid and as effectual as though such advertisement and sale had occurred after the qualification of such administrator de bonis non. (1935, c. 381.)

ARTICLE 15.

Proof and Payment of Debts of Decedent.

§ 28-105. **Order of payment of debts.**—The debts of the decedent must be paid in the following order:

This section relates exclusively to application of personal property, the only estate with which the administrator has any right to deal. *Moore v. Jones*, 226 N. C. 149, 36 S. E. (2d) 920 (1946). As to character of proceeds of land sold to make assets, see note to the following paragraph of this section.

Design of Section.—This section was only designed to recognize priorities among the creditors of the deceased and to establish the order of payment between claimants who have valid debts against the deceased. It was never intended to create a liability which did not otherwise exist. *Bower v. Daugherty*, 168 N. C. 242, 84 S. E. 265 (1915).

Recognizing priority of classes, this

section provides for the administration of assets for the benefit of all the creditors, according to definite and established rules. *Farmville Oil, etc., Co. v. Bourne*, 205 N. C. 337, 171 S. E. 368 (1933).

The intention of the legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding, upon proper safeguards, for the benefit of all the creditors. *Atkinson v. Ricks*, 140 N. C. 418, 53 S. E. 230 (1906).

Strict Construction.—This section, being in derogation of the equity of a pro rata distribution, should be strictly construed so as not to confer a priority over other creditors unless it is clearly called for. *Baker v. Dawson*, 131 N. C. 227, 42

S. E. 588 (1902); Park View Hospital Ass'n v. Peoples Bank, 211 N. C. 244, 189 S. E. 766 (1937).

If decedent's estate is not sufficient to pay his debts in full, then they are to be paid in classes, with those of the last class, if and when reached, sharing ratably in what is left. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24 (1936).

Duty of Representative.—To carry out the order designated by this section is a duty of the representative. State v. Oliver, 104 N. C. 467, 10 S. E. 709 (1889).

Testator Cannot Change Statutory Priority.—A testator may not so dispose of his estate as to avoid the payment of his debts in accordance with the priorities fixed by this section. First Security Trust Co. v. Lentz, 196 N. C. 398, 145 S. E. 776 (1928).

Section Construed to Favor Bankruptcy

First class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

A deed of trust executed to secure a debt which by law had a specific lien on property, as provided by the first class, has priority over the payment of taxes provided for *eo nomine* in the third subdivision of this section. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368 (1933).

Judgment Lien Is Not "Specific Lien on Property."—The lien of a docketed judgment, which is *eo nomine* put in the fifth class, is not such a "specific lien on property," unless made so by its terms, as to come within the first class mentioned in this section. Stewart v. Doar, 205 N. C. 37, 169 S. E. 804 (1933).

But Section Does Not Nullify Judgment Lien.—There is nothing in this section, or in any other provision of the law, that indicates intent to nullify the lien of a docketed judgment or to destroy any right acquired under the law prior to the death of the judgment debtor. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920 (1946).

Second class. Funeral expenses.

Expenses of Debtor Only.—The funeral and medical expenses referred to in this subdivision and the subdivision designated "Sixth class" are those of the debtor, and not of his wife, child or tenants. Baker v. Dawson, 131 N. C. 227, 42 S. E. 588 (1902).

See Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265 (1915), where it was held that the husband's estate is liable for the fu-

Third class. Taxes assessed on the estate of the deceased previous to his death.

Method of Collecting Taxes.—Section 105-412, construed in the light of this sub-

Rule.—Upon the death of an obligor the administration laws step in and determine the settlement of his estate. These have heretofore been construed by the Supreme Court to favor the bankruptcy rule. Thus a secured creditor is required to exhaust his security and then prove his claim for any balance still remaining or unpaid. Rierison v. Hanson, 211 N. C. 203, 189 S. E. 502 (1937).

This section creates no preference for payment on bank stock out of the assets of the estate of a deceased stockholder, and none results from the application of the pertinent principles of equity. Hood v. Darden, 206 N. C. 566, 174 S. E. 460 (1934).

The fees of a referee taxed against an administrator are not a preferred debt under this section. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161 (1904).

Where debtor's lands are sold under order of court to make assets, proceeds remain real estate until all liens are discharged, and are to be applied to payment of liens in the order of their priority, and only the residue, if any, is payable to administrator as personal property to be distributed in the order provided by this section. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920 (1946), citing Murchison v. Williams, 71 N. C. 135 (1874). See Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Where realty sold under order of court to make assets is subject to a docketed judgment and a subsequently recorded mortgage, the judgment must be satisfied in full before application of any part of the proceeds to the mortgage or to the payment of other debts. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920 (1946).

Applied in State v. Oliver, 104 N. C. 467, 10 S. E. 709 (1889).

neral expenses of his predeceased wife, in preference to the beneficiaries under his will.

Third Party Paying.—The provisions of this subdivision inure to the benefit of one who after having paid such expenses as a matter of affection and duty wants to recover the same from the estate. Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127 (1896).

division of this section, indicates that the ordinary methods of collecting taxes by a

sheriff do not apply to collection of taxes from a decedent's estate. *Sherrod v. Dawson*, 154 N. C. 525, 70 S. E. 739 (1911).

Relation to and Effect of § 105-408.—The General Assembly, by enacting § 105-408, providing that taxes assessed against land be paid from the proceeds of a foreclosure sale, did not intend to abolish the method definitely prescribed by this section for administering the estate of a person deceased or to modify the statutory direction as to the order in which the decedent's debts should be paid. *Farmville Oil, etc., Co. v. Bourne*, 205 N. C. 337, 171 S. E. 368 (1933).

Taxes Assessed against Life Tenant.—As a life tenant is liable for taxes assessed against the property during his lifetime, under § 105-410, when he dies without paying the same they constitute a claim against his estate and are payable in the third class. *Rigsbee v. Brogden*, 209 N. C. 510, 184 S. E. 24 (1936).

Tax-Sale Certificate Is Not a Preferred Claim.—A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate is by foreclosure under the provisions of C. S. §

8028. *Rigsbee v. Brogden*, 209 N. C. 510, 184 S. E. 24 (1936). [C. S. 8028 was repealed by Public Laws of 1939, c. 310, s. 1725. Ed. note.]

Provisions of this section that taxes should be paid by the personal representative in the third class of priority have no application to the statutory action to foreclose a tax-sale certificate. *Guilford County v. Estates Administration*, 213 N. C. 763, 197 S. E. 535 (1938).

Nor Are Assessments for Public Improvements.—See *Rigsbee v. Brogden*, 209 N. C. 510, 184 S. E. 24 (1936).

This section has no application to the payment of assessments made against land by a municipality for the purpose of improving streets. *High Point v. Brown*, 206 N. C. 664, 175 S. E. 169 (1934); *Saluda v. County of Polk*, 207 N. C. 180, 176 S. E. 298 (1934).

Or to Charges for Water and Gas Connection.—Charges for water and gas connections, incurred during the lifetime of a life tenant and unpaid at his death, do not constitute a preferred claim against his estate as taxes assessed on the estate prior to his death, since in no event would such charges stand upon a higher plane than assessments for permanent improvements. *Rigsbee v. Brogden*, 209 N. C. 510, 184 S. E. 24 (1936).

Fourth class. Dues to the United States and to the State of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this State, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Application to Funds in Administrator's Hands.—The provision of this clause applies to funds in the administrator's hands. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909).

Judgments Paid Out of Personalty.—This clause does not mean that the judgment shall be paid out of the realty of the decedent upon which it has become a lien. When a debtor dies, against whom there is a judgment docketed, his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the whole estate is to be administered just as if there were no judgment, that is to say, the personal property must be sold, if necessary, and all the personal assets collected, and out of these personal assets all the debts must be paid, if there be enough to pay all docketed judgments as well as others. The reason for this mode of administration is that, although a lien on land exists, the judgment should be paid out of the per-

sonal estate, if any, in exoneration of the land for the benefit of the heir or devisee. *Lee v. Eure*, 82 N. C. 428 (1880).

Creditor Must File Claim.—If a judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, and to protect himself against the running of the statute of limitations as against the debt (§ 1-22), he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Extent of Lien.—If the real estate upon which the judgment is a lien is of less value than the amounts of the judgment, then the extent of the lien under this subdivision is the value of the land only. *Jenkins v. Carter*, 70 N. C. 500 (1874). And if, in such a case, a part of the lien has been paid out of the personalty (which is first liable for the payment) the extent of the lien is the difference between the value of the land and amount paid out of the personalty. It is not the difference be-

tween the amount of the lien and the amount paid from the personality. *Murchison v. Williams*, 71 N. C. 137 (1874).

When Priorities Determined.—The priorities among judgment creditors, which are dependent upon the date of their respective recordation, are to be determined as they existed at the death of the debtor, after which they remain unaffected by lapse of time until barred by the statute of limitations or by executions issued upon the judgments. *Tarboro v. Penders*, 153 N. C. 427, 69 S. E. 425, 636 (1910); *Farmville Oil, etc., Co. v. Bourne*, 205 N. C. 337, 171 S. E. 368 (1933).

Statute of Limitations Not Affected.—The fact that under this subdivision judgments docketed and in force, which have become a lien upon decedent's property at the date of his death, have priority over certain other claims, does not stop the running of the statute of limitation upon such judgments. *Daniel v. Laughlin*, 87 N. C. 433 (1882).

The expiration of the judgment lien terminates the authority of the representative to pay such lien. The judgment lien must be in force at the time of payment.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such deceased person during the last illness of such person, said period of last illness not to exceed twelve months.

Cross Reference.—See annotation under the paragraph designated "Second class."

Editor's Note.—The 1941 amendment added to this paragraph the provision relating to drugs and medical supplies. For comment on the 1941 amendment, see 19 N. C. Law Rev. 546.

The words "medical services," include all services rendered to the deceased, because of his illness, upon the advice of his physician, which were reasonably necessary for his care and comfort and for his proper treatment by his physicians. *Park View Hospital Ass'n v. Peoples Bank, etc., Co.*, 211 N. C. 244, 189 S. E. 766 (1937).

Seventh class. All other debts and demands. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C. S., s. 93; 1941, c. 271.)

Cited in *Statesville v. Jenkins*, 199 N. C. 159, 154 S. E. 15 (1930); *Brown v. Brown*, 199 N. C. 473, 154 S. E. 731 (1930);

Matthews v. Peterson, 150 N. C. 132, 63 S. E. 721 (1909).

Where Debtor's Lands Are Sold under Order of Court to Make Assets.—See annotations under the subdivision designated "First class."

In such case no part of the proceeds may be taxed with costs of administration. However, a referee's fee by § 6-21 is taxable in the discretion of the court. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Application of Proceeds under a Consent Judgment to Sell Lands.—Where a commissioner be appointed to sell certain lands of a deceased person and pay the net proceeds to the administratrix of the deceased to pay the debts of his estate, the distribution of these proceeds was thereunder to be made under the provisions of this section, and a judgment ordering them to be paid to satisfy the lien of a judgment creditor on the lands of the estate, adjudging it a prior lien, was reversible error. *First Nat. Bank v. Mitchell*, 191 N. C. 190, 131 S. E. 656 (1926).

Expenses of Decedent Only.—The funeral and medical expenses referred to in this subdivision and subdivision two mean those of the debtor and not those of his wife, child, or tenants. *Baker v. Dawson*, 131 N. C. 227, 42 S. E. 588 (1902).

Board of Nurses Included in Medical Services.—The board of graduate nurses, who attended the deceased while he was a patient in plaintiffs' hospital, was a claim included in the term "medical services" as used in this section. *Park View Hospital Ass'n v. Peoples Bank, etc., Co.*, 211 N. C. 244, 189 S. E. 766 (1937).

Price v. Askins, 212 N. C. 583, 194 S. E. 284 (1937); *Rodman v. Stillman*, 220 N. C. 361, 17 S. E. (2d) 336 (1941).

§ 28-106. **No preference within class.**—No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out

of its class or by paying thereon more than a pro rata proportion in its class. (1868-9, c. 113, ss. 25, 26; Code, ss. 1417, 1418; Rev., s. 88; C. S., s. 94.)

Editor's Note.—The prohibition embodied in this section is against the representative. Hence a solvent person in his lifetime may by his will make preferences in favor of persons who would otherwise be postponed. But, as upon his death his effects and property vest in his representative who must pay the debts first, if the estate is insolvent the representative cannot assent to the payment of preferences before the payment of prior debts as prescribed in the preceding section. The result is that preferences made by an in-

solvent decedent are rendered ineffective for all purposes. See *Moore v. Byers*, 65 N. C. 240 (1871).

Paying by Honest Mistake.—If the representative pays a debt belonging to an inferior class in preference to a superior debt, even though he does it through an honest mistake, he is chargeable for the same. *Moye v. Albritton*, 42 N. C. 62 (1850).

Cited in *Park View Hospital Ass'n v. Peoples Bank, etc., Co.*, 211 N. C. 244, 189 S. E. 766 (1937).

§ 28-107. **When payment out of class held valid.**—Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought. (1869-70, c. 150; Code, s. 1496; Rev., s. 96; C. S., s. 95.)

Section Declaratory of Existing Law.—Even in the absence of this section the principal which it declares would hold true

under legal and equitable principles. *Coggins v. Flythe*, 113 N. C. 102, 18 S. E. 96 (1893).

§ 28-108. **Debts due representative not preferred.**—No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts. (1868-9, c. 113, s. 28; Code, s. 1420; Rev., s. 89; C. S., s. 96.)

§ 28-109. **Debts not due rebated.**—Debts not due may be paid on a rebate of interest thereon for the time unexpired. (1868-9, c. 113, s. 27; Code, s. 1419; Rev., s. 90; C. S., s. 97.)

§ 28-110. **Affidavit of debt may be required.**—Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit. (1868-9, c. 113, s. 33; Code, s. 1425; Rev., s. 91; C. S., s. 98.)

§ 28-111. **Disputed debt may be referred.**—If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal

representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it. (1868-9, c. 113, s. 34; 1872-3, c. 141; Code, s. 1426; Rev., s. 92; C. S., s. 99.)

Purpose of Section.—The section was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators or collectors and claimants against the estates of testators and intestates may be settled and determined. *State v. Potter*, 107 N. C. 415, 12 S. E. 55 (1890); *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

The proceeding authorized by this section is based upon agreement of the parties. It is not an action, nor a consent reference under the Code. It lacks the ordinary incidents of a special proceeding which is begun before the clerk. *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

Not Applicable to Creditor's Suit under § 28-122.—The proceedings authorized by this section are between a creditor and the personal representative, and have no application to creditor's bill under § 28-122 instituted to take the administration into the hands of the court. *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

Effect of Agreement to Arbitrate.—An agreement to arbitrate and to award under this section is competent evidence to prove the indebtedness of the estate. Such an agreement is, where there is no fraud or collusion, binding upon the heirs even though they were not parties to the proceedings. *Lassiter v. Upchurch*, 107 N. C. 411, 12 S. E. 63 (1890).

Finding of Arbitrators as Judgment.—The finding of arbitrators under this section is equivalent to a judgment, and the proceedings in which it is rendered can be impeached only for fraud or collusion. *Lassiter v. Upchurch*, 107 N. C. 411, 12 S. E. 63 (1890).

Under a fair interpretation of this section, the award of the referees, unless impeached for fraud and collusion, should

§ 28-112. Disputed debt not referred, barred in six months.—If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in § 28-111, the claimant must, within six months, after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. (1868-9, c. 113, s. 35; Code, s. 1427; Rev., s. 93; 1913, c. 3, s. 1; C. S., s. 100.)

Cross Reference.—As to effect of admission of claim by personal representative upon running of statute of limitations, see § 1-22.

The language of this section is positive

and have at least the effect of determining and putting an end to the controversy, if not the effect of a judgment in an action between the parties. *In re Reynold's Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

Who May Impeach.—Only those having a pecuniary interest in the estate may be heard to impeach the result for collusion or fraud. *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

Appeal.—Where a claimant and the personal representative voluntarily execute a written agreement referring the claim to disinterested persons under this section, the referees are not required to decide the matter according to law, and their report is conclusive and neither party is entitled to appeal therefrom upon exceptions, there being no provision in this section for appeal, and the proceeding being neither a civil action nor a special proceeding nor a judicial order. *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

Vacation of Reference.—Where clerk appointed a referee to hear claims against the estate of a deceased under this section, and thereafter approved the report of the referee, but on appeal the superior court ruled that the clerk had no authority in the premises and this ruling was unchallenged, such ruling vacated the supposed reference, and ended the matter. *In re Shutt*, 214 N. C. 684, 200 S. E. 372 (1939).

Effect of Failure to Refer Claim.—Where a claim against an executor is rejected by him in writing and is not referred in accordance with the provisions of this section, an action thereon is barred under § 28-112 if not brought within six months after the rejection of the claim by the executor. *Batts v. Batts*, 198 N. C. 395, 151 S. E. 868 (1930).

Cited in *Craver v. Spaugh*, 226 N. C. 450, 38 S. E. (2d) 525 (1946).

and explicit, and the section must be enforced in accordance with the plain meaning of its terms. *Morrisey v. Hill*, 142 N. C. 355, 55 S. E. 193 (1906).

Counterclaim Barred.—A claim barred

under this section cannot be pleaded even by way of counterclaim, in an action by the representative against the claimant, and this regardless of the fact that the general notice provided for in § 28-47 had not been given. *Morrissey v. Hill*, 142 N. C. 355, 55 S. E. 193 (1906).

Husband's Claim for Funeral Expenses of Wife.—While § 28-105 classifies funeral expenses as a debt of the estate, the amount due therefor cannot be regarded as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor, and the claim is rejected, and is not referred in accordance with § 28-111, an action on the claim is barred by failure to bring it within six months from the time of rejection of the claim by the exec-

utor. *Batts v. Batts*, 198 N. C. 395, 151 S. E. 868 (1930).

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contends were secured by the assignment is not barred, under this section, from asserting such right after the lapse of more than six months as against the administrator of the deceased insured in the administrator's action to recover the funds, the defense not constituting a prosecution of a claim against the administrator which had been denied. *Sellars v. First Nat. Bank*, 214 N. C. 300, 199 S. E. 266 (1938).

Applied in *Craver v. Spaugh*, 226 N. C. 450, 38 S. E. (2d) 525 (1946); *Craver v. Spaugh*, 227 N. C. 129, 41 S. E. (2d) 82 (1947).

§ 28-113. If claim not presented in twelve months, representative discharged as to assets paid.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector. (1868-9, c. 113, s. 37; Code, s. 1428; Rev., s. 94; C. S., s. 101.)

The purpose of this section is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same as to claims not presented within the prescribed time, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons. *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. 93 (1891).

Effect of Failure to Present Claim within Twelve Months.—Under this section a claimant who has not presented his claim within twelve months from the first publication of the general notice to creditors is allowed to assert his demand only as

against undistributed assets of the estate, and without cost against the executor. In re Estate of Bost, 211 N. C. 440, 190 S. E. 756 (1937).

Administrator May Hold Funds for Twelve-Month Period.—Under this section a bank, acting as an administrator, has a legal right to hold the funds of the estate for one year after appointment and to refuse to settle claims of heirs during this period. *Security Nat. Bank v. Bridgers*, 207 N. C. 91, 176 S. E. 295 (1934).

Cited in *Jackson v. Thomas*, 211 N. C. 634, 191 S. E. 327 (1937); *Strayhorn v. Aycock*, 215 N. C. 43, 200 S. E. 912 (1939), treated under § 1-49.

§ 28-114. No lien by suit against representative.—No lien shall be created by the commencement of a suit against an executor, administrator or collector. (1868-9, c. 113, s. 41; Code, s. 1432; Rev., s. 95; C. S., s. 102.)

Cited in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

§ 28-115. When costs against representative allowed.—No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which case the court may award such costs against the defendant personally, or against the estate, as may be just. (1868-9, c. 113, s. 38; Code, s. 1429; Rev., s. 97; C. S., s. 103.)

The purpose of this section is to urge the representative to an early and prompt settlement of claims against the deceased, and to protect the estate, when proper diligence was used, from cost needlessly

incurred by the creditors in prosecuting their claims. *May v. Darden*, 33 N. C. 239 (1880).

Exception to §§ 6-18 to 6-20.—This section forms an exception to §§ 6-18 to 6-20,

which are general provisions as to cost. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905). See also, *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6 (1942).

Not Applicable When Funds Misapplied.—In proceedings to subject a representative to liability for misapplication of the funds, as distinguished from proceedings to recover a debt out of the estate, this section does not apply, and the representative is chargeable with the cost. *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74 (1900).

Unreasonable Delay or Neglect.—Where an action was brought within fifty-two days of the qualification of the administrator, it was held that payment had not been “unreasonably delayed or neglected” within the meaning of this section. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905). A fortiori the same rule was applied, in *May v. Darden*, 83 N. C. 239

(1880), when the suit was instituted twenty days after appointment. See also, *Morris v. Morris*, 94 N. C. 613 (1886).

Land Chargeable with Cost.—In proceedings by the creditor to subject the land to the payment of debts, the land is subject to the payment of the cost, wherever the representative can be charged with the cost under the circumstances referred to in this section. *Long v. Oxford*, 108 N. C. 280, 13 S. E. 112 (1891).

Burden of Proof.—The burden is on the plaintiffs to show that they are entitled to recover costs under this section. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905).

Appeal.—Although the general rule is that an appeal lies from a judgment for cost only, there is an exception to this rule in favor of fiduciaries, inferred from this section. *May v. Darden*, 83 N. C. 239 (1880).

§ 28-116. **Obligations binding heirs collected as other debts.**—Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter. (1868-9, c. 113, s. 12; Code, s. 1404; Rev., s. 98; C. S., s. 104.)

ARTICLE 16.

Accounts and Accounting.

§ 28-117. **Annual accounts.**—Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (C. C. P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C. S., s. 105.)

The word “account” as used in this section means “a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates.” It does not include the idea of payment and settlement. *State v. Dunn*, 134 N. C. 663, 46 S. E. 949 (1904).

Account Necessary before Transferring Funds to Another Jurisdiction.—The administrator in this State of the estate of a nonresident dying in his own state, before transferring the funds to the state of the domicile, must comply with the provisions of this section. *Grant v. Rogers*, 94 N. C. 755 (1886).

A report showing all debts paid except a mortgage indebtedness cannot constitute a final account, since the duties and obligations of administration continue until all debts are paid or all assets exhausted. *Creech v. Wilder*, 212 N. C. 162, 193 S. E. 281 (1937).

Duty of Clerk to Accept Executor’s Annual Account.—Where property is devised or bequeathed by a will, upon certain trusts, and the testator does not appoint a trustee, it is the duty of the executor to carry out the provisions of the will. It is error for the clerk to refuse to accept an annual account tendered by the executor

for a year more than two years after the executor qualified but during the life of the trust estate. *In re Wachovia Bank, etc., Co.*, 210 N. C. 385, 186 S. E. 510 (1936). See § 28-121 and the note thereto.

Meaning of "Auditing Accounts".—The provision as to auditing the accounts has reference to the duty of examining the accounts to see that the account of charges corresponds with the inventories, passing upon the vouchers, and striking a balance after allowing commissions. *Heilig v. Foard*, 64 N. C. 713 (1870).

Ex Parte Proceeding.—The jurisdiction for auditing accounts conferred upon the clerk by this section is an *ex parte* jurisdiction of examining the accounts and vouchers of such persons, and does not conclude parties interested or affect suits *inter partes* upon the same matter. *Heilig v. Foard*, 64 N. C. 713 (1870); *Grant v.*

Hughes, 94 N. C. 231 (1886); *Bean v. Bean*, 135 N. C. 92, 47 S. E. 253 (1904).

Recorded Account Is Competent Evidence in Collateral Suit.—The account required by this section must be recorded as required in § 2-42. Such account therefore is not hearsay but is competent evidence in a collateral suit. *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340 (1936).

Prima Facie Evidence Only.—The sworn account referred to in this section is only prima facie evidence. It is not conclusive as against any person adversely interested. The statute merely shifts the burden of proof. *Allen v. Royster*, 107 N. C. 278, 12 S. E. 134 (1890); *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934); *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340 (1936).

The representative himself is not estopped to impeach the account. *Bean v. Bean*, 135 N. C. 92, 47 S. E. 232 (1904).

§ 28-118. Clerk may compel account.—If any executor, administrator or collector omits to account, as directed in § 28-117, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (C. C. P., s. 479; Code, s. 1400; Rev., s. 100; C. S., s. 106; 1933, c. 99.)

Editor's Note.—The last sentence was added by the 1933 amendment.

Original Jurisdiction.—Under this section the clerk has original jurisdiction to

remove. *Edwards v. Cobb*, 95 N. C. 5 (1886).

Applied in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

§ 28-119. Vouchers presumptive evidence.—Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character. (C. C. P., s. 480; Code, s. 1401; Rev., s. 101; C. S., s. 107.)

Independent of this section receipts of living persons are not strictly legal evidence to show a full administration. *Drake v. Drake*, 82 N. C. 443 (1880).

Vouchers Are Presumptive Though Not Primary Evidence.—While this section makes the vouchers presumptive proof, it by no means provides that they shall be primary evidence, and therefore actual payment may still be established in the same way as before the enactment of this section, when the receipts of living persons were not strictly legal evidence to show a full administration. *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432 (1890). See

Drake v. Drake, 82 N. C. 443 (1880).

What Vouchers Must Show.—This section makes vouchers presumptive evidence of disbursements actually made, but not of their nature and purpose and the necessity for them. To make such vouchers presumptive evidence, they should state with reasonable particularity their purpose, the particular account upon which they were made, the time, etc., so as to make it appear that the expenditure or disbursement was a proper one. *McLean v. Breese*, 109 N. C. 564, 13 S. E. 910 (1891).

Proof of Handwriting.—The handwriting of the person signing the voucher need

be proven only when the voucher is relied on as presumptive evidence under this sec-

tion. *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432 (1890).

§ 28-120. Gravestones authorized.—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The costs thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. Provided, however, that if the net estate is of a value in excess of fifteen thousand dollars (\$15,000), the executor or administrator may, in his discretion, expend not more than five hundred dollars (\$500) for this purpose without securing the order of court required herein. (1905, c. 444; Rev., s. 102; C. S., s. 108; 1925, c. 4; 1941, c. 102.)

Editor's Note.—The 1941 amendment added the proviso at the end of the section. For comment on this amendment, see 19 N. C. Law Rev. 546.

This section was held inapplicable where executors, in obedience to testamentary in-

structions, expended more than \$100 for a gravestone without order of court, when the estate appeared to be solvent, though in fact it was insolvent. *In re Estate of Bost*, 211 N. C. 440, 190 S. E. 756 (1937).

§ 28-120.1. Perpetual care of cemetery lot.—It shall be lawful for an executor or administrator to provide for perpetual care for the lot upon which is located the grave of his testator or intestate, and the cost thereof shall be paid and credited as such in final accounts: Provided, that the provisions of this section shall be applicable to an interment made in a cemetery authorized by law to operate as a perpetual care cemetery or association, and the cost thereof shall be in the sound discretion of the executor or administrator having due regard to the value of the estate and to the interest of the widow and legatees or distributees of the estate. Provided, where the executor or administrator desires to spend more than two hundred fifty dollars (\$250.00) for such purpose he shall file his petition before the clerk of the superior court and such order as will be made by the court shall specify the amount to be expended for such purpose. (1945, c. 756.)

§ 28-121. Final accounts.—An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk. (C. C. P., s. 481; Code, s. 1402; Rev., s. 103; C. S., s. 109.)

Cross Reference.—See note to § 28-117.

Jurisdiction.—Formerly the probate court had jurisdiction to make the representative account. *Rowland v. Thompson*, 63 N. C. 110 (1871). Under this section the clerk of the superior court has jurisdiction. *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265 (1890).

When Section Not Applicable.—This statutory requirement is not applicable where the duties imposed upon the executor by the will cannot be fully performed within two years from his qualification. *In re Wachovia Bank, etc., Co.*, 210 N. C.

385, 186 S. E. 510 (1936). See § 28-192.

Review of Order to File Final Account and Turn Over Assets.—Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon the facts found and not as a matter of discretion, the order is reviewable by the superior court upon appeal. *In re Wachovia Bank, etc., Co.*, 210 N. C. 385, 186 S. E. 510 (1936).

Auditing a Judicial Act.—The phrase "audit an account" means something more than the statement of an account by an

unauthorized person. It means the act of a court. Hence the auditing under this section must be performed by the clerk, and not by one of his ministerial officers, for a clerk for his judicial functions can have no deputy. *Rowland v. Thompson*, 65 N. C. 110 (1871).

Appeal from Audit.—This section, which directs that the probate judge (now the clerk) shall “audit” the account, implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Consequently an appeal may not be had from the decision of the probate judge (now the clerk) upon every question collaterally arising in the course of his investigation, in view of the inconveniences incident to such practice peculiar to the common-law action of account, now superseded by the more expeditious proceedings in equity. *Rowland v. Thompson*, 64 N. C. 714 (1870).

Ex Parte Proceeding Works No Estoppel.—The auditing by the clerk, whether under this or under § 28-117, is an ex parte proceeding, and does not work an estoppel upon the parties as a judgment in inter parte proceedings would. In this respect this section and the section just referred to

§ 28-121.1. **Final accounts; immediate settlement.**—The personal representative of a deceased person who did not own any real property or any interest in real property at the time of his death may file his final account for settlement at any time within one year after his appointment when the only assets of the estate consist of proceeds received for wrongful death. (1949, c. 63, s. 2.)

Editor’s Note.—For brief comment on this section, see 27 N. C. Law Rev. 414.

§ 28-122. **Creditor’s proceeding for accounting.**—Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively. (1871-2, c. 213; 1876-7, c. 241, s. 6; Code, s. 1448; Rev., s. 104; C. S., s. 110.)

The purpose of this section was to unite all the creditors in one special proceeding, in order to bring the personal representative to an account after two years and to compel an application of the assets by payment to the creditors whose debts have been ascertained. *Graham v. Tate*, 77 N. C. 120 (1877).

Proceedings authorized by § 28-111 have no application to situations arising under this section, whose primary object is to take the administration into the hands of the court. *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

Special Proceedings or Civil Action Optional.—Originally this section authorized the creditor to bring a “special pro-

ceeding”, but the amendment of 1876-77 inserted the words “civil action.” The effect of the amendment was to give the creditor an option to bring his action either before the clerk or at a regular term of the superior court. See *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890).

Concurrent Jurisdiction of Courts.—The act of 1876-77, ch. 241, § 6, which embodied also this section, and which provided that action against the personal representative may be brought originally to the superior court at term time, and stipulated for the repeal of conflicting laws, is not in conflict with the jurisdiction of the probate court (before the clerk), and the jurisdiction is concurrent. Hence the

are alike. *Bean v. Bean*, 135 N. C. 92, 47 S. E. 232 (1904).

Ex Parte Account Presumed Correct.—When ex parte accounts are filed under this section, they are, as a matter of law, to be taken as correct until shown to be erroneous. *Turner v. Turner*, 104 N. C. 566, 10 S. E. 606 (1889).

Filing of a “final report” by an executor does not have the effect of removing him from office if in fact the estate has not been fully settled, and therefore filing of such a report does not create a vacancy, and does not give the clerk authority to appoint an administrator c. t. a., d. b. n. *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

Limitation of Action against Representative.—An action against an administrator or executor is barred in ten years after the two years allowed under this section, even though no express demand is made by any party interested for the settlement of the estate. *Edwards v. Lemmond*, 136 N. C. 329, 48 S. E. 737 (1904).

Applied in Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295 (1934).

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345 (1934).

court first acquiring jurisdiction of the controversy will retain it. Thus, where under this section special proceedings were instituted by a creditor, in the superior court, and the representative thereafter instituted proceedings in the probate court (before the clerk) for the sale of land, it was held that the superior court had acquired jurisdiction of the matter and the representative could be restrained from further proceeding in the probate court. *Haywood v. Haywood*, 79 N. C. 42 (1878); *Pegram v. Armstrong*, 82 N. C. 326 (1880).

Nature of Superior Court's Jurisdiction.—Under this section the superior court has original jurisdiction over proceedings instituted against the representative. *Bratton v. Davidson*, 79 N. C. 423 (1878).

Jurisdiction of Judge in Term.—The proceedings under this section are exceptions to the rule that the judge in term has no jurisdiction over the settlement of an intestate's estate. *Moore v. Ingram*, 91 N. C. 376 (1884).

Equitable Character of Proceedings.—The special proceedings under this section are of equitable character. Hence the court may in the same proceedings make the heirs and the next of kin parties, and compel the latter to account for the personalty received by him, or may order the realty to be sold for the payment of the debts. *Devereux v. Devereux*, 81 N. C. 12 (1879); *Warden v. McKinnon*, 94 N. C. 378 (1886).

Remedy against Settlement before Payment of Debts.—If an administrator should file a petition for the settlement of the estate before he has paid the debts the remedy of the creditor is by a creditor's bill in accordance with this section, or an action upon the administration bond. They cannot seek to be made parties to the settlement proceedings, *Carlton v. Byers*, 93 N. C. 302 (1885); or to a petition by the representative to sell land for the payment of debts. *Dickey v. Dickey*, 118 N. C. 956, 24 S. E. 715 (1896).

Creditor's Suit Distinguished.—A special proceeding under this section differs from a creditor's bill in that in the latter case all the creditors may make themselves parties, while in the former case they are required to do so. *Patterson v. Miller*, 72 N. C. 516 (1875).

Other Creditors May Come In.—Where a creditor has instituted a special proceeding under this section, all or any of the creditors not designated by name are at liberty to come in and share the benefits of the suit. Every creditor has an inchoate interest in the suit, and is, in an essential

sense, a party to the action. *Dobson v. Simonton*, 93 N. C. 268 (1885).

Enjoining Creditor's Independent Action.—A creditor who chooses not to come in, and resorts to an independent action, may be enjoined by the court as soon as the decree for an account is rendered in the main suit. *Dobson v. Simonton*, 93 N. C. 268 (1885).

Process or General Notice Essential.—Unless personally served with notice, or unless a general notice is published as prescribed by § 28-126, creditors are not bound by special proceedings instituted under this section by another creditor. *Hester v. Lawrence*, 102 N. C. 319, 8 S. E. 915 (1889).

Summons and Complaints Necessary.—Special proceedings under this section must be by summons and complaint in the first instance. But creditors subsequently coming in need not file a complaint unless their claim is denied. *Isler v. Murphy*, 76 N. C. 52 (1877).

The mere filing by a creditor of a claim with the clerk gives him a standing in the court, and is all that is required of him unless the claim is contested. *Warden v. McKinnon*, 94 N. C. 378 (1886).

Each Complaint a Distinct Proceeding.—In proceedings under this section each complaint of the several creditors constitutes a distinct proceeding to be proceeded in separately. *Graham v. Tate*, 77 N. C. 120 (1877).

Institution of Proceedings Stops Running of Limitations.—Proceedings under this section instituted by one creditor prevent the running of the statute of limitations not only as to the claim of that creditor, but also as to the claims of those in whose behalf the proceedings are instituted. *Dobson v. Simonton*, 93 N. C. 268 (1885).

Allegations Necessary to Compel Representative to Sell Lands.—This section cannot be construed to empower a creditor or creditors to institute or maintain an action (where objection is raised by demurrer, certainly) to compel the personal representative to sell the lands of a decedent to make assets, unless it is alleged in the complaint that the personal estate is insufficient to discharge the debts, or has been exhausted and is no longer available for their satisfaction. *Clement v. Cozart*, 107 N. C. 695, 12 S. E. 254 (1890); *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891).

Termination of Special Proceedings.—Special proceedings commenced under this section are not terminated by being let off

the docket, but continue until all the debts are discharged and there is a final judgment. When so dropped from the docket, they may be brought forward on a motion. *Warden v. McKinnon*, 94 N. C. 378 (1886).

Nor does the termination of collateral issues, such as on contested claims, terminate such proceedings. *Warden v. McKinnon*, 94 N. C. 378 (1886).

Personal Judgment against Representative.—It is intimated that in special proceedings under this section the clerk has jurisdiction to render a personal judgment against the representative, where the latter has committed devastavit, as well as a judgment in his representative capacity. *Hester v. Lawrence*, 102 N. C. 319, 8 S. E. 915 (1889).

The costs of proceedings under this section are determined by the same provisions as are applicable to other proceedings. *Patterson v. Miller*, 72 N. C. 516 (1875).

Effect of Irregularities.—Where, under

§ 28-123. **Rules which govern creditor's proceeding.**—The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter. (1871-2, c. 213, s. 2; Code, s. 1449; Rev., s. 105; C. S., s. 111.)

Cross Reference.—For general statutes governing procedure in special proceedings, see § 1-393 et seq.

Summons and Complaint.—As the proceedings under the preceding section are not ex parte proceedings within the contemplation of § 1-400, but are adverse within the meaning of § 1-394, they must,

§ 28-124. **When and where summons returnable.**—The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof. (1871-2, c. 213, s. 3; Code, s. 1450; Rev., s. 106; C. S., s. 112.)

Effect of Irregularity in Time of Return.—Notwithstanding the irregularity in the time of the return as required by this sec-

tion, the proceedings are valid unless objected to. *Brooks v. Brooks*, 97 N. C. 136, 1 S. E. 487 (1887).

§ 28-125. **Clerk to advertise for creditors.**—On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (1871-2, c. 213, s. 4; Code, s. 1451; Rev., s. 107; C. S., s. 113.)

It is the duty of the clerk to advertise as directed by statute. *Warden v. McKinnon*, 94 N. C. 378 (1886).

The mode of advertisement under this section is regulated by the provisions of § 28-126. *Hester v. Lawrence*, 102 N. C. 319, 8 S. E. 915 (1889).

Failure to Publish Is Assignable on Appeal.—Failure to publish as required by this and the succeeding section is an error which may be assigned by the representa-

this section, the court has jurisdiction of the person and the subject matter, mere irregularities in the proceedings will not render them void, no objection being made as to such irregularities. *Brooks v. Brooks*, 97 N. C. 136, 1 S. E. 487 (1887).

Thus where the plaintiff does not purport to sue for himself and on behalf of all other creditors, in the absence of objection, the proceedings are not void. *Brooks v. Brooks*, 97 N. C. 136, 1 S. E. 487 (1887).

Motion to Issue Execution.—In view of the remedy given to the creditors under this section and other sections of this chapter, a motion for leave to issue execution against the estate of a decedent cannot be allowed. *Cowles v. Hall*, 113 N. C. 359, 18 S. E. 329 (1893).

Cited in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934); *Buchanan v. Oglesby*, 207 N. C. 149, 176 S. E. 281 (1934).

under the provisions of this section, be commenced by summons and complaint. *Isler v. Murphy*, 76 N. C. 52 (1877).

A creditor subsequently coming in, however, need not file a new complaint, unless his claim is denied. *Isler v. Murphy*, 76 N. C. 52 (1877).

tion, the proceedings are valid unless objected to. *Brooks v. Brooks*, 97 N. C. 136, 1 S. E. 487 (1887).

On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (1871-2, c. 213, s. 4; Code, s. 1451; Rev., s. 107; C. S., s. 113.)

It is the duty of the clerk to advertise as directed by statute. *Warden v. McKinnon*, 94 N. C. 378 (1886).

The mode of advertisement under this section is regulated by the provisions of § 28-126. *Hester v. Lawrence*, 102 N. C. 319, 8 S. E. 915 (1889).

The proceedings, however, are not void for lack of advertisement (which is considered as a mere irregularity), unless objected to. *Brooks v. Brooks*, 97 N. C. 136, 12 S. E. 487 (1887).

§ 28-126. **Publication of advertisement.**—The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication. (1871-2, c. 213, s. 5; Code, s. 1452; 1903, c. 134; Rev., s. 108; C. S., s. 114.)

Cross Reference.—See note to § 28-125. paper, and posted at the courthouse door.
Advertisement Both Published and Posted.—The advertisement under this section must be both published in a news-
 Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915 (1889).

§ 28-127. **Creditors to file claims and appoint agent.**—The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office. (1871-2, c. 213, s. 6; Code, s. 1453; Rev., s. 109; C. S., s. 115.)

§ 28-128. **Proof of claims.**—If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given. (1871-2, c. 213, s. 7; Code, s. 1454; Rev., s. 110; C. S., s. 116.)

§ 28-129. **Representative to file claims; notice to creditors.**—On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address. (1871-2, c. 213, s. 8; Code, s. 1455; Rev., s. 111; C. S., s. 117.)

§ 28-130. **Clerk to exhibit to representative claims filed.**—On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof. (1871-2, c. 213, s. 9; Code, s. 1456; Rev., s. 112; C. S., s. 118.)

§ 28-131. **If representative denies claim, creditor notified.**—Within five days thereafter the personal representative shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases. (1871-2, c. 213, s. 10; Code, s. 1457; Rev., s. 113; C. S., s. 119.)

Each Complaint a Distinct Proceeding.
 —Where, under this section, the claims of two or more creditors have been dis-
 computed and the issue joined upon the complaints sent to the superior court in pursuance of the succeeding section, the com-

plaint of each creditor constitutes a distinct proceeding, to be proceeded in separately so as to "let each tub stand on its

own bottom." *Graham v. Tate*, 77 N. C. 120 (1877).

§ 28-132. **Issues joined; cause sent to superior court.**—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial. (1871-2, c. 213, s. 11; Code, s. 1458; Rev., s. 114; C. S., s. 120.)

Title of the Proceeding.—When, under this section, issues upon several complaints have been sent to the superior court, although the title of the cause should be in the name of the creditors who instituted the special proceedings, it is proper to make a further title setting out the name of the creditor upon whose com-

plaint the issues are raised. For example: "X, (the original creditor) v. Y., administrator. Issues on the complaint of Z." In this way the complaints of the several creditors will be kept separate and unnecessary confusion avoided. *Graham v. Tate*, 77 N. C. 120 (1887).

§ 28-133. **When representative personally liable for costs.**—If any personal representative denies the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue is finally decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it appears that he had reasonable cause to contest the claim and did so bona fide. (1871-2, c. 213, s. 12; Code, s. 1459; Rev., s. 115; C. S., s. 121.)

Cross Reference.—See note to § 28-115.

Correlation of This and § 28-122.—This section applies to cases where the ad-

ministrator unreasonably denies a claim filed under § 28-122. *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74 (1900).

§ 28-134. **Court may permit representative to appear after return day.**—If the personal representative fails to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just. (1871-2, c. 213, s. 13; Code, s. 1460; Rev., s. 116; C. S., s. 122.)

§ 28-135. **Clerk to state account.**—Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court. (1871-2, c. 213, s. 14; Code, s. 1461; Rev., s. 117; C. S., s. 123.)

§ 28-136. **Exception to report; final report and judgment.**—After the clerk has stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice. (1871-2, c. 213, s. 15; Code, s. 1462; Rev., s. 118; C. S., s. 124.)

Applied in *In re Estate of Bost*, 211 N. C. 440, 190 S. E. 756 (1937).

§ 28-137. **Appeal from judgment; security for costs.**—Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking. (1871-2, c. 213, s. 17; Code, s. 1464; Rev., s. 119; C. S., s. 125.)

Applied in *In re Estate of Bost*, 211 N. C. 440, 190 S. E. 756 (1937).

§ 28-138. **Papers on appeal filed and cause docketed.**—On an appeal

the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term. (1871-2, c. 213, s. 18; Code, s. 1465; Rev., s. 120; C. S., s. 126.)

§ 28-139. Prior creditors not affected by appeal may docket judgments.—If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon. (1871-2, c. 213, s. 19; Code, s. 1466; Rev., s. 121; C. S., s. 127.)

§ 28-140. Judgment where assets sufficient to pay a class.—If upon taking the account it is admitted, or is found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class is in litigation, the amount of such claim, with the probable cost of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended. (1871-2, c. 213, s. 20; Code, s. 1467; Rev., s. 122; C. S., s. 128.)

§ 28-141. Judgment where assets insufficient to pay a class.—If the assets are insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class. (1871-2, c. 213, s. 21; Code, s. 1468; Rev., s. 123; C. S., s. 129.)

§ 28-142. Contents of judgment; execution.—All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs. (1871-2, c. 213, s. 22; Code, s. 1469; Rev., s. 124; C. S., s. 130.)

§ 28-143. When judgment to fix with assets.—No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets. (1871-2, c. 213, s. 23; Code, s. 1470; Rev., s. 125; C. S., s. 131.)

A judgment against an executor or administrator in his representative capacity merely establishes the debt sued on, and does not constitute a lien upon the lands of the estate, in the absence of a stipulation in the judgment to the contrary, until leave of court is granted for execution for failure of the representative to pay the ratable part of such judgment. *Tucker v. Almond*, 209 N. C. 333, 183 S. E. 407 (1936).

An absolute judgment against the representative neither fixes the defendant with assets nor disturbs the order of administration. It merely ascertains the debt sued on. *Dunn v. Barnes*, 73 N. C. 273 (1875).

Where a warranty deed was not regis-

tered until several years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor, and the grantee in the deed sold the land after the judgments had been docketed to a purchaser for value by warranty deed, it was held that under the provisions of this and §§ 28-144 and 28-148 the judgments did not constitute a lien on the land in violation of the warranty against encumbrances. *Tucker v. Almond*, 209 N. C. 333, 183 S. E. 407 (1936).

Applied in *Holmes v. Foster*, 78 N. C. 35 (1878); *Grant v. Bell*, 91 N. C. 495 (1884); *Hood v. Stewart*, 209 N. C. 424, 184 S. E. 36 (1936).

§ 28-144. **Form and effect of execution.**—All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally. (1871-2, c. 213, s. 24; Code, s. 1471; Rev., s. 126; C. S., s. 132.)

§ 28-145. **Report is evidence of assets only at date.**—The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates. (1871-2, c. 213, s. 25; Code, s. 1472; Rev., s. 127; C. S., s. 133.)

§ 28-146. **Creditor giving security may show subsequent assets.**—Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed so far as the same may be necessary. (1871-2, c. 213, s. 26; Code, s. 1473; Rev., s. 128; C. S., s. 134.)

§ 28-147. **Suits for accounting at term.**—In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require. (1876-7, c. 241, s. 6; Code, ss. 215, 1511; Rev., s. 129; C. S., s. 135.)

Extent of Jurisdiction Generally.—While the clerk of the superior court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the superior court in term is by this section constituted a forum for the settlement of controversies over estates. *State v. Griggs*, 223 N. C. 279, 25 S. E. (2d) 862 (1943).

The superior court is given concurrent jurisdiction with the probate courts, that is, clerks of the superior courts, in actions of the class mentioned in this section. *Maryland Cas. Co. v. Lawing*, 223 N. C. 8, 25 S. E. (2d) 183 (1943).

This section was construed in *Haywood v. Haywood*, 79 N. C. 42 (1878); *Fisher v. Trust Co.*, 138 N. C. 91, 50 S. E. 592 (1905), and other cases, in all of which it is held that concurrent original jurisdiction with the probate court is conferred on the superior court in a civil action to settle estates and subject real estate to the payment of debts. *Bratton v. Davidson*, 79 N. C. 423 (1878); *Pegram v. Armstrong*, 82 N. C. 326 (1880); *Shober v. Wheeler*, 144 N. C. 403, 57 S. E. 152 (1907). The jurisdiction of the clerk of the superior court in such cases is not exclusive,

but concurrent with that of the superior court. *State v. McCannless*, 193 N. C. 200, 136 S. E. 371 (1927). See *Privette v. Morgan*, 227 N. C. 264, 41 S. E. (2d) 845 (1947).

Power of Judge in Term.—The expression in *Moore v. Ingram*, 91 N. C. 376 (1884), that “the judge in term has no jurisdiction over the settlement of intestates’ estates” was made by inadvertence and only with reference to the situation presented in that case, not with reference to this section, which confers such jurisdiction in express terms. *Tillett v. Aydllett*, 93 N. C. 15 (1885).

Jurisdiction by Consent of Parties.—“A special proceeding before the clerk, instituted by the personal representative of a decedent to sell land to make assets, is, by consent, converted into an administration suit and heard by the judge. *Rigsbee v. Brogden*, 209 N. C. 510, 184 S. E. 24 (1936). If the parties are content to proceed in this way, perhaps the court ought not to object sua sponte. Its jurisdiction is not questioned. *Tillett v. Aydllett*, 93 N. C. 15 (1885).” *Edney v. Mathews*, 218 N. C. 171, 10 S. E. (2d) 619 (1940).

The jurisdiction and powers of the court are very comprehensive in actions of this

nature as to the purposes contemplated by them. Hence the court is vested with all powers, such as the power to grant injunctions, appoint receivers, etc., to effectuate a just and equitable settlement of the controversy. *Godwin v. Watford*, 107 N. C. 168, 11 S. E. 1051 (1890).

Under this section the superior court has jurisdiction to entertain suits brought not only by creditors, but also by any party interested in the proper administration of an estate. It may bring the creditors in as defendants and protect the rights of the parties by the appointment of a receiver. *Fisher v. Trust Co.*, 138 N. C. 91, 50 S. E. 592 (1905).

Court May Safeguard Rights of All Parties.—In an action by the beneficiaries to recover assets of the estate alleged to have been wrongfully dissipated by defendant administrator to the profit of the other defendants, alleged to have been in collusion with him, the fact that the administrator has been discharged will not preclude plaintiffs' right to maintain the action for want of a personal representative to administer any recovery that might be had, since the court has power by proper action to safeguard the rights of all parties. *Johnson v. Hardy*, 216 N. C. 558, 5 S. E. (2d) 853 (1939).

Having Acquired Jurisdiction, Court May Retain the Cause.—In an action instituted under this section to declare a trust and to adjudge the liability of certain lands to the payment of legacies, the superior court (and also the Supreme Court) once having acquired jurisdiction of the controversy may retain the cause and incidentally grant the application of the personalty. *Devereux v. Devereux*, 81 N. C. 12 (1879).

This section is not confined to actions pertaining to final settlement in the administration of estates of deceased persons. *Maryland Cas. Co. v. Lawing*, 223 N. C. 8, 25 S. E. (2d) 183 (1943).

Suit in Nature of Bill in Equity.—A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify

the executor's account. *Thigpen v. Farmers' Banking, etc., Co.*, 203 N. C. 291, 165 S. E. 720 (1932).

An action for the breach of a representative's bond and for an account may, under this section, be brought before the superior court in term, without first seeking an account in the probate court. *Bratton v. Davidson*, 79 N. C. 423 (1878).

Under this section the distributees of an estate may bring suit originally in the superior court against the administrator for an accounting and for a breach of his bond. *Leach v. Page*, 211 N. C. 622, 191 S. E. 349 (1937). See *Privette v. Morgan*, 227 N. C. 264, 41 S. E. (2d) 845 (1947).

Action by Surety on Guardian's Bond.—Where a guardian uses guardianship funds to improve and keep up property in which she is individually interested along with the wards, contributing nothing from her own funds, but taking her share of the rents, and violates her obligations as guardian in other respects, the surety on the guardian's bond may maintain an action in the superior court at term time prior to termination of the guardianship to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts, either at common law or under this section. *Maryland Cas. Co. v. Lawing*, 223 N. C. 8, 25 S. E. (2d) 183 (1943).

An action to recover for personal services rendered testator's wife is properly brought in the superior court, where it involves a construction of the will and an accounting. *Meares v. Williamson*, 209 N. C. 448, 184 S. E. 41 (1936).

The venue of an action under this section is the county of decedent's last domicile, where the will is probated. No objection as to the wrong venue, however, can be raised on an appeal if not raised in the court below. *Devereux v. Devereux*, 81 N. C. 12 (1879).

Applied in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

Cited in *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844 (1937); *Maryland Cas. Co. v. Lawing*, 225 N. C. 103, 33 S. E. (2d) 609 (1945).

§ 28-148. Proceedings against land, if personal assets fail.—If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the

proceeding shall be as is directed in other like cases. (1871-2, c. 213, ss. 27, 28; Code, ss. 1474, 1475; Rev., ss. 130, 131; C. S., s. 136.)

Necessity of Summons.—In a case falling under the provisions of this section it is unnecessary for the clerk to issue the summons referred to in this section where the parties are all in court. *Dickey v. Dickey*, 118 N. C. 956, 24 S. E. 715 (1896).

Insufficiency of Personalty.—Whether the proceedings to sell the real estate are under this section or § 28-122, it is essen-

tial that the insufficiency of the personalty be made to appear. *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891).

Applied in *Hood v. Stewart*, 209 N. C. 424, 184 S. E. 36 (1936).

Cited in *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844 (1937); *Pearson v. Pearson*, 227 N. C. 31, 40 S. E. (2d) 477 (1946).

ARTICLE 17.

Distribution.

§ 28-149. **Order of distribution.**—The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

Editor's Note.—For an analysis of this section (before the 1945 and 1947 amendments) and the classification of the interest of the various classes of distributees thereunder, see *Wells v. Wells*, 158 N. C. 330, 74 S. E. 114 (1912).

Distributees are named in this section. *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948). See note to § 31-42.

Distribution under Equitable Conversion.—While this section, as its subject matter implies, concerns the distribution of decedent's personalty, under circumstances which bring in the application of the doctrine of equitable conversion even realty or its proceeds is subject to the order of distribution prescribed under this section as if it had been personalty. *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399 (1922).

Wife Dissenting from the Will.—Even though a husband die testate, leaving a will in which he has provided for the wife, if she dissents from the will, as to her the husband has died intestate and she is entitled to her distributive right in accordance with this section, as if he had left no will. *Hunter v. Husted*, 45 N. C. 97 (1852).

Per Capita or Per Stirpes.—Where a fund consists of personalty and the claim-

ants at the death of the intestate, were, and now are, all in equal degree the next of kin of the intestate, the distribution under this section must be per capita. Representation in the distribution of this kind of property, when allowed, is resorted to only when it is necessary to bring the claimants to equality of position as next of kin. *Ellis v. Harrison*, 140 N. C. 444, 53 S. E. 299 (1906).

Distribution Per Capita Where Heirs Are of Equal Degree.—Where an intestate dies owning personalty and leaving as his sole heirs at law children of two deceased brothers and one deceased sister, the personalty must be equally divided among all his nephews and nieces per capita and not per stirpes, since all of the heirs at law are of equal degree of kinship. *Nixon v. Nixon*, 215 N. C. 377, 1 S. E. (2d) 828 (1939).

Husband as Next of Kin.—The husband of a deceased wife is not her next of kin so as to be entitled to a distributive share as such, within the purview of this section. *Peterson v. Webb*, 39 N. C. 56 (1845).

Illegitimate Child.—See note to § 28-152. **Applied in** *Lopez v. United States*, 82 F. (2d) 982 (1936).

Cited in *In re Estate of Pruden*, 199 N. C. 256, 154 S. E. 7 (1930).

1. If a married man die intestate leaving one child and a wife, the estate shall be equally distributed between the child and wife; the child or children of any child or children of the intestate who may have died prior to the father, shall represent his, her or their parent in such distribution.

Editor's Note.—The 1945 amendment re- For comment on the 1945 amendment, see wrote this subsection and subsection 2. 23 N. C. Law Rev. 348.

2. If there is more than one child, the widow shall share equally with all the children and be entitled to a child's part; the child or children of any child or

children of the intestate who may have died prior to the father shall represent his, her or their parent in such distribution.

Editor's Note.—The 1945 amendment rewrote this subsection and subsection 1. For comment on the 1945 amendment, see 23 N. C. Law Rev. 348.

"Child's Part" Interpreted.—The phrase

"child's part" as used in this section refers to the personal estate of the intestate, not to the real estate. *McKrow v. Painter*, 89 N. C. 438 (1883).

3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

Reason Where Terms Are Plain.—The terms of this subsection are plain, and it is the duty of the court to observe them, even if it (the court) cannot supply the legislative reason therefor. *Wells v. Wells*, 156 N. C. 246, 72 S. E. 311 (1911).

Intestate's Mother His Next of Kin.—When an intestate leaves no children, but a widow, a mother and sisters, the distribution of his estate is governed by this subdivision, and his mother is his next of kin and entitled to share equally in his personalty with his widow. His sisters are one degree farther than his mother.

Wells v. Wells, 158 N. C. 330, 74 S. E. 114 (1912).

Representation among Collateral Relations.—This subsection changes the former rule under the Revised Code of 1854, so as to allow representation among collateral relations as to personalty to the same extent as in the descent of real property; and where the aunts and uncles of the deceased must take, the children of those who have died may take the part of the personalty their parents would have taken if living. *Moore v. Rankin*, 172 N. C. 599, 90 S. E. 759 (1916).

4. If there is no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

5. If there is neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

Mother as Next of Kin.—If there are no children and no widow of an intestate, there is no one in equal degree with the mother; and she as the next of kin is entitled to the personal estate of her son, under this subdivision. *Wells v. Wells*, 158 N. C. 330, 74 S. E. 114 (1912).

The father and mother of an intestate under this subsection are next of kin of equal degree. *Davis v. Railroad Co.*, 136 N. C. 115, 48 S. E. 591 (1904).

Sisters and Descendants of Brothers and Sisters.—Where intestate died leaving surviving him two sisters and the descendants of three brothers and two sisters who predeceased him, in the division of the personalty the estate should be divided in seven equal parts, the surviving sisters each taking a part per capita, and

the descendants of the deceased brothers and sisters taking the share of their ancestors per stirpes. In *re Poindexter's Estate*, 221 N. C. 246, 20 S. E. (2d) 49, 140 A. L. R. 1138 (1942).

Brother and Children of Deceased Brother—Husband of Deceased Niece.—The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, and also, under the facts of this case, to the husband of a deceased niece who was living at the death of the intestate. In *re Estate of Wallace*, 197 N. C. 334, 148 S. E. 456 (1929).

Applied in *In re Estate of Mizzelle*, 213 N. C. 367, 196 S. E. 364 (1938).

6. If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The terms "father" and "mother" shall not apply to a step-parent, but shall apply to a parent by adoption: Provided, that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such

child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.

Editor's Note.—Prior to the 1915 amendment, this subsection entitled the father to the whole estate of his deceased child, to the exclusion of the mother. By the 1927 amendment the proviso to this subsection was added.

Distribution of Recovery for Wrongful Death.—Where the right of action created by statute for wrongful death does not constitute an asset of the estate, but belongs to the beneficiaries designated by this section and § 28-173 as the beneficiaries of the recovery, the administrator in bringing the action is pro hac vice their representative and not the representative of the estate. In such cases the prevailing view is to the effect that the negligence of the parent, directly or proximately contributing to the death of a child non sui juris, will bar the recovery in an action by the administrator, at least to the extent that the recovery, if any, would inure to the benefit of the parent so guilty of contributory negligence. *Pearson v. National Manufacture, etc., Corp.*, 219 N. C. 717, 14 S. E. (2d) 811 (1941).

Right of Divorced Husband to Share in Recovery for Death of His Child.—Where the husband has abandoned his wife and infant child, and the wife has obtained a divorce, and a recovery is had for the wrongful death of the child by her mother, who has again married, and has qualified as administratrix of her infant child, under the provisions of this clause of this section, casting the inheritance upon the father and mother under stated conditions when both are living, the father is entitled to half the money recovered by the mother for the wrongful death of their infant child, though under a separate statute he has lost the right to its care and custody by a former adjudication of the court in the wife's action for divorce. *Avery v. Brantley*, 191 N. C. 396, 131 S. E. 721 (1926).

7. If there is no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there is one, shall be entitled to all the personal estate of such intestate.

8. If a married woman die intestate leaving one child and a husband, the estate shall be equally distributed between the child and husband; if she leaves more than one child and a husband, the estate shall be distributed in equal portions and the husband shall receive a child's part, the child or children of any child or children of the intestate, who may have died prior to the mother, to represent his, her, or their parent in such distribution.

Editor's Note.—The 1921 amendment added the provision at the end of this clause, that the child of the intestate's

Right of Action for Mutilation of Child's Dead Body.—A father's relation to his minor child and the consequent duties imposed on him by law clothes him with a preferential right of action over the mother of the child to bring an action to recover damages for the mutilation of its dead body, and the provisions of this section do not affect the result. *Stephenson v. Duke University*, 202 N. C. 624, 163 S. E. 698 (1932). See *Floyd v. Atlantic Coast Line R. Co.*, 167 N. C. 55, 83 S. E. 12 (1914).

Distributee of Proceeds of War Risk Insurance Policy.—Where the mother of a deceased soldier was dead at the time of his death, but his father was living, and the soldier had no wife or child or issue of a child at the time of his death, it was held that under this section the proceeds of a war risk insurance policy vested in the father as sole distributee under the intestate laws of this State. *In re Hall*, 205 N. C. 241, 171 S. E. 61 (1933).

Funds Due under Policy as Assets of Estate.—Unpaid installments which accrued under a war risk insurance policy in favor of the father and mother of a deceased soldier as beneficiaries during their lives became the property of their respective estates. Installments which accrued to the assured during his lifetime, and the commuted value of the installments payable subsequent to the parents' death, became the property of the assured's estate. *McCullough v. Smith*, 293 U. S. 228, 55 S. Ct. 157, 79 L. Ed. 297 (1934), reversing *In re Estate of Reid*, 206 N. C. 102, 173 S. E. 49 (1934), which held that the installments which accrued to the beneficiaries—father and mother—during their lives should be treated as parts of the estate of the insured.

Cited in *In re Peaden*, 199 N. C. 486, 154 S. E. 832 (1930).

child shall represent his parent in the event such parent dies before the intestate.

For the history of this subsection and

subsection 9, see *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

Husband Entitled to His Distributive Share Only.—In *Kilpatrick v. Kilpatrick*, 176 N. C. 182, 96 S. E. 988 (1918), it was held that under this section, as amended by the laws of 1923, the administrator of the wife may recover from the husband notes made payable to the wife and husband in consideration of the sale of her real property, and that the husband was entitled only to his distributive share through the administration.

Husband's Interest as Counterclaim

9. If a married woman dies intestate, leaving a husband but no children, the surviving husband shall be entitled to all the personal estate of which his wife died intestate.

Cross References.—As to husband's right to administer, and his right in surplus of wife's personalty, see § 28-7 and notes. As to inheritance under insurance policy where insured killed beneficiary and himself, see note to § 28-10. As to rules of descent, see § 29-1.

For the history of this subsection and subsection 8, see *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

Collateral relatives do not share in the personal estate of a married woman dying intestate and leaving a husband or child, or both, surviving. *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948). See § 28-7.

10. An adopted child shall be entitled by succession, inheritance, or distribution of personal property, including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted parent by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents.

Editor's Note.—This subsection was added by the 1947 amendment, discussed in 25 N. C. Law Rev. 443.

11. The adoptive parents shall be entitled by succession, inheritance, or distribution of personal property including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted child by, through, and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

Editor's Note.—This subsection was added by the 1947 amendment, discussed in 25 N. C. Law Rev. 443.

12. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. § 49-10 or G. S. § 49-12 such child shall be entitled to all the rights of succession, inheritance, or distribution of personal property of its father and mother as it would have had had it been born their issue in lawful wedlock. (R. S., c. 64, s. 1; R. C., c. 64, s. 1; 1868-9, c. 113,

against His Note.—Where a husband is under this clause entitled to his distributive part in the personal property of his deceased wife, and she had a certain amount of money deposited in a bank which has become insolvent and is in a receiver's hands, the husband may not, under § 1-137, successfully set up this interest as a counterclaim against his own note, in an action thereon by the receiver of the bank, until the wife's administrator has accounted for his trust or distributed the assets of his intestate's estate. *Williams v. Williams*, 192 N. C. 405, 135 S. E. 39 (1926).

Action for Wrongful Death.—Where an administrator instituted action for wrongful death against intestate's husband upon allegations that the husband's negligence caused the death of his intestate, and intestate left no children surviving her, it was held that the husband being the sole beneficiary of any recovery under this section, the courts will look beyond the nominal party plaintiff, and recovery will not be allowed under the principle that a wrongdoer will not be permitted to enrich himself as a result of his own misconduct. *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947).

Cited in *McMillan v. Robeson*, 225 N. C. 754, 36 S. E. (2d) 235 (1945).

s. 53; Code, s. 1478; 1893, c. 82; Rev., s. 132; 1913, c. 166; 1915, c. 37; C. S., ss. 7, 137; 1921, c. 54; 1927, c. 231; 1945, c. 46; 1947, c. 879.)

Editor's Note.—This subsection was added by the 1947 amendment, discussed in 25 N. C. Law Rev. 443.

§ 28-150. **Advancements to be accounted for.**—Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled Descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate. (1868-9, c. 113, s. 54; Code, s. 1483; Rev., s. 133; C. S., s. 138.)

Cross Reference.—See § 29-1, Rule 2, and notes.

Advancement Defined.—An advancement is defined to be an irrevocable gift in praesenti of money or property, real or personal, by a parent to a child to enable the latter to anticipate the inheritance or succession of the property of the former to the extent of the gift. *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912).

Creature of Statute Law.—Advancements are the creatures of statute law. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Advancements are restricted by this section to gifts from a parent to a child, and ordinarily grandchildren may not be held accountable for gifts to themselves, but must account for gifts from their grandparents to their parent before they can inherit from their grandparent. *Parker v. Eason*, 213 N. C. 115, 195 S. E. 360 (1938).

Gifts made to the grandchildren are not required to be accounted for. *Daves v. Haywood*, 54 N. C. 253 (1854); *Skinner v. Wynne*, 55 N. C. 41 (1854). But see *Wolfe v. Galloway*, 211 N. C. 361, 190 S. E. 213 (1937).

Advancements by Mother.—The original statute (1 Rev. Stat. ch. 64, sec. 2) which provides for the accounting of advancements used the pronouns "he" and "she", and under this terminology it was held that the statute applied to advancements made by the mother as well as by the father. *Daves v. Haywood*, 54 N. C. 253 (1854).

Advancement a Matter of Intention.—The question whether a transfer of property from a parent to the child was a gift, loan or advancement is to be settled by the intention of the parent and surrounding circumstances at the time of the

transfer, which may be shown by parol evidence. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Presumption of Advancement.—The presumption is that property transferred or money paid by the parent is an advancement. But this presumption is prima facie, and is rebuttable by parol even where there is a recital of the consideration in the deed, by a showing that the parent had a contrary intention at the time. The rule is not altered by this section. *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912). See *Hollister v. Attmore*, 58 N. C. 373 (1860); *Harper v. Harper*, 92 N. C. 300 (1885).

Recital of Valuable and Adequate Consideration.—Where a valuable and adequate consideration is recited, the presumption is against the conveyance's being an advancement, and the burden to overcome this presumption is upon him who alleges the transfer to be an advancement. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Return of Advancements as to the Widow.—Before the act of 1784, advancements were not required to be brought into the hotchpot for the benefit of the widow. But since that act, the policy of equality between the widow and the children, as well as among the children themselves, is pronounced by the express terms of this section. *Davis v. Duke*, 1 N. C. 526 (1801). This principle is applied in *Eller v. Lillard*, 107 N. C. 486, 12 S. E. 462 (1890).

Intestate's Dying Seized of Land Not a Prerequisite.—The advancements are to be accounted for even though the intestate has not died seized of any real estate. *Headen v. Headen*, 42 N. C. 159 (1850).

§ 28-151. **Children advanced to render inventory; effect of refusal.**—Where any parent dies intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth there-

in the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of said estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share. (1868-9, c. 113, ss. 55, 56; Code, ss. 1484, 1485; Rev., ss. 134, 135; C. S., s. 139.)

Restricted Meaning of Section.—The general words of this section requiring the child to give an inventory of "any personal property of what nature or kind soever" have uniformly been held to have a restricted meaning, in that every gift of personal property by a donor is not necessarily an advancement. *Bradsher v. Canady*, 76 N. C. 445 (1877).

Expenses Properly Charged as Advancements to Grandchild.—Intestate's grand-

child, a daughter of intestate's deceased daughter, was charged with advancements for sums paid by intestate for her schooling and expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. Upon the facts found by the referee the charge of advancements was correct. *Wolfe v. Galloway*, 211 N. C. 361, 190 S. E. 213 (1937). See annotations under § 28-150.

§ 28-152. Illegitimates next of kin to mother and to each other.—Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock. 1868-9, c. 113, ss. 57, 58; Code, ss. 1486, 1487; Rev., ss. 136, 137; C. S., s. 140.)

Cross References.—As to effects of legitimation, see § 49-11, and § 28-149, clause 12. As to descent of real property to and among illegitimates, see § 29-1, Rules 9 and 10.

Inheritance from Grandfather through Mother Who Predeceased Him.—An illegitimate child may not inherit as heir at law from her grandfather, dying intestate, through her legitimate mother who predeceased him, under this section and § 28-149, clauses 4 and 5. In re Estate of Bullock, 195 N. C. 188, 141 S. E. 577 (1928), citing *Waggoner v. Miller*, 26 N. C. 480 (1844); *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925), and distinguishing *Skinner v. Wynne*, 55 N. C. 41 (1854).

Brothers and Sisters of Bastard's Mother Do Not Inherit.—Under this section the mother and brothers and sisters of a bastard may inherit from him, but the rule extends no further, and the brothers and sisters of the bastard's mother may not inherit from him. *Sharpe v. Carson*, 204 N. C. 513, 168 S. E. 829 (1933).

Distributive Shares of Widow and Niece.—Where a bastard died intestate leaving the daughter of a bastard brother, born of the same mother, his next of kin and a widow, it was held that the widow was entitled only to one-third of the personal estate and the daughter of his bastard brother to two-thirds. *Coor v. Starling*, 54 N. C. 243 (1854). As to present amount of widow's distributive share, see § 28-149.

Conflict of Laws.—In the case of *Kenny v. Seaboard, etc., R. Co.*, 167 N. C. 14, 82 S. E. 968 (1914), an action was brought to recover damage for wrongful death under the Federal Employers' Liability Act which made the "next of kin," in the absence of other specified persons, the distributee of the decedent. It was held that the persons included in the phrase "next of kin" are to be determined by the laws of this State; and hence, the half brothers and sisters of the illegitimate child deceased were his "next of kin" within the meaning of this section, and entitled to their respective distributive shares as such.

§ 28-153. Allotment to after-born child in real estate.—The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there is enough for that purpose; and if there is none undevise, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devise; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient,

as will make the proper share of such child. (1868-9, c. 113, s. 108; Code, s. 1536; Rev., s. 138; C. S., s. 141.)

Cross References.—See § 31-45. As to compelling contribution among heirs, see § 28-67.

§ 28-154. **Allotment to after-born child in personal property.**—The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose; and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child. (1868-9, c. 113, s. 109; Code, s. 1537; Rev., s. 139; C. S., s. 142.)

As of What Time Contributions Made.—Contributions to make up the share of a child born after the execution of his father's will, must be made by the legatees in proportion to their respective interests under the will, dated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time. *Johnson v. Chapman*, 54 N. C. 130 (1853).

Child Not en Ventre Sa Mere.—Before a child can be entitled to a distributive share under the statute of distribution, it must appear that he was either in being or en ventre sa mere at the time of the death of the intestate. Thus a half brother of the intestate born ten months and a half after her death is not entitled to a distributive share, though born before distribution. *Grant v. Bustin*, 21 N. C. 77 (1835).

§ 28-155. **Allotment of personalty from proceeds of realty.**—If, after satisfaction of the child's share of real estate out of undeviseed lands, there is a surplus of such lands, and there is no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undeviseed land, or as much as be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both deviseed and descended; and the same shall be set apart and secured as real estate to such child, if an infant or non compos. (1868-9, c. 113, s. 110; Code, s. 1538; Rev., s. 140; C. S., s. 143.)

§ 28-156. **Effect of allotment of realty; contribution to equalize burden.**—Upon the allotment of such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every one of them equitable, and in the ratio of the values of the several devisees and legacies. (1868-9, c. 113, s. 111; Code, s. 1539; Rev., s. 141; C. S., s. 144.)

Cross Reference.—As to compelling contribution among heirs, see § 28-67.

§ 28-157. **After-born child on allotment deemed devisee or legatee.**—An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels deviseed or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit in-

stituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit. (1868-9, c. 113, s. 112; Code, s. 1540; Rev., s. 142; C. S., s. 145.)

§ 28-158. **Before settlement executor may have claimants' shares in estate ascertained.**—In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly. (1868-9, c. 113, s. 113; Code, s. 1541; Rev., s. 143; C. S., s. 146.)

§ 28-159. **Legacy or distributive share recoverable after two years.**—Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceeding therein conducted as prescribed in other cases of special proceedings. (1868-9, c. 113, s. 83; Code, s. 1510; Rev., s. 144; C. S., s. 147.)

When Suit for Legacy May Be Maintained.—Only after final account is filed or after the lapse of two years can a suit for a legacy be maintained. *King v. Richardson*, 136 F. (2d) 849 (1943).

What Court Has Jurisdiction.—Under this section the probate court (i. e., the clerk of the superior court) has exclusive jurisdiction of proceedings for the recovery of legacies and distributive shares. When, however, a specific pecuniary legacy has been given, and has been assented to by the executor, it becomes a debt, and must be recovered by action brought to the regular term of the superior court. *Hendrick v. Mayfield*, 74 N. C. 626 (1876).

Under this section the clerk of the superior court has original jurisdiction by special proceedings for the recovery of legacies, etc. But where an action is brought for the same to the regular term of the superior court, the defect is cured by the act of 1870, 1871, ch. 108 (Bat. Rev. ch. 17, secs. 425, 426). *Bell v. King*, 70 N. C. 330 (1874).

Proof of Assets.—While under this section a petition for the recovery of a legacy may be filed before the clerk of the superior court and prosecuted as in other

cases of special proceedings, unless the personal representative has assented to the legacy or the admission of assets is otherwise made to appear, a recovery can be had only upon proof that assets either have come or should have come into his hands applicable to the payment of the legacy. Unless this is done a judgment in the legatee's favor is reversible error. *York v. McCall*, 160 N. C. 276, 76 S. E. 884 (1912).

In special proceedings to remove an administratrix, her rights as distributee may not be determined, such rights being determinable only in an action or proceeding in which both she and the administrator are parties. In *re Banks' Estate*, 213 N. C. 382, 196 S. E. 351 (1938).

Where executors never delivered stock to the trustees of a trust, they are not protected by the conveyance made by the trustees to the holder of the life interest, who was one of their number, but they too are liable for the value of the stock, since as executors they held it as trustees for those to whom it was devised. *King v. Richardson*, 136 F. (2d) 849 (1943).

Applied in *Security Nat. Bank v. Bridgers*, 207 N. C. 91, 176 S. E. 295 (1934).

§ 28-160. **Payment to clerk after one year discharges representative pro tanto.**—It is competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of admin-

istration, to pay into the office of the clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid. (1881, c. 305, s. 1; Code, s. 1543; Rev., s. 145; C. S., s. 148.)

The purpose of this section is to provide a safe public depository for such moneys and the exoneration of the personal representative. Ex parte Cassidey, 95 N. C. 225 (1886).

Provisions Directory.—The provisions of this section are directory, and not mandatory. Moore v. Eure, 101 N. C. 11, 7 S. E. 471 (1888); Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520 (1889).

Clerk's Responsibility.—Moneys paid to the clerk under this section do not pass into the jurisdiction of the superior court, but the clerk receives and is chargeable with them, not, however, by virtue of his duties in connection with the court as a clerk, but as a safe public depository. Ex parte Cassidey, 95 N. C. 225 (1886).

He receives them by virtue of his office as a clerk, and hence (his bond covering all moneys coming into his hands by virtue or color of his office) he is liable for them upon his bond. Presson v. Boone, 108 N. C. 78, 12 S. E. 897 (1891). See Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520 (1889).

Liability for Interest.—Where funds belonging to a minor are paid into the hands of the clerk of the superior court by an administrator under the provisions of this section, discharging the administrator and his sureties from liability in regard thereto, it is not required by §§ 28-166 and 2-46 that the clerk invest the funds, upon inter-

est, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested; but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody. Williams v. Hooks, 199 N. C. 489, 154 S. E. 828 (1930).

Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of this section, the case will be remanded for a specific finding in regard thereto. Williams v. Hooks, 199 N. C. 489, 154 S. E. 828 (1930).

Deposit of Moneys of Heirs.—The deposit authorized by this section refers to moneys belonging to the legatees or distributees of the estate. It does not refer to funds belonging to the heirs, such as proceeds of realty after payment of debts, which by the terms of § 28-58 are considered as realty belonging to the heirs or devisees. Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520 (1889).

Applied in Hunter v. Nunnamaker, 230 N. C. 384, 53 S. E. (2d) 292 (1949).

§ 28-161. On payment clerk to sign receipt.—It is the duty of the clerk, in the cases provided for in § 28-160, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office. (1881, c. 305, s. 3; Code, s. 1544; Rev., s. 146; C. S., s. 149.)

Cross Reference.—See annotations under § 28-160.

Recovery of Moneys Paid into Clerk's Office.—A proceeding similar to that provided in §§ 28-147 and 28-159 may be maintained against the clerk, either by

special proceedings or by civil action in the superior court, in cases where a representative has paid the money in his hands into the office of the clerk under § 28-160. Ex parte Cassidey, 95 N. C. 225 (1886).

ARTICLE 17A.

Uniform Simultaneous Death Act.

§ 28-161.1. Disposition of property where no sufficient evidence of survivorship.—Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be dis-

posed of as if he had survived, except as provided otherwise in this article. (1947, c. 1016, s. 1.)

§ 28-161.2. **Beneficiaries of another person's disposition of property.**—Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived. (1947, c. 1016, s. 2.)

§ 28-161.3. **Joint tenants or tenants by the entirety.**—Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants. (1947, c. 1016, s. 3.)

§ 28-161.4. **Insurance policies.**—Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. (1947, c. 1016, s. 4.)

§ 28-161.5. **Article does not apply if decedent provides otherwise.**—This article shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this article. (1947, c. 1016, s. 6.)

§ 28-161.6. **Uniformity of interpretation.**—This article shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it. (1947, c. 1016, s. 7.)

§ 28-161.7. **Short title.**—This article may be cited as the Uniform Simultaneous Death Act. (1947, c. 1016, s. 8.)

ARTICLE 18.

Settlement.

§ 28-162. **Representative must settle after two years.**—No executor, administrator, or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased; and the clerk of the superior court in each county shall require settlement of the balance in hand due distributees as shown by the final account of any administrator, executor, or guardian, and shall audit same: Provided, that the several clerks of the superior courts of this State may, in their discretion, for good cause shown, extend the time for the final settlement of any administrator or executor; provided, that nothing herein contained shall relieve any such administrator or executor of the duty of administering and distributing such funds and property in his hands as may be available for such purposes; provided, further, that any party having an interest in any such estate may, within ten days from the entry of an order extending the time for final settlement, appeal from such order to the resident or presiding judge of the district, which appeal shall be heard as is now or may hereafter be prescribed by law for the

hearing of other appeals from the clerk. (1868-9, c. 113, s. 59; Code, s. 1488; Rev., s. 147; 1919, c. 69; C. S., s. 150; 1933, c. 188; 1935, c. 377.)

Editor's Note.—The allowance of two years in this section is intended as a maximum limitation beyond which the representative may not retain any part of the estate; it is not a permissive limitation for a period of two years. It is based upon the supposition that many estates which are complicated cannot be settled in less time. Hence where there are no debts due from the estate, the representative will not be permitted to suspend the settlement for a period of two years. See *Turnage v. Turnage*, 42 N. C. 127 (1850).

This section merely marks the utmost limit of time in which the representative must settle; it does not authorize him to withhold settlement for that length of time (two years) where there is no justification therefor. Hence the parties interested may call on him to account within that period. *Snow v. Boylston*, 185 N. C. 321, 117 S. E. 14 (1923). See *Clements v. Rogers*, 91 N. C. 63 (1884).

Same — Amendments.—The first proviso, as added by the 1933 amendment, was changed by the 1935 amendment, which also added the last two provisos.

The final account always precedes the settlement, for without it there is no way of telling what is due. *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

Statute of Limitation.—After ten years from the expiration of the two years' period prescribed by this section, an action for settlement against the personal representative will be barred by the statute of limitation. *Edwards v. Lemmond*, 136 N. C. 329, 48 S. E. 737 (1904).

This section gives the personal representative two years to make a final settlement, but he may be sued within ten years thereafter. *Healey v. Reynolds Tobacco Co.*, 48 F. Supp. 207 (1942).

Cited in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

§ 28-163. **Extension of time for final accounts when funds are in closed banks.**—Where as much as twenty-five per cent of the estate of any decedent is represented by deposits in a bank or trust company in course of liquidation, the personal representative of such decedent shall, in the discretion of the clerk of the superior court, have ninety days after the payment of the final dividend in which to file his final account. The several clerks of the superior court of this State may, in their discretion, upon good cause shown, extend the time for the final settlement of any executor or administrator: Provided, that this section shall not relieve any personal representative of the duty of administering and distributing other funds and property in his hands, as now required by law. (1935, c. 244.)

§ 28-164. **Retention of funds to satisfy claims not due or in litigation.**—If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim. (1868-9, c. 113, s. 60; Code, s. 1489; Rev., s. 148; C. S., s. 151.)

No Allowance for Contingent Liabilities.—Claims for which an allowance will be made to the representative, within the contemplation of this section, are such claims as are existing and capable of being ascertained, and not a mere contin-

gent liability which may never ripen into a cause of action, such as the contingent liability of a surety or cosurety on an administration bond. *Adams v. Durham, etc., R. Co.*, 110 N. C. 325, 14 S. E. 857 (1892).

§ 28-165. **After final account representative may petition for settlement.**—An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his

charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right. (1868-9, c. 113, s. 96; Code, s. 1525; Rev., s. 150; C. S., s. 152.)

Payment of Debts Necessary.—The personal representative should pay all debts before beginning a proceeding under this section. *Carlton v. Byers*, 93 N. C. 302 (1885).

Allegations of Petition.—Where the petition filed under this section does not state that the personal representative has filed a final account or that he has the

funds ready in hand for distribution, the petition will be dismissed. *Moore v. Rankin*, 172 N. C. 599, 90 S. E. 759 (1916). See *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

Applied in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

Cited in *In re Estate of Wallace*, 197 N. C. 334, 148 S. E. 456 (1929).

§ 28-166. **Payment into court of fund due absent defendant or infant.**—When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C. S., s. 153.)

Cross Reference.—As to the manner of investment of funds in the hands of clerks of court under color of their office, see § 2-54 et seq. It has been suggested in 9

N. C. Law Rev. 399 that this section is impliedly repealed in part by those sections.

§ 28-167. **Procedure where person entitled unheard of for seven years.**—When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C. S., s. 154.)

§ 28-168. **Parties to proceeding for settlement.**—In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record. (1893, c. 206; Rev., s. 154; C. S., s. 155.)

§ 28-169. **When legacies may be paid in two years.**—It is in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund. (Code, s. 1512; Rev., s. 155; C. S., s. 156.)

Expiration of Two Years Not Prerequisite to Payment.—The provision of this section is only a legislative affirmation of

the law as it existed before the Code. The allowance of two years to the representative is intended as an indulgence; it does

not authorize him to defer the settlement until the expiration of that time, without necessity. *Clements v. Rogers*, 91 N. C. 63 (1884).

It follows that in a petition filed against the representative for settlement absence of allegation that two years have elapsed since his qualification is immaterial, where it is alleged that the estate is solvent and that there is no reason why the represent-

ative should further retain the fund. *Leonard v. Leonard*, 107 N. C. 168, 11 S. E. 1051 (1890).

Call for Account within Two Years.—The representative may be called upon by the legatees or the next of kin to account for the distributive shares and legacies even before the expiration of two years from the time of grant of administration. *Hobbs v. Craige*, 23 N. C. 332 (1840).

§ 28-170. Commissions allowed representatives.—Executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries shall be entitled to commissions to be fixed in the discretion of the clerk not to exceed five per cent upon the amount of receipts, including the value of all personalty when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. In determining the amount of such commissions, both upon personalty received and upon expenditures made, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. Where land is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies. The clerk may make allowances on account of commissions on receipts of personalty and expenditures at any time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit herein fixed. Nothing in this section shall prevent the clerk allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of the shares of distributees of personal property or on distribution of shares of legatees; and nothing herein contained shall be construed to abridge the right of any interested party to such administration to appeal from the clerk's order to the judge of the superior court. (1868-9, c. 113, s. 95; 1869-70, c. 189; Code, s. 1524; Rev., s. 149; C. S., s. 157; 1941, c. 124.)

Editor's Note.—The 1941 amendment rewrote this section. For comment on the 1941 amendment, see 19 N. C. Law Rev. 543.

Representative Not Entitled to Commissions at All Events.—The representative is not, under this section, entitled to commission at all events. He must have earned them by a just and reasonable discharge of his duties. It must appear that the "receipts and expenditures" referred to have been fairly made in the course of administration. The law will not allow compensation to one who disregards its commands. *Grant v. Reese*, 94 N. C. 720 (1886).

When Commissions and Charges Should Not Be Allowed.—The compensation is allowed to the representative in order to reward him not only for his time, labor and trouble but also for the responsibility incurred, and the fidelity with which he discharged the duties of his trust. It should not be allowed where due to his

neglect the estate has suffered loss. *Kelly v. Odum*, 139 N. C. 278, 51 S. E. 953 (1905).

This same rule applies to the allowance of necessary charges and disbursements, such as counsel fees, *Kelly v. Odum*, 139 N. C. 278, 51 S. E. 953 (1905); for example, where the representative resists a claim which has been adjudged against him in a prior litigation. *Johnson v. Marcom*, 121 N. C. 83, 28 S. E. 58 (1897).

Commissions are allowed where one person is both administrator and guardian of distributee. *Rose v. Bank of Wadesboro*, 217 N. C. 600, 9 S. E. (2d) 2 (1940).

Attorney as Executor.—When a lawyer voluntarily becomes executor he assumes the office cum onere, and the exercise by him of his professional skill in the management of the estate does not entitle him to counsel fees, but his compensation is limited to the five per cent maximum allowed by this section. *Lightner v. Boone*, 221 N. C. 78, 19 S. E. (2d) 144 (1942).

Commission on Both Receipts and Disbursements.—Commissions may be allowed to the representative on both receipts and disbursements, as separate acts. *Bank v. Bank*, 126 N. C. 531, 36 S. E. 39 (1900).

Commission on Specific Property Administered.—It was formerly held that specific articles merely inventoried by an executor and delivered to the legatee, were not "receipts," within the meaning of this section, upon which a commission was to be calculated. It was held that it might be proper, in estimating the commission, to take into consideration the trouble of managing such articles, but that the value of such articles was not to be the basis of such computation. *Walton v. Avery*, 22 N. C. 405 (1839). But see the effect of the 1941 amendment to this section, which, among other changes, inserted the words "including the value of all personalty when received" in the first sentence.

Dower as an "Interest in the Estate."—Manifestly, a claim of dower is an "interest" in the estate. Hence the wording of this section lends direct support to a judgment giving priority to commissions due executors, reasonable attorney's fees and

costs. *Parsons v. Leak*, 204 N. C. 86, 167 S. E. 563 (1933).

Necessary Charges.—Besides commissions, the representative is allowed to retain his expenses for necessary charges and disbursements in the settlement of the estate. Among these necessary charges fees paid to counsel are embraced. *Hester v. Hester*, 38 N. C. 9 (1843); *Love v. Love*, 40 N. C. 201 (1848); *Fairbairn v. Fisher*, 58 N. C. 385 (1860).

Order for Commissions Final Judgment.—An order allowing commissions is a final judgment upon which an appeal may be taken. *Bank v. Bank*, 126 N. C. 531, 36 S. E. 39 (1900).

Appeal on Commission under 5%.—Notwithstanding the fact that the amount of commissions allowed in a given case has not exceeded 5% on the receipts and disbursements, the allowance is reviewable upon appeal for inadequacy or excessiveness. It cannot strictly be said that the lower court has exclusive discretion within the limit of 5%. *Bank v. Bank*, 126 N. C. 531, 36 S. E. 39 (1900).

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345 (1934).

§ 28-171. **Liability and compensation of clerk.**—Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow. (1868-9, c. 113, s. 98; Code, s. 1527; Rev., s. 152; C. S., s. 158.)

ARTICLE 19.

Actions by and against Representative.

§ 28-172. **Action survives to and against representative.**—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate. (1868-9, c. 113, s. 63; Code, s. 1490; Rev., s. 156; C. S., s. 159.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—For a discussion of this section, see note to *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946), in 25 N. C. Law Rev. 84.

Section Changes Common Law.—The rule of the common law that a personal right of action dies with the person has been changed by this section and § 1-74, and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal

representative. *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938). See *Mast v. Sapp*, 140 N. C. 533, 53 S. E. 350 (1906).

Relation of Revival and Survival.—The general rule is that wherever an action can be revived against the representative, it will also survive against him. *Butner v. Keelhn*, 51 N. C. 60 (1858).

A cause of action which survives against successor personal representatives of an estate likewise survives in favor of successor personal representatives of the estate. *Harrison v. Carter*, 226 N. C. 36, 36

S. E. (2d) 700 (1946), citing *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938).

Injuries to Person Not Causing Death.—It was formerly held that this section did not change the common-law rule that a right of action sounding in tort for personal injuries does not survive the tortfeasor or the injured person where the injury did not cause death, in view of the express terms of the statute from which § 28-175 is derived, which then provided that injuries to the person not causing death to the injured party shall not survive. See *Harper v. Commissioners*, 123 N. C. 118, 31 S. E. 384 (1898); *Strauss v. Wilmington*, 129 N. C. 99, 39 S. E. 772 (1901); *Bolick v. Railroad*, 138 N. C. 370, 50 S. E. 689 (1905); *Watts v. Vanderbilt*, 167 N. C. 567, 83 S. E. 813 (1914). And under the same provision, it was held that an action for mental anguish caused by failure to deliver a telegram did not survive. *Morton v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484 (1902).

But the said provision no longer appears, and the fact that the injury in suit did not cause the death of the injured party, but that death resulted from another cause, does not now prevent the survival of an

action for negligent injury. *Fuquay v. A. & W. Ry. Co.*, 199 N. C. 499, 155 S. E. 167 (1930).

The breach of a condition subsequent contained in a deed entitles the grantor during his life, or his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, this section not being applicable. *Barkley v. Thomas*, 220 N. C. 341, 17 S. E. (2d) 482 (1941).

This section does not revive the action against a distributee, but against the personal representative. *Healey v. Reynolds Tobacco Co.*, 48 F. Supp. 207 (1942).

Vindictive Damages.—Though the cause of action for trespass may survive against the representative of the trespasser, no vindictive damages may be recovered in such action. *Rippey v. Miller*, 33 N. C. 247 (1850).

Applied in *Baird Co. v. Boyd*, 41 F. (2d) 578 (1930); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947).

Cited in *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937); *Morgan v. Carolina Coach Co.*, 225 N. C. 668, 36 S. E. (2d) 263 (1945).

§ 28-173. **Death by wrongful act; recovery not assets; dying declarations.**—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence. (R. C., c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70, 72, 115; Code, ss. 1498, 1500; Rev., s. 59; 1919, c. 29; C. S., s. 160; 1933, c. 113.)

- I. In General.
- II. Limitation of the Action.
- III. Parties to the Action.
- IV. Distribution of Recovery.
- V. Admission of Declarations.

I. IN GENERAL.

Cross Reference.—See note to § 1-183.

Editor's Note.—The exception as to burial expenses to the exemption of the amount from payment of debts was inserted by the 1933 amendment.

For critical appraisal of this section, see 11 N. C. Law Rev. 263. And see 16 N. C. Law Rev. 211. For a discussion of the right of husband or wife to recover damages for the loss of consortium by reason of injury or death, see 3 N. C. Law Rev. 98.

Purpose of Section.—The purpose of this section was to withdraw claims of this kind from the effect and operation of the maxim *actio personalis moritur cum persona*, and to continue, as the basis of the

claim of his estate, the wrongful injury to the person resulting in death. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

Section Creates New Cause of Action.—The cause of action for personal injuries ceases with the death of the injured party and the action under this section is not a survival of the former but an entirely new action. *Harper v. Commissioners*, 123 N. C. 118, 31 S. E. 384 (1898); *Bolick v. Railroad*, 138 N. C. 370, 50 S. E. 689 (1905). See *Taylor v. Cranberry, etc., Iron Co.*, 94 N. C. 526 (1886).

This section creates a new cause of action, however, only in the sense that at common law the right did not survive to the personal representative. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

The wrongful death statutes (now this and the following section), confer a new right of action with damages limited to fair and just compensation for the pecuniary injury resulting from death, recoverable by the personal representative for the benefit of the next of kin. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946). See *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948).

No Such Right Existed at Common Law.—The right of recovery for death by wrongful act did not exist at common law, and rests entirely upon this section. *Broadnax v. Broadnax*, 160 N. C. 432, 76 S. E. 216 (1912); *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 126 S. E. 307 (1925); *Wilson v. Massagee*, 224 N. C. 705, 32 S. E. (2d) 335 (1944); *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948); *Lewis v. North Carolina State Highway, etc., Comm.*, 228 N. C. 618, 46 S. E. (2d) 705 (1948).

The right to maintain an action for wrongful death is purely statutory. No such right existed at common law, and the provisions of this section authorizing the institution and maintenance of such an action are no more binding upon the courts than the provisions of this section which direct how the recovery in such action shall be distributed. *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947).

Construction.—This section is not penal but remedial in its nature, and it should be given such construction as will effectuate the intention of the legislature in enacting it. *Vance v. Railroad*, 138 N. C. 460, 50 S. E. 860 (1905); *Hall v. Southern R. Co.*, 149 N. C. 108, 62 S. E. 899 (1908).

This section does not regard the family relation, and is not for the purpose of compensating the families of persons killed by

accident. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900).

Right of Action a Property Right.—This section gives clear indication of the purpose of the legislature to impress upon the right of action the character of property as a part of the intestate's estate. *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674 (1907).

What Constitutes a Cause of Action.—It is entirely immaterial for the purpose of establishing a cause of action under the provisions of this section whether the act was wanton or cruel. Facts showing a legal duty and neglect thereof on the part of defendant with a resulting injury to the plaintiff are sufficient to constitute a cause of action. *Western Union Tel. Co. v. Catlett*, 177 F. 71 (1910).

Plaintiff must show failure on part of defendant to exercise proper care in performance of some legal duty which the defendant owed plaintiff's testator under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of injury which produced death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the existing facts. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945).

Where Deceased Is an Infant.—Under this section the administrator may sue for the death of an infant a few months old. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900); *Davis v. Railroad Co.*, 136 N. C. 115, 48 S. E. 591 (1904).

No Action Where Decedent Fully Compensated before Death.—Where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of action arising from the same injury will not lie after his death for further damages for the benefit of his estate. *Edwards v. Interstate Chemical Co.*, 170 N. C. 551, 87 S. E. 635 (1916).

Recovery of Burial Expenses.—A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947).

Killing in Georgia of North Carolina Resident.—The wrongful death statute of Georgia is not so dissimilar from this section in scope, meaning, and practical ap-

plication as to deprive the trial courts of this State of jurisdiction to hear and determine a cause for the negligent killing in the state of Georgia of a resident of this State. *Rodwell v. Camel City Coach Co.*, 205 N. C. 292, 171 S. E. 100 (1933).

Right Must Be Asserted in Conformity with Section.—The right to maintain an action for damages for wrongful death must be asserted in conformity with this section. *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948).

Writ of Attachment May Issue.—A writ of attachment will issue under § 1-440, subsection 4, to enforce the right created by this section. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

Nonsuit.—In a civil action under this and the succeeding section to recover damages for alleged wrongful death, where issues of fact are raised which the jury alone may decide, it is error for the court to allow a motion for judgment as of nonsuit. *Henson v. Wilson*, 225 N. C. 417, 35 S. E. (2d) 245 (1945).

Applied in Hancock v. Wilson, 211 N. C. 129, 189 S. E. 631 (1937); *Lemings v. Southern Ry. Co.*, 211 N. C. 499, 191 S. E. 39 (1937); *Mack v. Marshall Field & Co.*, 217 N. C. 55, 6 S. E. (2d) 889 (1940); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947); *Hahn v. Perkins*, 228 N. C. 727, 46 S. E. (2d) 854 (1948).

Cited in *Harper v. Bullock*, 198 N. C. 448, 152 S. E. 405 (1930); *Hawkins v. Rowland Lumber Co.*, 198 N. C. 475, 152 S. E. 169 (1930); *Wilson v. Clement Co.*, 207 N. C. 541, 177 S. E. 797 (1935); *Peter-son v. McManus*, 208 N. C. 802, 182 S. E. 483 (1935); *Winslow v. Carolina Confer-ence Ass'n*, 211 N. C. 571, 191 S. E. 403 (1937); *Taylor v. Atlantic Coast Line R. Co.*, 213 N. C. 671, 197 S. E. 159 (1938); *Barber v. Minges*, 223 N. C. 213, 25 S. E. (2d) 837 (1943); *Morgan v. Carolina Coach Co.*, 225 N. C. 668, 36 S. E. (2d) 263 (1945); *Martin v. Currie*, 230 N. C. 511, 53 S. E. (2d) 447 (1949).

II. LIMITATION OF THE ACTION.

Provision as to Time Strictly Construed.

—The provision requiring suit to be brought within one year after the death must be strictly complied with. *Taylor v. Cranberry Iron, etc., Co.*, 94 N. C. 525 (1886); *Whitehead v. Branch*, 220 N. C. 507, 17 S. E. (2d) 637 (1941). And no explanation as to why the action was not brought within such time can avail. Therefore, the fact that no administrator was appointed does not vary the rule. *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997 (1890).

See *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948).

Provision Is Condition Affecting Cause of Action.—The provision that the action must be brought within one year is not a statute of limitation but is a condition affecting the cause of action itself. *Trull v. Seaboard Air Line R. Co.*, 151 N. C. 545, 66 S. E. 586 (1909). See *Mathis v. Camp Mfg. Co.*, 204 N. C. 434, 168 S. E. 515 (1933); *Curlee v. Duke Power Co.*, 205 N. C. 644, 172 S. E. 329 (1934).

The one year limitation in this section has been consistently construed as a condition precedent to maintenance of the right of action. *Moore v. Atlantic Coast Line R. Co.*, 153 F. (2d) 782 (1946). See also, *Webster v. Charlotte*, 222 N. C. 321, 22 S. E. (2d) 900 (1942); *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700 (1946); *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948), discussed in 27 N. C. Law Rev. 160; *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948); *Wilson v. Chastain*, 230 N. C. 390, 53 S. E. (2d) 290 (1949).

And when the action is not brought within the prescribed time the liability created by the statute ceases. *Lewis v. North Carolina State Highway, etc., Comm.*, 228 N. C. 618, 46 S. E. (2d) 705 (1948); *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948), discussed in 27 N. C. Law Rev. 160.

Compliance Must Be Alleged and Proved by Plaintiff.

—Compliance with the provision requiring the action to be brought within one year after the death must be alleged and proved by the plaintiff, and the defendant is not required to plead the provision as a statute of limitations. *Bennett v. North Carolina R. Co.*, 159 N. C. 345, 74 S. E. 883 (1912); *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529 (1922); *Hanie v. Penland*, 193 N. C. 800, 138 S. E. 165 (1927).

The personal representative must allege and prove that the action is instituted within the time prescribed. *Wilson v. Chastain*, 230 N. C. 390, 53 S. E. (2d) 290 (1949). See *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948), discussed in 27 N. C. Law Rev. 160.

And Defendant Need Not Plead Provision.

—The requirement that the action shall be brought within one year is a condition annexed to the right of action and not to the person of the defendant and it must be shown by the plaintiff that he has complied therewith, and it is not necessary for the defendant to plead it as a statute of limitations. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928).

Noncompliance May Be Taken Advantage of by Demurrer.—The fact that an action is not instituted within the limitation prescribed may be taken advantage of by demurrer when the dates appear as a matter of record. *George v. Atlanta, etc., Ry. Co.*, 210 N. C. 58, 185 S. E. 431 (1936).

The fact that an amended complaint stating for the first time a cause of action for wrongful death is filed more than one year after the death of plaintiff's intestate may be taken advantage of by demurrer. *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948), discussed in 27 N. C. Law Rev. 160.

Where it appeared upon the face of the record that more than one year had elapsed between the accrual of the cause of action and the filing of the amended complaint, the demurrer of the defendants was properly sustained, the action against them not having been instituted within the limitation prescribed by this section. *George v. Atlanta, etc., Ry. Co.*, 210 N. C. 58, 185 S. E. 431 (1936). See *Davis v. Norfolk Southern R. Co.*, 200 N. C. 345, 157 S. E. 11 (1931).

Provision Applies to Nonresident Defendant.—The provision that the action must be brought within one year applies with full force whether the defendant be a resident or a nonresident. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928), citing *McGuire v. Lumber Co.*, 190 N. C. 806, 131 S. E. 274 (1925).

Effect of Soldiers' and Sailors' Relief Act.—At the time of intestate's death plaintiff administrator was in the armed forces. Plaintiff was appointed administrator within one year after discharge from the army and instituted this suit for wrongful death. Intestate had other adult children not in the armed forces. It was held that the Soldiers' and Sailors' Civil Relief Act, Title 50, U. S. C. A., sec. 525, does not justify maintenance of the action more than one year after intestate's death, since plaintiff in an action for wrongful death, even though a distributee, does not maintain the action as in his own right, but solely in his official capacity as a representative of the estate. *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948).

New Action after Nonsuit.—A new action under this section may be commenced within one year after a nonsuit, as provided in § 1-25. *Neekins v. Norfolk, etc., R. Co.*, 131 N. C. 1, 42 S. E. 333 (1902); *Trull v. Seaboard, etc., R. Co.*, 151 N. C. 545, 66 S. E. 586 (1909). See also, *Swainey v. Great Atlantic, etc., Tea Co.*, 204 N. C. 713, 169 S. E. 618 (1933); *Jones v. Bag-*

well, 207 N. C. 378, 177 S. E. 170 (1934); *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553 (1940).

This section, construed with § 1-25, extends the time within which the action must be brought in case of nonsuit to the extreme limit of two years, and where the defendant has, under the federal statutes, removed the cause from the State to the federal court, and there taken a nonsuit, and has commenced his action again in the State court, the fact that the second action between the same parties, upon the same subject matter, was commenced in the State court more than one year after the date of the death does not bar the plaintiff's right of action. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532 (1927), citing *Fleming v. R. R.*, 128 N. C. 80, 38 S. E. 253 (1901).

After Discontinuance.—Where there is a break in the continuity in the issuance of alias and pluries summonses in a civil action to recover damages for a wrongful death there is a discontinuance, and service of a summons thereafter commences a new action, and if the summons is issued more than one year after the wrongful death the action will be dismissed. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928).

Where a demurrer is sustained to the complaint and an amended complaint is thereafter filed, the action is instituted for the purpose of applying the provisions of this section from the date the amended complaint was filed, since the action could not be maintained on the original complaint. *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948), discussed in 27 N. C. Law Rev. 160.

Discovery of Will Probated in Another State.—Where a duly appointed administrator instituted an action for wrongful death within the time allowed, and upon discovery of a will probated in another state, on motion of defendant an order was entered revoking the letters and appointing an administrator c. t. a. and later the administrator c. t. a. resigned, the original administrator, who at the instance of the beneficiary of the estate was appointed administrator c. t. a., d. b. n., could enter the action for wrongful death as plaintiff, notwithstanding that more than a year had passed since the death. *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

Conflict of Laws.—This section confers a right not existing at common law, and the provision that the action be brought within one year is a condition annexed to the cause of action, and also a statute

of limitation in regard thereto, and an action brought against a resident defendant by a nonresident plaintiff for a wrongful death occurring in another state is controlled by our statute prescribing the time within which such action can be brought, and not by a general statute of the state in which the death occurred which allows a longer period. *Tieffenbrun v. Flannery*, 198 N. C. 397, 151 S. E. 857 (1930).

Action Instituted within Prescribed Limitation.—In an action for wrongful death it was alleged that death occurred "on or about midnight of November 21-22, 1947, and which is less than one year next preceding the institution of this action." The summons and complaint were stamped "filed Nov. 22, 1948, at 2:35 p. m." It was held that a demurrer on the ground that it appeared upon the face of the complaint and record that the action was not brought within one year of death, was properly overruled. *Wilson v. Chastain*, 230 N. C. 390, 53 S. E. (2d) 290 (1949).

III. PARTIES TO THE ACTION.

Suit Must Be Brought by Personal Representative.—The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of this section. *Hanes v. Southern Pub. Utilities Co.*, 191 N. C. 13, 131 S. E. 402 (1926). See *Hood v. American Tel., etc., Co.*, 162 N. C. 70, 77 S. E. 1096 (1913); *White v. Holding*, 217 N. C. 329, 7 S. E. (2d) 825 (1940).

While any sum recovered is not a part of decedent's estate, such sum can only be recovered in the name of the personal representative, and must be distributed under laws of intestacy in this State. *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700 (1946), citing *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674 (1907); *Hines v. Foundation Co.*, 196 N. C. 322, 145 S. E. 612 (1928).

In His Official Capacity.—The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue as administrator. *Hall v. Southern R. Co.*, 146 N. C. 345, 59 S. E. 879 (1907).

The personal representative alone can maintain the action, and only in his official capacity. He sues in his own right and not en autre droit. *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948). See *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 48 S. E. 743 (1904).

Hence under this section an action cannot be maintained by a widow as such, but

must be brought by the personal representative of the deceased. *Bennett v. North Carolina R. Co.*, 159 N. C. 345, 74 S. E. 883 (1912); *Craig v. Suncrest Lumber Co.*, 189 N. C. 137, 126 S. E. 312 (1925).

Nor can a husband as such sue for the wrongful death of his wife. *Hood v. American Tel., etc., Co.*, 162 N. C. 70, 77 S. E. 1096 (1913). A father cannot maintain an action in his individual capacity for the death of his son. *Killian v. Southern R. Co.*, 128 N. C. 261, 38 S. E. 873 (1901). Nor for the wrongful death of his daughter resulting from seduction. *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459 (1894).

The real party in interest in an action under this section is not the administrator, but the beneficiary under the statute for whom the recovery is sought. *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947).

Appointment of Administrator.—A cause of action under this section is sufficient for the appointment of an administrator. *Vance v. Southern R. Co.*, 138 N. C. 460, 50 S. E. 860 (1905).

Where a deceased has left a will naming an executor, and disposing of all his property, the right of action for his wrongful death must be by the executor named. *Hood v. American Tel., etc., Co.*, 162 N. C. 70, 77 S. E. 1096 (1913).

Foreign Administrator Cannot Sue.—A foreign administrator cannot bring an action under this section. Therefore when an administrator does not qualify in this State until after the commencement of the suit and the expiration of one year from the death of his intestate he cannot bring the action. *Vance v. Railroad*, 138 N. C. 460, 50 S. E. 860 (1905); *Hall v. Southern R. Co.*, 149 N. C. 108, 62 S. E. 899 (1908).

Since an action for wrongful death exists solely by virtue of this section, it must be maintained and prosecuted in strict accord herewith, and an administratrix appointed by the court of another state may not maintain an action for wrongful death in this State. This holding does not impinge Article IV, § 1, of, or the 14th Amendment to, the United States Constitution. *Monfils v. Hazlewood*, 218 N. C. 215, 10 S. E. (2d) 673 (1940).

And His Complaint Is Demurrable.—Where an action for wrongful death is instituted in this State by an administratrix appointed by the court of another state, the defect may be taken advantage of by demurrer, since such plaintiff does not have legal capacity to sue and thus the complaint does not state facts sufficient to constitute a cause of action. *Monfils v.*

Hazlewood, 218 N. C. 215, 10 S. E. (2d) 673 (1940).

Action by Representative of Employee Who Has Received Workman's Compensation.—Although an administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, under this section, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate, and where the insurance carrier has paid the compensation later awarded, it is subrogated to the rights of the employer and may maintain the action against such third person in the name of the administratrix. *Phifer v. Berry*, 202 N. C. 388, 163 S. E. 119 (1932).

Since the North Carolina Workmen's Compensation Act expressly provides that the subrogated right of action against the third person tort-feasor in favor of the insurance carrier paying compensation for which the employer is liable must be maintained in the name of the injured employee or his personal representative, the act does not change or modify the requirement of this section that an action for wrongful death must be maintained by the administrator of the deceased, and the insurance carrier cannot maintain the action for wrongful death in its own name against the third person tort-feasor. *Whitehead v. Branch*, 220 N. C. 507, 17 S. E. (2d) 637 (1941). See also, *Brown v. Southern R. Co.*, 202 N. C. 256, 162 S. E. 613 (1932).

Action by Administrator of Child against Parents.—An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death, as this section gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action. *Goldsmith v. Samet*, 201 N. C. 574, 160 S. E. 835 (1931).

Action against Estate of One Causing Wrongful Death.—Where a person is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor and administrator of the deceased defendant under the provisions of this section. *Tonkins v. Cooper*, 187 N. C. 570, 122 S. E. 294 (1924).

Joinder of Employer with Employee.—

Where the death is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of respondeat superior. *Brown v. Southern R. Co.*, 202 N. C. 256, 162 S. E. 613 (1932).

Joinder of Joint Tort-Feasor as Party Defendant.—One of several defendants, in an action for wrongful death arising out of a joint tort, may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, although plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736 (1943).

Where plaintiff sues defendant under this section, alleging that her intestate was killed by his negligence, defendant may not join as a joint tort-feasor under § 1-240 a railway company by which the plaintiff's intestate was employed in interstate commerce. *Wilson v. Massagee*, 224 N. C. 705, 32 S. E. (2d) 335 (1944).

IV. DISTRIBUTION OF RECOVERY.

The North Carolina law is materially different from that of most states in that distribution is made, not to designated classes, but in accordance with the statute of distribution. *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948).

Recovery Held in Trust.—The administrator holds the amount recovered in trust for those that may be entitled thereto as distributees. *Baker v. Raleigh, etc., R. R.*, 91 N. C. 308 (1884); *Avery v. Brantley*, 191 N. C. 396, 131 S. E. 721 (1926).

Existence of Beneficiaries Immaterial.—The existence of persons who will be entitled to the recovery under § 28-149 is not a condition precedent to the right to bring the action. The purpose of the section is to give the action irrespective of who may become beneficiaries of the recovery. *Warner v. Western, etc., R. Co.*, 94 N. C. 250 (1886). See *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947); *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1949), holding that evidence as to the number of children left is inadmissible.

The damages when recovered are not to be simply distributed, but disposed of as provided in case of intestacy, and the complaint need not allege that the intestate left next of kin. *Warner v. Western, etc., R. Co.*, 94 N. C. 250 (1886).

Distribution When There Are No Next of Kin.—In an action under this section

for damages for negligently causing the death of the intestate, if there be no next of kin who are entitled to the recovery, under the statute of distributions, the recovery goes to the University. *Warner v. Western, etc., R. Co.*, 94 N. C. 250 (1886).

When Rights of Distributees Fixed.—Under this section the rights of the distributees are fixed as of the time when the intestate died. *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674 (1907). See *Davenport v. Patrick*, 227 N. C. 686, 44 S. E. (2d) 203 (1947).

Recovery Not Assets of Deceased's Estate.—Damages for a wrongful death are not assets of the estate available to creditors, but are to be disposed of according to the statute of distribution. *Hines v. Foundation Co.*, 196 N. C. 322, 145 S. E. 612 (1928).

The provision that the recovery is not to be applied as assets in the payment of debts or legacies extends to creditors of the intestate and not to creditors of the distributees. *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674 (1907).

Not Subject to Widow's Year's Support.—The damages recovered are not subject to the widow's year's support, as such support is not provided for "in this chapter" as specified by the section. *Broadnax v. Broadnax*, 160 N. C. 432, 76 S. E. 216 (1912).

Contributory Negligence of One Beneficiary.—In an action to recover for wrongful death of a 2½-year-old child, contributory negligence on the part of its mother is a bar to so much of the recovery as would accrue to her as a beneficiary of the child's estate, but negligence of the child's mother will not be imputed to the child's father, and is no bar to the recovery of the amount which would inure to his benefit as beneficiary of the child's estate. *Pearson v. National Manufacture, etc., Corp.*, 219 N. C. 717, 14 S. E. (2d) 811 (1941).

Distribution When Deceased Was Non-resident.—Where a person was domiciled in another state and was killed in this State, and an administrator sues in this State, the funds recovered must be distributed under the laws of this State, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 133 N. C. 566, 45 S. E. 901 (1903). See *Hall v. Southern R. Co.*, 146 N. C. 345, 59 S. E. 879 (1907).

Recovery under Federal Employer's Liability Act.—In an action to recover damages under the Federal Employer's Liability Act, this State statute does not apply as to the distribution of the re-

covery. *Horton v. Seaboard, etc., R. Co.*, 175 N. C. 472, 95 S. E. 883 (1918), overruling *In re Stone*, 173 N. C. 208, 91 S. E. 852 (1917).

V. ADMISSION OF DECLARATIONS.

Rules of Evidence Changed—Amendment Applies to Prior Cases.—The 1919 amendment to this section, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. This is a general statute changing the rule of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will. *Williams v. Randolph, etc., R. Co.*, 182 N. C. 267, 108 S. E. 915 (1921). And this change is valid and constitutional. *Tatham v. Andrews Mfg. Co.*, 180 N. C. 627, 105 S. E. 423 (1920).

What Declarations Permitted.—This section permits in evidence declarations of the act of killing and circumstances immediately attendant on the act, which constitute a part of the *res gestae*, uttered when the declarant was in actual danger of death, and made in full apprehension thereof, and when the death accordingly ensued. *Tatham v. Andrews Mfg. Co.*, 180 N. C. 627, 105 S. E. 423 (1920).

As in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused, to be admissible upon the trial of an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and must be confined to the act of killing and the attendant circumstances forming a part of the *res gestae*. *Dellinger v. Elliott Building Co.*, 187 N. C. 845, 123 S. E. 78 (1924).

Preliminary Facts Must Be Shown.—The dying declarations of a deceased person for whose death an action has been brought under this section are competent as evidence, provided the preliminary facts are made to appear. *Southwell v. R. R.*, 189 N. C. 417, 127 S. E. 361 (1925). Otherwise they are not admissible. *Holmes v. Wharton*, 194 N. C. 470, 140 S. E. 93 (1927).

Declarations Made before Occurrence of Accident.—Where the declarant was fatally injured in an automobile accident, declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. *Gassaway v. Gassaway*, 220 N. C. 694, 18 S. E. (2d) 120 (1942).

Testimony of Statement Held Inadmissible.—In a workmen's compensation case, testimony of a statement by an officer shortly before his death from coronary occlusion that he "had had a time all the morning" arresting three men who re-

sisted him, was incompetent as a dying declaration, not having been brought within the terms of this section. *West v. North Carolina Dept. of Conservation and Development*, 229 N. C. 232, 49 S. E. (2d) 398 (1948).

§ 28-174. Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such satisfaction for the pecuniary injury resulting 1868-9, c. 113, s. 71; Code, s. 1499; Rev., s. 60; C. S., s. 161.)

The jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. *Horton v. Seaboard, etc.*, R. Co., 175 N. C. 472, 95 S. E. 883 (1918); *Carpenter v. Asheville Power, etc., Co.*, 191 N. C. 130, 131 S. E. 400 (1926).

could recover damages sustained by the injured person during his lifetime, and for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

No "Hard and Fast Rule" Prescribed.—The Supreme Court has not prescribed any "hard and fast rule" by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment to damages in any particular way. *Poe v. Railroad*, 141 N. C. 525, 54 S. E. 406 (1906).

Recovery for Pain and Suffering and for Medical Expenses.—Recovery for pain and suffering and for hospital and medical expenses relate to a single cause of action and should be submitted upon a single issue of damages. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

Question of Damages Is for Jury.—The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantages from the continuance of the life of the deceased" is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. Railroad*, 139 N. C. 499, 52 S. E. 642 (1905).

Pecuniary Loss Suffered by Relative Is Measure.—In estimating damages under this section, the question is, did the relative suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. *Carter v. Railroad*, 139 N. C. 499, 52 S. E. 642 (1905).

Recovery Not Limited to Actual Pecuniary Loss.—It has been held by the Supreme Court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900).

Reasonable Expectation of Pecuniary Advantage.—The correct measure of the quantum of damages is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. *Kesler v. Smith*, 66 N. C. 154 (1872).

But exemplary or punitive damages are not recoverable in an action for wrongful death. *Martin v. Currie*, 230 N. C. 511, 53 S. E. (2d) 447 (1949).

The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased must, in all cases, guide the jury in determining the quantum of damages, to which end evidence as to the age, habits, industry, business, etc., of the deceased is indispensable. *Burton v. Wilmington, etc.*, R. Co., 82 N. C. 505 (1880).

No damages are to be allowed as solatium or a punishment. *Kesler v. Smith*, 66 N. C. 154 (1872); *Bradley v. Ohio River, etc.*, R. Co., 122 N. C. 972, 30 S. E. 8 (1898); *Western Union Tel. Co. v. Catlett*, 177 F. 71 (1910).

Net Present Pecuniary Worth of Deceased.—The damages recoverable for the wrongful death of another negligently caused are the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900); *Purnell v. Rockingham R. Co.*, 190

This section restricts the recovery for malpractice to compensatory damages. *Gray v. Little*, 127 N. C. 304, 37 S. E. 270 (1900).

Damages Sustained by Deceased in His Lifetime.—Where the injured person lived for 31 days, and thereafter died as a result of injuries, his personal representative

N. C. 573, 130 S. E. 313 (1925); *Carpenter v. Asheville Power, etc., Co.*, 191 N. C. 130, 131 S. E. 400 (1926).

The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when, according to his expectancy, the intestate would have died in due course of nature; but this total may be composed of many annual incomes of different amounts. The present value of that sum, whatever it may be, is what the jury should allow in the way of damages. *Poe v. Railroad*, 141 N. C. 525, 54 S. E. 406 (1906).

Probable Gross Income Less Probable Expenses.—The measure of damages in an action for wrongful death is the present worth of the pecuniary loss suffered by those entitled to the distribution of the recovery, which is to be measured by the probable gross income of the deceased during his life expectancy less the probable cost of his own living and usual or ordinary expenses. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949).

The measure of damages for wrongful death is the present value of the accumulations of income which would have been derived from the decedent's own exertions, after deducting the probable cost of living and ordinary expenses, based upon decedent's life expectancy. *Rea v. Simowitz*, 226 N. C. 379, 38 S. E. (2d) 194 (1946).

What Expenses to Be Deducted.—In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted. *Carter v. Railroad*, 139 N. C. 499, 52 S. E. 642 (1905).

The measure of damages for the wrongful killing of a mother of children is the value of her labor or the amount of her earnings if she had lived out her expectancy, without regard to the number of her children and the intellectual and moral training she might have given them. *Bradley v. Ohio River, etc., R. Co.*, 122 N. C. 972, 30 S. E. 8 (1898).

The value of the life before twenty-one as well as after twenty-one years of age is recoverable. *Gurley v. Southern Power Co.*, 172 N. C. 690, 90 S. E. 943 (1916).

Wrongful Death of Child.—The meaning of damages, in the case of the wrongful death of a child is the same as in the case of an adult. The difficulty is in the application. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900). See

Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916).

In estimating the pecuniary value of a child to her next of kin, the jury could take into consideration all the probable or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900).

Mental Anguish and Loss of Services Not to Be Considered.—Where the plaintiff brings an action, under § 28-173, as administrator of his child, his recovery is limited to the value of the life, and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851 (1905).

Estimating Life Expectancy of Child.—In an action for the wrongful death of a child nine years of age the rule for measuring damages is that expectancy of life may be determined by the jury based upon the constitution, health and habits of the infant, and where the jury was so instructed, it was not error for the court in illustrating the rule to use the figures fifty and twenty in referring to life expectancy. *Rea v. Simowitz*, 226 N. C. 379, 38 S. E. (2d) 194 (1946).

Evidence Held Competent in General.—In an action for wrongful death, evidence relating to the age, health and life expectancy of deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had of earning money is competent. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949). See *Kesler v. Smith*, 66 N. C. 154 (1872); *Burton v. Wilmington, etc., R. Co.*, 82 N. C. 505 (1880); *Poe v. Railroad*, 141 N. C. 525, 54 S. E. 406 (1906); *Hicks v. Love*, 201 N. C. 773, 161 S. E. 394 (1931).

The admission of testimony that the deceased had a 200-acre farm, a comfortable home, and plenty for his family to eat and wear, was not error. *Hicks v. Love*, 201 N. C. 773, 161 S. E. 394 (1931).

The inventory of the estate of the deceased showing the salary due him at the time of death and the present action for wrongful death as the total assets of the estate is competent as an aid to the jury in arriving at a proper estimate of the pecuniary worth of the decedent to those entitled to the distribution of the recovery. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949).

Evidence Showing Attitude of Deceased

towards His Family.—In an action for wrongful death the verified complaint in an action theretofore instituted by deceased against his wife for absolute divorce, alleging that he and his wife had entered into an agreement respecting custody and support of the minor children of the marriage, and setting forth the agreement, was competent upon the issue of damages to show the attitude of the deceased toward his family. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949).

Authenticated copies of court records showing that deceased was sentenced for nonsupport of his minor children, with sentence suspended on condition that he pay a stipulated sum weekly for their support, was held competent on the issue of damages, since it imported more than a single act of dereliction and revealed a serious defect of character. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949).

A complaint and order for temporary alimony which had not been served on deceased because of his death were properly excluded. *Hanks v. Norfolk, etc., R. R.*, 230 N. C. 179, 52 S. E. (2d) 717 (1949).

Evidence as to Number of Children Inadmissible.—In an action for death under this section, evidence of the number of children left by the deceased is inadmissible as irrelevant and calculated to mislead the jury. *Kesler v. Smith*, 66 N. C. 154 (1872). See *McCoy v. Atlantic Coast Line R. Co.*, 229 N. C. 57, 47 S. E. (2d) 532 (1948).

Annuity Act Not to Be Considered.—In estimating the damages under this section the court should not permit the jury to consider the provisions of § 8-47 (the Annuity Act) for the purposes of as-

certaining the present value of intestate's life. *Poe v. Railroad*, 141 N. C. 525, 54 S. E. 406 (1906).

Evidence of the pecuniary state of defendant is irrelevant in an action for wrongful death, and objection was properly sustained to a question asked defendant as to the amount of land he owned. *Martin v. Currie*, 230 N. C. 511, 53 S. E. (2d) 447 (1949).

Instructions Must Be Specific.—The instruction for the determination of the quantum of damages must be so specific as to contain an explanation of the consideration to be given to the whole evidence in fixing the worth of the life. An error due to such a defect will not be cured by the judge's reducing the amount of damages assessed. *Burton v. Wilmington, etc., R. Co.*, 82 N. C. 505 (1880).

Instruction as to Necessity for Showing Amount of Earnings.—Where the evidence disclosed that deceased was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability, and the court correctly instructed the jury as to the method of ascertaining the present net worth of deceased to his family, the refusal of a requested instruction that since the administrator had not shown the amount of any earning on the part of the deceased, the jury should not speculate as to what his earnings had been, is not error. *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940).

Cited in *Hines v. Foundation Co.*, 196 N. C. 322, 145 S. E. 612 (1928); *Wise v. Hollowell*, 205 N. C. 286, 171 S. E. 82 (1933); *McClamroch v. Colonial Ice Co.*, 217 N. C. 106, 6 S. E. (2d) 850 (1940); *United States v. Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (1946).

§ 28-175. **Actions which do not survive.**—The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.
2. Causes of action for false imprisonment and assault and battery.
3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death. (1868-9, c. 113, s. 64; Code, s. 1491; Rev., s. 157; 1915, c. 38; C. S., s. 162.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—This section formerly contained an additional provision to the effect that "injuries to the person, where such injury does not cause the death of the injured party" shall not survive. But this provision was omitted by the 1915 amendment. See note to § 28-172.

Public Laws of 1915, ch. 38, which amended the survival statutes (now this section and § 28-172) by striking out the words "or other injuries to the person, where such injury does not cause death of the injured party" from the exceptions to the causes of action which survive, has the effect of prescribing that causes of action for wrongful injury do survive the death

of the injured party. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

In General.—Except as specified in this section, an action originally maintainable

by or against a deceased person is now maintainable by or against his personal representative. *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938).

§ 28-176. **To sue or defend in representative capacity.**—All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity. (1868-9, c. 113, s. 79; Code, s. 1507; Rev., s. 160; C. S., s. 164.)

Cross References.—As to joinder of beneficiary, see § 1-63. As to when heirs and devisees are necessary parties, see § 28-87.

Heirs and Next of Kin as Parties.—The heirs and next of kin have no right to be made parties to an action on an account against a personal representative, although they allege collusion between the plaintiff and the representative. *Byrd v. Byrd*, 117 N. C. 523, 23 S. E. 324 (1895).

Application to Administrator d. b. n.—The provisions of this section apply to suits brought by administrator de bonis non, as well as to original administrator, and are mandatory. There is no middle ground. *Rogers v. Gooch*, 87 N. C. 442

(1882).

There is no statutory authority for a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. *Cannon v. Cannon*, 228 N. C. 211, 45 S. E. (2d) 34 (1947).

Action to collect note payable to decedent and maturing before his death must be instituted by the representative of his estate in his representative capacity. *Cannon v. Cannon*, 228 N. C. 211, 45 S. E. (2d) 34 (1947).

Cited in *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

§ 28-177. **Service on or appearance by one binds all.**—In actions against several executors, administrators or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all. (1868-9, c. 113, s. 81; Code, s. 1508; Rev., s. 161; C. S., s. 165.)

§ 28-178. **When creditors may sue on claim; execution in such action.**—An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted. (1868-9, c. 113, s. 82; Code, s. 1509; Rev., s. 162; C. S., s. 166.)

Cross Reference.—See § 28-114.

Any Court May Entertain Suit to Establish Claim.—In construing this section, it was decided at a very early day after its enactment that any court having jurisdiction of the amount sued for could entertain the suit of the creditor so far as to establish his claim and give him judgment therefor. *Heilig v. Foard*, 64 N. C. 710 (1870); *Vaughn v. Stephenson*, 69 N. C. 212 (1873); *Shields v. Payne*, 80 N. C. 291 (1879); *Hoover v. Berryhill*, 84 N. C. 133 (1881).

Jurisdiction for Breach of Contract.—

The superior court in term has, under this section, jurisdiction of an action by a creditor against an administrator for breach of a contract made by his intestate. *Shields v. Payne*, 80 N. C. 291 (1879).

What Court May Grant Leave to Issue Execution.—The court which, under this section, may grant leave to issue execution is the court which has jurisdiction of probate matters, and no other court. *Vaughn v. Stephenson*, 69 N. C. 212 (1873).

§ 28-179. **Service by publication on executor without bond.**—Whenever process may issue against an executor who has not given bond, and the same

cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions. (1868-9, c. 113, s. 94; Code, s. 1523; Rev., s. 163; C. S., s. 167.)

§ 28-180. **Execution by successor in office.**—Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done. (1868-9, c. 113, s. 84; Code, s. 1513; Rev., s. 164; C. S., s. 168.)

§ 28-181. **Action to continue, though letters revoked.**—In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death. (1868-9, c. 113, s. 85; Code, s. 1514; Rev., s. 165; C. S., s. 169.)

Cited in *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

ARTICLE 20.

Representative's Powers, Duties and Liabilities.

§ 28-182. **Representative may maintain appropriate suits and proceedings.**—Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent. (1868-9, c. 113, s. 73; Code, s. 1501; Rev., s. 159; C. S., s. 170.)

Cross Reference.—As to discovery of assets, see §§ 28-69 to 28-72.

Recovery of Realty by Administrator d. b. n., c. t. a.—Where an executor is entitled, under this section, to the possession of the land, his successor, an ad-

ministrator de bonis non, cum testamento annexo, is entitled to the same rights and remedies as his predecessor in office. *Smathers v. Moody*, 112 N. C. 791, 175 S. E. 532 (1893).

§ 28-183. **Representative may purchase for estate to prevent loss.**—At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate. (1868-9, c. 113, s. 77; Code, s. 1505; Rev., s. 85; C. S., s. 171.)

Section Applies in Sale of Realty Only.—This section authorizes the representative to bid at the sale of realty only. Hence the nonstatutory rule that a representative cannot bid at his own sale applies in sales

of personalty. *Woody v. Smith*, 65 N. C. 116 (1871).

Cited in *Pearson v. Pearson*, 227 N. C. 31, 40 S. E. (2d) 477 (1946).

§ 28-184. **Representatives hold in joint tenancy.**—Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy. (1868-9, c. 113, s. 74; Code, s. 1502; Rev., s. 166; C. S., s. 172.)

§ 28-185. **Representatives liable for devastavit.**—The executors and administrators of persons who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their

testator or intestate might have been. (1868-9, c. 113, s. 68; Code, s. 1495; Rev., s. 167; C. S., s. 173.)

§ 28-186. Nonresident executor or guardian to appoint process agent.—A nonresident qualifying in the State as an executor or guardian shall at the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor or guardian. The executor or guardian shall file the appointment with the clerk in the county of his qualification, and the clerk shall record it in the record book immediately after the record of qualification, and shall properly index it in the record book. All citations, notices, and processes served on such process agent shall be as effective as if served on the executor or guardian, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters shall be granted to an executor nor shall a guardian be permitted to qualify, unless the process agent is named simultaneously with the application for letters or for qualification. (1917, c. 198, ss. 1, 2, 3; C. S., s. 174.)

§ 28-187. Executor or guardian removing from State to appoint process agent.—When a resident executor or guardian removes from the State, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed, or a new guardian, as the case may be. (1917, c. 198, s. 4; C. S., s. 175.)

§ 28-188. Nonresident's failure to obey process ground for removal.—The clerk may remove any nonresident executor or guardian who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in §§ 28-186, 28-187, and appoint a resident. (1917, c. 198, s. 5; C. S., s. 176.)

§ 28-189. Power to renew obligation; no personal liability.—Whenever a decedent is a maker, a surety, an indorser, or a guarantor of any note, bond or other obligation for the payment of money which is due at his death, or thereafter becomes due prior to the settlement of his estate, such obligation may be renewed under the following conditions:

(1) The executor, administrator or collector of the decedent's estate may execute in his official capacity a new obligation, in the same capacity as decedent was obligated, for an amount equal to or less but not greater than the sum due on the original obligation, which shall be in lieu of the original obligation of decedent, whether made payable to the original holder or another; and the executor, administrator or collector may renew the obligation from time to time, and it shall bind the decedent's estate in the same manner and to the same extent as the original obligation; but the maturity of the obligation or any renewal thereof by the executor, administrator or collector shall not extend beyond a period of two years from the qualification of the original executor, administrator or collector, except as hereinafter provided.

(2) If the court finds that it is for the best interest of the estate that the maturity of any such obligation be extended beyond two years from the qualification of the original executor, administrator or collector, the court in its discretion may authorize the executor, administrator or collector to renew the obligation for such additional period as the court may deem best. This additional period shall be for not more than two years unless the time for final settlement of the estate is extended, in which case, paragraph three, below, applies.

(3) When the time for final settlement of the decedent's estate has been extended from year to year for a longer period by order of the clerk of the superior court, approved by the resident judge of the superior court, the obligation may

likewise be further extended, but not beyond the period authorized by the court for the final settlement of the decedent's estate.

(4) No obligation executed under this section shall bind the executor, administrator or collector personally. (1925, c. 86; 1933, cc. 161, 196, 498.)

Local Modification. — Mecklenburg, vey of the 1933 amendment to this section, Pamlico, 1933, c. 161, s. 2. see 11 N. C. Law Rev. 264. For review of

Editor's Note.—For a descriptive sur- this section, see 4 N. C. Law Rev. 18.

§ 28-190. Continuance of farming operations of deceased persons.—When any person shall die while engaged in farming operations, his executor or administrator shall be authorized to continue such farming operations until the end of the current calendar year, and until all crops grown during that year are harvested: Provided, that only the net income from such farming operations shall be assets of the estate, and any indebtedness incurred in connection with such farming operations shall be a preferred claim as to any heir, legatee, devisee, distributee, general or unsecured creditor of said estate. Nothing herein contained shall limit the powers of an executor under the terms of a will. (1935, c. 163.)

ARTICLE 21.

Construction and Application of Chapter.

§ 28-191. Where no time specified, reasonable time allowed; extension.—If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk. (1871-2, c. 213, s. 16; Code, s. 1463; Rev., s. 169; C. S., s. 177.)

§ 28-192. Powers under will not affected.—Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will, provided creditors be not delayed thereby nor the order changed in which by law they are entitled to be paid. (R. C., c. 46, ss. 12, 13; 1868-9, c. 113, s. 23; Code, s. 1415; Rev., s. 170; C. S., s. 178.)

Cross Reference.—See §§ 28-117, 28-121 and notes thereto.

ARTICLE 22.

Estates of Missing Persons.

§ 28-193. Petition for administration; service upon next of kin, etc.; notice to appear and answer.—When, by verified application or petition for probate of a will or letters of administration, it shall be made to appear to the satisfaction of the clerk of the superior court that any person has disappeared from the community of his or her residence, that his or her whereabouts are unknown, and that such absentee has not been heard from in said community within seven years last past, such clerk shall cause summons and a copy of said petition to be served upon all persons shown therein to be in possession of property of the missing person and all next of kin of said missing person who are known and shown to reside within this State, and, by publication provided by G. S. § 1-99, said clerk shall give notice of such petition, directing the missing person, his or her spouse, heirs and next of kin, to appear before his court within twenty days from service of said notice and answer or demur to the allegations contained in said petition. (1949, c. 581.)

Editor's Note.—For discussion of this article, see 27 N. C. Law Rev. 410.

§ 28-194. Appointment of guardian ad litem; notice to produce evidence that missing person, etc., alive; presumption and declaration of

death; administration of estate.—Upon failure of the missing person to appear as provided in the preceding section, said clerk shall appoint some suitable person or persons to act as guardian ad litem for the missing person and such spouse and child, or issue thereof, who may be living but have made no appearance, and shall cause to be published once a week for four weeks a notice requiring the missing person, spouse and children or their issue, if alive, or any other person for them, to produce to the court evidence of the continuation in life of the missing person, spouse, child or issue thereof. If within twenty days from service of such notice evidence is not produced to the clerk that the missing person is alive, he or she shall be presumed to be deceased, may be so declared by the clerk upon hearing of said petition, and the estate of the missing person may thereupon be administered as provided in this article and by law. (1949, c. 581.)

§ 28-195. **Findings of clerk as to spouse and issue of missing person.**—If it shall appear from the aforesaid petition that the spouse of the missing person is also missing and has not been heard from in the community of his or her residence within seven years last past, or if it appears therein that said missing person had no child at the time of disappearance and that no child has been so heard from within said seven-year period, upon the hearing of said petition, if the spouse of the missing person does not appear, and there is no evidence that such spouse is alive, it shall be presumed that such spouse is deceased, or if no child or issue thereof appears, and there is no evidence that a child or issue thereof be alive, it shall be presumed that said missing person died without a child or issue thereof surviving, and the clerk may so find as to said spouse, child or issue thereof. (1949, c. 581.)

§ 28-196. **Effect of declaration and findings.**—Until set aside on subsequent appearance in said proceeding by the missing person, spouse, child or issue thereof, such declaration and finding or findings shall be conclusive, and effective as of the date thereof, in the administration of the estate of the missing person, in subsequent sales or partition of his or her property, and in determination of any other interest, estate or trust to be vested or contingent upon the death of such missing person. (1949, c. 581.)

§ 28-197. **Validity of conveyances of real property of missing persons.**—All conveyances of real property of said missing person made by any devisee or heir at law within two years of said declaration and findings shall be void as to said missing person, his or her spouse and unknown children or issue thereof, but such conveyances to bona fide purchasers for value, if made after said two-year period, shall be valid. (1949, c. 581.)

§ 28-198. **Distribution of property held by or in trust for missing person; bond of distributee.**—Before any distribution of property held by or in trust for the missing person is made, the persons entitled to such distribution shall give their bond, with such sureties as the clerk may require, or secured by the property so received, conditioned that if the missing person, spouse, children or issue thereof shall in fact be alive at the time, they will, respectively, refund to whosoever may be entitled thereto, the property or amounts received with interest thereon, but no surety or security shall be required when the missing person has been absent for a period of twenty-five years and has not been heard from in the community of his or her residence during said period. (1949, c. 581.)

§ 28-199. **Limitation of action on bond; civil immunity of purchasers for value and fiduciaries.**—No action shall be instituted on such bond after the expiration of two years from date thereof, no action may be maintained against the purchaser for value of any property sold by any administrator, executor or other fiduciary pursuant to the declaration or findings authorized in this article,

and no action may be maintained against any administrator, executor or other fiduciary for any act done prior to revocation of the probate or letters authorized by this article in reliance upon said declaration or findings, or under authority of this article. (1949, c. 581.)

§ 28-200. Action against distributee for recovery of property or its value.—Nothing in this article shall bar any action, or affect the statute of limitation applicable thereto, brought by any missing person, spouse, child or issue thereof, to recover any property delivered to and in possession of a distributee as authorized in this article, or to recover from any distributee the value of any property alienated by him, but the possession of such distributee shall be deemed to be adverse and the statute of limitation shall begin to run as against such action from the date of the declaration and findings of the clerk as provided in this article. (1949, c. 581.)

§ 28-201. Jurisdiction of clerk of county of last known residence or where property located; publication of notices.—The clerk of the superior court of the county of the last known residence of the missing person shall have prior right to jurisdiction of the proceedings provided for in this article and probate of a will or appointment of an administrator for the estate of a missing person, but if no prior appointment has been made after the expiration of ten years from such disappearance, jurisdiction may be assumed by the clerk of the superior court of any county in which the missing person had property, or in which property is held in trust for him: Provided, that when jurisdiction is assumed by the clerk of any county other than that of the last known residence of the missing person, the notices required in this article shall be published in the county of the court taking jurisdiction and in the county where the missing person had a last known residence. (1949, c. 581.)

Chapter 29.

Descents.

Sec.

29-1. Rules of descent.

§ 29-1. **Rules of descent.**—When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: (R. C., c. 38, s. 1; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Cross Reference.—As to distribution of estates, see § 28-149 et seq.

Descents are regulated by statute in this State. *Edwards v. Yearby*, 168 N. C. 663, 85 S. E. 19 (1915); *University v. Markham*, 174 N. C. 338, 93 S. E. 845 (1917).

The English canons of descent remained in force in North Carolina until 1784. Because certain provisions seemed repugnant to republican principles, the legislature was led to make the changes which distinguish this section from the English act. *Clement v. Cauble*, 55 N. C. 82 (1854).

By virtue of this section an heir takes only the undevise inheritance of which the ancestor was seized at the time of his death. *Gosney v. McCullers*, 202 N. C. 326, 162 S. E. 746 (1932).

Rule 1, Lineal descent. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided. (R. C., c. 38, Rule 1; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Actual or Legal Seizin Unnecessary.—By the terms of Rules 1 and 12, neither actual nor legal seizin is necessary to make a stock sufficient as a source of descent. *Sears v. McBride*, 70 N. C. 152 (1874); *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904). See Rule 12 and note.

Descent of Remainders.—Where a re-

Title Vests Immediately.—Upon the death of an intestate ancestor, the title to his estate descends and vests at once in his heirs; it cannot stand in abeyance and vest in the future like an executory devise. *Harris v. Russell*, 124 N. C. 547, 32 S. E. 958 (1899).

The expression "lawful heirs" in a will, applied to describe those who are to take a bequest of personalty, means such as take that sort of property in cases of intestacy. *Nelson v. Blue*, 63 N. C. 659 (1869). As to wills, see § 31-1 et seq.

As to aliens taking by descent, see § 64-1. For cases dealing with former provision, see *Rutherford's Heirs v. Wolfe*, 10 N. C. 272 (1824); *Campbell v. Campbell*, 58 N. C. 246 (1859).

mainderman dies before the life tenant, upon the death of the life tenant the remainder descends to the heirs at law of the original remainderman. *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904), distinguishing *Lawrence v. Pitt*, 46 N. C. 344 (1854) and *King v. Scoggin*, 92 N. C. 99 (1885).

Rule 2, Females inherit with males, younger with older children; advancements. Females shall inherit equally with males, and younger with older children: Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share

as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate. (1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2; R. C., c. 38, s. 1, Rule 2; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Cross References.—As to advancements generally, see §§ 28-150 and 28-151. As to the right of adopted children to inherit, see Rule 14.

This rule abolishes the priority of the male over the female line, and places them upon a perfect equality, both as to collateral and lineal descents. *Bell v. Dozier*, 12 N. C. 333 (1827).

And Provides for Equality.—The purpose of Rule 2 is to produce equality among those equally entitled to property descending from a parent, in accord with the presumed intention of the parent. *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

When the Parent Dies Wholly Intestate.—This rule was never intended to interfere in any case where the parent himself had by his will produced an inequality by giving to one of his children either land or chattels and not to the others. But where he dies totally intestate as to all his property of every kind, then the rule provides for an equality, as near as it can, by directing that such of the children as have been advanced by the intestate in his lifetime, in either realty or personalty, shall account for the advancement in the division of both. *Jenkins v. Mitchell*, 57 N. C. 207 (1858).

Owner's Wishes Are Respected.—This rule contains nothing to exclude the intent and circumstances of the case, but leaves in force the ancient principle that the owner of property may dispose of it according to his own desire. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896); *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912).

Advancements Regulated by Early Statute.—The North Carolina statutes on the subject of advancements began with Laws of 1784, c. 22, s. 2. *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

Definition of Advancement.—In its legal sense an advancement is an irrevocable gift in praesenti of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift. *Paschal v. Paschal*, 197 N. C. 40, 147 S. E. 680 (1929); *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948). See *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912); *Nobles v.*

Davenport, 183 N. C. 207, 111 S. E. 180 (1922); *Southern Distributing Co. v. Carraway*, 189 N. C. 420, 127 S. E. 427 (1925); *Parker v. Eason*, 213 N. C. 115, 195 S. E. 360 (1938).

Same—Small Presents Not Included.—An advancement is a gift of money or property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child. The latter are the natural duties of the parent which he is required to perform. *Meadows v. Meadows*, 33 N. C. 148 (1850); *Bradsher v. Cannady*, 76 N. C. 445 (1877); *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Doctrine Applies Only in Case of Total Intestacy.—Under the English statute of distributions, as well as under the North Carolina statute, no advancements are to be accounted for except in cases of total intestacy. *Brown v. Brown*, 37 N. C. 309 (1842); *Jenkins v. Mitchell*, 57 N. C. 207 (1858).

Hence, advancements in land by a father are not to be brought into hotchpot and accounted for in the division among his children of his real estate, unless the father dies totally intestate. *Jenkins v. Mitchell*, 57 N. C. 207 (1858).

Where the deceased leaves a will disposing of his estate the doctrine of advancements to his child or children has no application. *Prevette v. Prevette*, 203 N. C. 89, 164 S. E. 623 (1932).

Presumption and Burden of Proof.—The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of division among their children; hence a gift of property or money is prima facie an advancement, that is, property transferred or money paid in anticipation of a distribution of his estate. *Ex parte Griffin*, 142 N. C. 116, 54 S. E. 1007 (1906); *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912); *Nobles v. Davenport*, 183 N. C. 207, 111 S. E. 180 (1922).

Same—Nominal Consideration.—When a parent dies intestate having previously made a conveyance of land of substantial value to one of several children for a nominal consideration or natural affection, the

presumption is that he intended the land thus conveyed as an advancement. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896); *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

In such case the burden of proof is on the grantee or donee to show that an advancement was not intended. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Same — Valuable Consideration. — But when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property, the burden then to prove it an advancement is upon the person claiming it to be such. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

Intention of Parent Govern. — Whether the gift is an advancement or not depends on the intention of the parent at the time the gift is made. *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature of circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement, is to be settled by ascertaining what was the intention of the parent. *Melvin v. Bullard*, 82 N. C. 34 (1880); *Harper v. Harper*, 92 N. C. 300 (1885); *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896); *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010 (1912).

Same — Parol Evidence and Matters to Be Considered. — And in the determination of whether a loan, a gift or an advancement was intended parol evidence is admissible. *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38 (1896).

The nature of the gift, the consideration expressed, and the circumstances under which it is made are material in determining the intention. *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

Determination of Value of Advancement. — Ordinarily the value of an advancement is to be determined as of the date of its making, and on an accounting no interest is to be charged against an advancement prior to the death of the testator or intestate, or the time fixed for division, where by will it is extended beyond the death of the parent or testator. *Southern Distributing Co. v. Carraway*, 189 N. C. 420, 127 S. E. 427 (1925). See *Stallings v. Stallings*, 16 N. C. 298 (1829); *Lamb v. Carroll*, 28 N. C. 4 (1845).

Where an intestate had put slaves into

the possession of his child, and afterwards made a deed of gift of them, the advancement must take effect and be estimated as of the date of the deed and not of the commencement of the possession. *Shiver v. Brock*, 55 N. C. 137 (1855); *Ward v. Riddick*, 57 N. C. 22 (1858).

Payments Made for Land Conveyed as an Advancement. — In ascertaining the value of an advancement of realty for the purpose of equalizing the heirs' share in the real estate, or in charging the child advanced in the distributive share of the personality in the event the advancement exceeds the value of his share of the realty, the commissioners should take into consideration any payments found to have been made for the land conveyed as an advancement. *Harrelson v. Gooden*, 229 N. C. 654, 50 S. E. (2d) 901 (1948).

Instances of Advancements. — Property put into the possession of a child on his setting out in life, suitable to housekeeping and family purposes, is not to be considered as a present but as an advancement. *Shiver v. Brock*, 55 N. C. 137 (1855).

Under this rule an estate, *pur autre vie*, given to a child by an intestate father, is subject to be brought into hotchpot as an advancement in the division of other lands. *Dixon v. Coward*, 57 N. C. 354 (1859).

One-half an estate in land given by an intestate by deed to his daughter and her husband is subject to be brought into hotchpot. *Dixon v. Coward*, 57 N. C. 354 (1859).

Joint Enterprise Not an Advancement. — Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. *Paschal v. Paschal*, 197 N. C. 40, 147 S. E. 680 (1929).

Application to Grandchildren. — Grandchildren are bound to bring into hotchpot the gifts to their parents, but not those to themselves; this rule being restricted to gifts from a parent to a child, and not including donations to grandchildren. *Headen v. Headen*, 42 N. C. 159 (1850). See *Shiver v. Brock*, 55 N. C. 137 (1855).

Rule 3, Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the

person himself would have done had he been living. (1808, c. 739; R. C., c. 38, Rule 3; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

This rule is an almost verbatim copy of the fourth English canon of descent and should receive the same construction which has been given to that canon. *Clement v. Cauble*, 55 N. C. 82 (1854).

Right of Representation Indefinite.—In rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred. *Johnston v. Chesson*, 59 N. C. 146 (1860).

Realty Descends Per Stirpes.—In the descent of real estate, the next collateral relations of the person last seized, who are of equal degree, take per stirpes, and not per capita. *Clement v. Cauble*, 55 N. C. 82 (1854); *Haynes v. Johnson*, 58 N. C. 124

(1859); *Crump v. Fawcett*, 70 N. C. 345 (1874).

Personalty Distributed Per Capita.—Where a fund consists solely of personalty, and the claimants at the time of the intestate's death were and are now all in equal degree the next of kin of the intestate, § 28-149 requires that the fund shall be distributed per capita. *Ellis v. Harrison*, 140 N. C. 444, 53 S. E. 299 (1906).

Heirs of Trustee Take Nothing.—Where a trustee, in accordance with a provision of the trust, passes his bare legal title to another, there was nothing to descend to his heirs at his death. *Fleming v. Barden*, 126 N. C. 450, 36 S. E. 17 (1900).

Rule 4, Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules. (1808, c. 739; R. C., c. 38, Rule 4; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

When Rule Applies.—This rule applies where, and only to the extent that, the inheritance (1) has been transmitted by descent from an ancestor, or (2) has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs. *Jones v. Jones*, 227 N. C. 424, 42 S. E. (2d) 620 (1947).

This rule is confined to cases where there is no other disposition of the land by the will which would interfere with the prescribed course of descent. *Kirkman v. Smith*, 174 N. C. 603, 94 S. E. 423 (1917).

The principal object of the rule is the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with him. *Poisson v. Pettaway*, 159 N. C. 650, 75 S. E. 930 (1912). See *Wilkerson v. Bracken*, 24 N. C. 315 (1842).

Construed with Rule 6.—This rule and Rule 6 are in pari materia and should be construed together, and it was clearly intended that they should be. *Paul v. Carter*, 153 N. C. 26, 68 S. E. 905 (1910).

Under Rules 4, 5 and 6 a grandson of the deviser of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, even though he takes the same lands and interest under the devise that he would

have taken under the descent had his father not been living, and he acquires a new estate by purchase, descendible to his heirs at law under the canons of descent. *Peel v. Corey*, 196 N. C. 79, 144 S. E. 559 (1928).

Under Rule 5 purchased estates—in the popular sense of the term purchase—descend to the nearest relations of the propositus whether of the paternal or maternal line; while under Rule 4 descended estates and certain excepted purchased estates descend to the nearest relations of the propositus, who were of the blood of the ancestors from whom the estate moved. The purchased estates excepted, including those derived by gift, devise or settlement, are those where the purchaser would have been an heir in case of the ancestor's death, that is, these excepted purchasers are put on the same footing with a descent. The question whether the purchaser or donee would have been an heir is determined as of the time of the purchase. And thus where a purchaser at the time of the purchase would not have been an heir had the ancestor died, Rule 5 applies and collateral relations of both paternal and maternal lines inherit, even though a subsequent act of the legislature made such purchaser an heir. See *Burgwyn v. Devereux*, 23 N. C. 583 (1841).

Blood of Ancestor Necessary.—In order for a collateral relation of the half blood to

inherit under this rule, he must be of the blood of the purchasing ancestor from whom the lands descend. *Poisson v. Pettaway*, 159 N. C. 650, 75 S. E. 930 (1912); *Noble v. Williams*, 167 N. C. 112, 83 S. E. 180 (1914).

Collateral Relations Take Per Stirpes.—When lands descend to collateral relations under this rule the collateral relations of equal degree take per stirpes and not per capita. *Clement v. Cauble*, 55 N. C. 82 (1854); *Haynes v. Johnson*, 58 N. C. 124 (1859); *Cromartie v. Kemp*, 66 N. C. 382 (1872).

Where Contingency Happens.—Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. *Stevens v. Wooten*, 190 N. C. 378, 130 S. E. 13 (1925).

Failure of Contingency.—Where lands were devised to be sold upon the happening of a certain event which failed to happen, it was held that the land was never converted into personalty but remained realty and belonged to the heirs at law of the blood of the testator. *Elliott v. Loftin*, 160 N. C. 361, 76 S. E. 236 (1912).

Rule 5, Collateral descent of estate not derived from ancestor. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules. (1808, c. 739; R. C., c. 38, Rule 5; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Cross Reference.—See note under Rule 4.

Descended Estate.—Where an estate has been transmitted by descent, and the blood of the acquiring ancestor has become extinct, upon the death of the person last seized intestate and without issue, the estate descends to the nearest collateral relations. *University v. Brown*, 23 N. C. 387 (1841).

Necessary Qualification for Collateral Relation.—In the descent of acquired estates, the only qualification necessary to a collateral relation is that he be the nearest relation of the person last seized. *Bell v. Dozier*, 12 N. C. 333 (1827).

Whether of Whole or Half Blood.—Where a son acquires land by deed from

Examples.—Where a person died intestate and without lineal descendants, the real estate inherited by him from his father descended to his brother, who was his next collateral relation capable of inheriting of the blood of his father. *Jones v. Hoggard*, 108 N. C. 178, 12 S. E. 906 (1891).

When an estate goes to a person through a series of descents or settlements, and that person dies without issue, it reverts back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. *Wilkerson v. Bracken*, 24 N. C. 315 (1842); *Poisson v. Pettaway*, 159 N. C. 650, 75 S. E. 930 (1912).

A husband who had acquired real estate by descent, devised same to his wife by will. The wife took by purchase, and since she is not an "heir," the provisions of this rule do not apply, and upon her death without lineal descendants the land descends to her collateral heirs rather than to those of her husband. *Jones v. Jones*, 227 N. C. 424, 42 S. E. (2d) 620 (1947).

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the lifetime of his father, it was held that, the devisee not being an heir or one of the heirs of the devisor, the estate passed to his uncles and aunts on the mother's side as well as those on the side of the father, the devisee's parents then being dead. *Osborne v. Widenhouse*, 56 N. C. 238 (1857).

his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death, intestate, the land descends to the collateral relations of the son whether of the whole or half blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. *Ex parte Barefoot*, 201 N. C. 393, 160 S. E. 365 (1931).

Illegitimate Not Included.—An illegitimate child is not a collateral relation of, and capable of inheriting from, a legitimate child of the same mother, under this rule. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925). As to inheritance by illegitimate children, see notes under Rules 9 and 10.

Rule 6, Half blood inherits with whole; parents from child. Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized leaves no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father and mother, as tenants in common if both are living, and if only one of them is living, then in such survivor. (1808, c. 739; R. C., c. 38, Rule 6; Code, s. 1281; Rev., s. 1556; 1915, c. 9, s. 1; C. S., s. 1654.)

Construed with Rule 4.—This rule and Rule 4 are in *pari materia*, and should be construed together and harmonized; and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood, under the provisions of this rule, where, under the requirements of Rule 4, they are of the blood of the ancestor from whom the estate was derived. *Paul v. Carter*, 153 N. C. 26, 68 S. E. 905 (1910); *Noble v. Williams*, 167 N. C. 112, 85 S. E. 180 (1914).

Personal Property.—Under this rule, claimants of the half blood are entitled to share equally with claimants of the whole blood in the distribution of personal property. In *re Skinner's Estate*, 178 N. C. 442, 100 S. E. 882 (1919).

When Blood of Ancestor Immaterial.—The surviving father or mother of one seized of land, who dies without leaving issue capable of inheriting, or brothers, or sisters, or the issue of such, will take the inheritance under the proviso in this rule without regard to the question whether such parent is of the blood of the purchasing ancestor. *McMichal v. Moore*, 56 N. C. 471 (1857). See *Weeks v. Quinn*, 135 N. C. 425, 47 S. E. 596 (1904).

Formerly Natural Parent Prevalled.—Where a child by adoption died seized of realty, without leaving a brother or sister, and the property was claimed by both the adopted and natural father, this rule was held to confer it upon the latter. *Edwards v. Yearby*, 168 N. C. 663, 85 S. E. 19

Rule 7, Unborn infant may be heir. No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized. (1823, c. 1210; R. C., c. 38, Rule 7; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Inheritance Vesting in Unborn Child.—Upon the death of the father seized of lands, his wife then being *eniente*, the inheritance will immediately vest in the child *en ventre sa mere*. *Deal v. Sexton*, 144 N. C. 157, 56 S. E. 691 (1907).

Child Born after Ten Months.—An estate is not divested out of one upon whom

(1915). But by virtue of § 48-23 this rule no longer governs.

Proviso Conditional.—The word "if" as used in the proviso to this rule is one of condition, and the estate will not vest if it is not complied with. Thus, the fact that the mother was living at the death of her child is made a condition precedent to the vesting of the estate, and the claimant cannot recover should the propositus have outlived the mother. *University v. Markham*, 174 N. C. 338, 93 S. E. 845 (1917).

Widow's Heirs Inherit.—Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow was in possession. *Weeks v. Quinn*, 135 N. C. 425, 47 S. E. 596 (1904).

Prior to the Amendment of 1915.—Upon the death of a minor child who took an estate in remainder as a new propositus after the death of his mother, under his grandfather's will, without a brother or sister or issue of such, the inheritance was cast, under this rule before the amendment of 1915, upon the father if living, the amendment having the effect of making the father and mother tenants in common if both are living, and, if only one of them is living vesting the inheritance in such survivor. *Allen v. Parker*, 187 N. C. 376, 121 S. E. 665 (1924).

it has devolved by the birth of a child more than ten lunar months after the death of the propositus. *Britton v. Miller*, 63 N. C. 268 (1869).

Applied in *Rutherford v. Green*, 37 N. C. 121 (1842); *Severt v. Lyall*, 222 N. C. 533, 23 S. E. (2d) 829 (1943).

Rule 8, Widow or husband may take as heir. When any person dies intestate,

leaving none who can claim as heir to such deceased person, but leaving surviving a widow or husband, such widow or husband shall be deemed his heir and as such inherit his estate. (1801, c. 575, s. 1; R. C., c. 38, Rule 8; Code, s. 1281; Rev., s. 1556; C. S., s. 1654; 1925, c. 7.)

Editor's Note.—Previous to the 1925 amendment of this rule, it was provided that a widow should be deemed an heir of her husband when he died leaving none other who could claim as an heir. The amendment made the rule mutual between husband and wife.

Construing the original rule before the word "intestate" was added by the 1925 amendment the Supreme Court held that the rule could only apply to property not devised by the husband. Hence, if the husband's will gave a life estate to the widow, with remainder over to his "legal heirs," and the widow failed to dissent to the will, the rule would not apply. Therefore, in such case, if the husband had no legal heirs, the property, at the death of the wife, would escheat instead of going to the wife's heirs. See *Grantham v. Jinnette*, 177 N. C. 229, 98 S. E. 724 (1919). The addition of the word "intestate" seems to

modify the decision. Undoubtedly such term will be construed to cover a partial, as well as a total, intestacy. See 4 N. C. Law Rev. 15.

When Rule Applies.—In express terms this rule provides that the widow shall be heir only when there is no one else who can claim as heir. *University v. Markham*, 174 N. C. 338, 93 S. E. 845 (1917); *Bryant v. Bryant*, 190 N. C. 372, 130 S. E. 21 (1925).

Same—No Will.—This rule applies only if there is no will, or a will not disposing of the entire estate. *Grantham v. Jinnette*, 177 N. C. 229, 98 S. E. 724 (1919).

Widow Prevails Over Illegitimate Half-Brother.—Decedent left a wife and no descendants or collateral relatives except an illegitimate half-brother. The wife and not the half-brother is the heir in such case. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925).

Rule 9, Illegitimate children inherit from mother. Every illegitimate child of the mother and the descendants of any such child deceased shall be considered an heir: Provided, however, that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral. (1799, c. 522; R. C., c. 38, Rule 10; Code, s. 1281; Rev., s. 1556, Rule 9; 1913, c. 71; C. S., s. 1654.)

Cross References.—See Rule 10 and note thereto. As to distribution of property among illegitimate children, see § 28-152. As to effects of legitimation, see § 49-11.

In General.—This rule breaks the connection at the mother in the ascending line when it is necessary to pursue that in order to reach the propositus, and expressly prohibits any direct lineal or collateral descent except that mentioned in the first clause, namely, from the mother herself to the illegitimate child or the descendant of any such child deceased, and the descent provided for in Rule 10 as between illegitimates themselves and from them or their issue, as therein specially provided. *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905).

A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. *Battle v. Shore*, 197 N.

C. 449, 149 S. E. 590 (1929).

Rule Applies Only in Case of Illegitimates.—This rule provides only for descents from a mother who leaves surviving an illegitimate child or descendants of such child. Such a child is an heir of the mother, without regard to whether she leaves or does not leave a legitimate child. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925). See *Paul v. Willoughby*, 204 N. C. 595, 169 S. E. 226 (1933).

Same—And Only to Inheritance from Mother.—This rule applies only to inheritance from the mother and not to the inheritance from a legitimate half-brother. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925).

Estate of Kindred Excluded.—This rule excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral. *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905).

Inheritance under Will.—Where a testator by his will gave property to a son and three daughters with a provision that, on the death of either of them intestate, or without heirs of his or her body, his or her share should go over, it was held that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was enti-

tled to his mother's share. *Fairly v. Priest*, 56 N. C. 383 (1857).

As "Lawful Issue" of Mother.—An illegitimate child, under this rule, is eligible to inherit from his mother, but he cannot take as the lawful issue of his mother under the terms of the will of his grandfather. *Brown v. Holland*, 221 N. C. 135, 19 S. E. (2d) 255 (1942).

Rule 10, Heirs of illegitimate. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock; and upon the death of an illegitimate child not leaving issue capable of inheriting, his estate shall descend in the following order:

(1) To the children of his mother, whether legitimate or illegitimate, or their issue.

(2) If there are no such children or their issue, then to the mother.

(3) If there are no such children or their issue, nor mother, then to the brothers and sisters of the mother, or their issue.

(4) If there are none who can take under paragraphs (1), (2), or (3) of this rule, then to the surviving spouse.

Nothing herein shall be construed to change the existing rules with respect to curtesy and dower or other rights of inheritance by virtue of marriage, nor to allow illegitimate children to inherit from legitimate children of the same mother. (R. C., c. 38, Rule 11; Code, s. 1281; Rev., s. 1556; C. S., s. 1654; 1935, c. 256; 1945, c. 520.)

Editor's Note.—The 1935 amendment added provisions for inheritance by legitimate children surviving the mother and for inheritance by her brothers and sisters, and the 1945 amendment rewrote this rule. See 25 N. C. Law Rev. 347.

The cases appearing in this note were decided under the rule as it stood before the 1935 amendment.

There is nothing dubious about this rule, but on the contrary its language is plain, direct, and perfectly intelligible. *University v. Markham*, 174 N. C. 338, 93 S. E. 845 (1917).

It does not apply to descents from a legitimate child. *Flintham v. Holder*, 16 N. C. 345 (1829); *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181 (1925).

Legitimates May Inherit from Illegitimates.—Where there are children of the same mother, some born in wedlock and some illegitimate, the former class may inherit from the latter. *Flintham v. Holder*, 16 N. C. 345 (1829). Thus, where an illegitimate brother died intestate and without issue, his legitimate brothers and sisters shared in the inheritance. *McBryde v. Patterson*, 78 N. C. 412 (1878).

The illegitimates mentioned are those who are the children of the same mother, and they inherit as between themselves and their representatives, as if they were legiti-

mate. *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905).

As to necessity for representatives to be legitimate, see *Powers v. Kite*, 83 N. C. 156 (1880); *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891); *Bryant v. Bryant*, 190 N. C. 372, 130 S. E. 21 (1925).

There is no half blood between illegitimates; they are treated as children without a father of any kind. The law takes no notice of him, for they trace only through the mother. *Ashe v. Camp Mfg. Co.*, 154 N. C. 241, 70 S. E. 295 (1911).

As between Surviving Brothers and Widow.—Under this rule where an illegitimate son dies, leaving surviving illegitimate brothers and sisters of the same mother, they may collaterally inherit the estate and the inheritance cannot be cast upon his surviving widow, as his heir. *Bryant v. Bryant*, 190 N. C. 372, 130 S. E. 21 (1925).

Collateral Relatives of Mother.—Prior to the 1935 amendment when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child. *Board of Education v. Johnston*, 224 N. C. 86, 29 S. E. (2d) 126 (1944).

Same—1935 Amendment Not Applicable to Person Dying before Its Enactment.—

The provisions of the 1935 amendment were held not to affect the distribution of the estate of a person dying prior to its enactment, the provisions of the statute that it should apply to estates of such persons which had not then been distributed being inoperative; and an illegitimate person dying prior to the enactment leaving only the brothers of his mother, or their legal representatives, him surviving, was held to leave no person surviving him en-

titled to inherit from him, and his property, both real and personal, was held to vest immediately in the University of North Carolina. *Carter v. Smith*, 209 N. C. 788, 185 S. E. 15 (1936).

Applied, as to issue of slaves, in *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891); as to legitimate claiming from illegitimate first cousin, in *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905).

Rule 11, Estate for life of another, not devised, deemed inheritance. Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter. (R. C., c. 38, Rule 12; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Rule Differs from Older English Statutes.—This rule was a departure from the

older English statutes. *Brown v. Brown*, 168 N. C. 4, 84 S. E. 25 (1915).

Rule 12, Seizin defined. Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance. (R. C., c. 38, Rule 13; Code, s. 1281; Rev., s. 1556; C. S., s. 1654.)

Cross References.—See Rule 1 and note. As to distributees of illegitimates, see § 28-152. As to effects of legitimation, see § 49-11.

Seizin at Common Law and under Rule.—The seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while all that is required under the present section to constitute a sufficient seizin for the creation of a new stock of inheritance or stirpes of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested in possession or not; for the language of the statute is explicit that a person having any such right, title, or interest shall be deemed to have been seized thereof. *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904); *Severt v. Lyall*, 222 N. C. 533, 23 S. E. (2d) 829 (1943).

Trust for Wife Descends to Her Heirs.—The resulting trust in favor of the wife in lands the title to which has been acquired by her husband by deed is now descendible to her heirs under this rule, though she may not have been in separate possession thereof during her life. *Tyndall v. Tyndall*, 186 N. C. 272, 119 S. E. 354 (1923), distinguishing *Barrett v. Brewer*, 153 N. C. 547, 69 S. E. 614 (1910).

Rule 13, Issue of certain colored persons to inherit. The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are declared legitimate children of such parents or either one of them, with all the rights of

New Propositus Created by Will.—Under a devise of land to testator's two daughters for life, and at the death of either or both of them, then said land to go to the child or children of each, the child or children representing the mother in interest, it was held, upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. *Allen v. Parker*, 187 N. C. 376, 121 S. E. 665 (1924).

Issue of Contingent Remainderman Inherit.—Under the provisions of Rule 1 and this rule, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. *Hines v. Reynolds*, 181 N. C. 343, 107 S. E. 144 (1921).

Under a will giving an estate to W. during his life, and at his death to his eldest son, not then in esse, with residuary clause to the testator's children, it was held that the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. *Carolina Power Co. v. Haywood*, 186 N. C. 313, 119 S. E. 500 (1923).

heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead, their issue shall represent them with all the rights of heirs at law and next of kin provided by this section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise. (1879, c. 73; Code, s. 1281; 1897, c. 153; Rev., s. 1556; C. S., s. 1654.)

Rule Legitimates Children Only as to Inheritance.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, are not legitimated by this rule, except to the extent of inheriting from their parents. *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891). See *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905); *Croom v. Whitehead*, 174 N. C. 305, 93 S. E. 854 (1917).

Before the passage of this rule, children born prior to 1868 of colored parents who lived together as man and wife had only the rights of other illegitimates, and could only inherit from their mother, when there was no legitimate child, and from one another. *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891).

Rule Applies to Estates of Parents Only.—This rule conveys the right of inheritance upon the children only as to the estate of their parents, not as to collaterals. *Tucker v. Bellamy*, 98 N. C. 31, 4 S. E. 34 (1887); *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891); *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905); *Croom v. Whitehead*, 174 N. C. 305, 93 S. E. 854 (1917); *Bryant v. Bryant*, 190 N. C. 372, 130 S. E. 21 (1925).

All Colored Parents Are Included.—This rule is a valid law as to descents after its passage, and renders legitimate the children of all colored parents living together as man and wife, born before January 1, 1868, even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889).

The two conditions necessary to give effect to this rule are cohabitation existing at the birth of the child, and paternity of the party from whom the property claimed is derived. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889); *Woodard v. Blue*, 107 N. C. 407, 12 S. E. 453 (1890); *Croom v. Whitehead*, 174 N. C. 305, 93 S. E. 854 (1917).

The cohabitation must be exclusive in the sense that it must show a single, not a polygamous, relation. *Branch v. Walker*, 102 N. C. 34, 8 S. E. 896 (1889); *Croom v. Whitehead*, 174 N. C. 305, 93 S.

E. 854 (1917).

In order to come within the provision of this rule, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse. *Spaugh v. Hartman*, 150 N. C. 454, 54 S. E. 198 (1909).

But it need not be enduring or in strict personal fidelity while it continued. *Hall v. Fleming*, 174 N. C. 167, 93 S. E. 728 (1917). And a single act of infidelity on the part of the parents did not have the effect of destroying the provisions of the rule primarily enacted to legitimate the offspring. *Croom v. Whitehead*, 174 N. C. 305, 93 S. E. 854 (1917).

Presumption Arising from Cohabitation.—The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons thus living and indicating their relations; but the presumed fact is open to disproof, and to be determined, as other facts, upon the force of the evidence adduced, which may be sufficient to overcome the presumption. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889).

This rule operates only prospectively and cannot divest any estate acquired before its enactment. *Tucker v. Bellamy*, 98 N. C. 31, 4 S. E. 34 (1887); *Jones v. Hoggard*, 108 N. C. 178, 12 S. E. 906 (1891).

It is distinguished from § 51-5, which deals with marriage. *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584 (1905); *Croom v. Whitehead*, 174 N. C. 305, 93 S. E. 854 (1917).

Illegitimates Excluded.—Where a man and woman, both slaves, cohabited as husband and wife for several years, but separated prior to emancipation and children were born while this relation existed and after the separation the woman entered into a similar relation with another slave, which continued until after the end of the war, when the parties duly acknowledged and had recorded the fact of cohabitation the children of the last union were legitimate and inherited the lands of which their father died seized and they also inherited the lands of which their mother died seized to the exclusion of her children born of the first union. *Jones v. Hoggard*, 108 N. C. 178, 12 S. E. 906 (1891).

Evidence.—The quasi marriage relation necessary to legitimize the children of colored parents, under the provision of this rule may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage. *Nelson v. Hunter*, 140 N. C. 598, 53 S. E. 439 (1906); *Spaugh v. Hartman*, 150 N. C. 454, 64 S. E. 198 (1909).

Legal Marriage.—To repeal the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full, affirmative, repelling proof, such as impotency, nonaccess and the like, or the presumption of legitimacy will stand. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889).

Same—Rule Less Strict than in Case of

Rule 14, Succession and inheritance rights of adopted child. An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents. (1947, c. 832.)

Cross Reference.—See § 48-23.

added this rule. See 25 N. C. Law Rev.

Editor's Note.—The 1947 amendment

443.

Rule 15, Succession and inheritance rights of adoptive parents. The adoptive parents shall be entitled by succession or inheritance to any real property by, through, and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents. (1947, c. 832.)

Editor's Note.—The 1947 amendment added this rule. See 25 N. C. Law Rev. 443.

Rule 16, Succession and inheritance rights of legitimate children. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. § 49-10 or G. S. § 49-12 such child shall be entitled to all the rights of succession or inheritance to any real property of its father and mother as it would have had had it been born their issue in lawful wedlock. (1947, c. 832.)

Editor's Note.—For discussion of the 1947 amendment which added this rule, see 25 N. C. Law Rev. 443.

Chapter 30.

Widows.

Article 1.

Dissent from Will.

Sec.

- 30-1. Time and manner of dissent.
 30-2. Effect of dissent.
 30-3. Widow's interest not liable for husband's debts.

Article 2.

Dower.

- 30-4. Who entitled to dower.
 30-5. In what property widow entitled to dower.
 30-6. Dower not affected by conveyance of husband; exception.
 30-7. Dower conveyed by wife's joinder in deed.
 30-8. Conveyance of home site by wife's joinder in deed or other conveyance.
 30-9. Conveyance without joinder of insane wife; certificate of lunacy.
 30-10. Renouncement of dower.

Article 3.

Allotment of Dower.

- 30-11. By agreement between widow and heir.
 30-12. Petition filed in superior court.
 30-13. Assignment of dower.
 30-14. Notice to parties of meeting of jury.

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

Sec.

- 30-15. When widow entitled to allowance.
 30-16. Duty of personal representative or justice to assign allowance.
 30-17. When children entitled to an allowance.
 30-18. From what property allowance assigned.

Part 2. Assigned by Justice of the Peace.

- 30-19. Value of property ascertained.
 30-20. Procedure for assignment.
 30-21. Report of commissioners.
 30-22. Fees of commissioners.
 30-23. Right of appeal.
 30-24. Hearing on appeal.
 30-25. Personal representative entitled to credit.
 30-26. When above allowance is in full.

Part 3. Assigned in Superior Court.

- 30-27. Widow or child may apply to superior court.
 30-28. Nature of proceeding; parties.
 30-29. What complaint must show.
 30-30. Judgment and order for commissioners.
 30-31. Duty of commissioners; amount of allowance.
 30-32. Exceptions to the report.
 30-33. Confirmation of report; execution.

ARTICLE 1.

Dissent from Will.

§ 30-1. **Time and manner of dissent.**—Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant, or insane, she may dissent by her guardian. (1868-9, c. 93, s. 37; Code, s. 2108; Rev., s. 3080; C. S., s. 4096.)

Cross Reference.—See note to § 30-5.

Editor's Note.—See 11 N. C. Law Rev. 274, for suggested revision of this and subsequent sections. And see 23 N. C. Law Rev. 380, for elections under will.

Section Is a Statute of Limitations.—This section is not a statute conferring a right of dower, but a statute of limitation

upon that right, as it existed at common law. In other words its effect is to prescribe a limitation in respect to the time in which the widow may claim or reject the provisions of the will. *Hinton v. Hinton*, 61 N. C. 410 (1868).

The object of giving the widow six months within which to make an election

to take under the will or against it, under the law, is to enable the widow to fully learn the condition of the estate and the advantages to be derived under the provisions made for her, as compared with those occurring as in case of an intestacy, and thus to intelligently exercise her right to dissent. *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452 (1887); *Richardson v. Justice*, 125 N. C. 409, 34 S. E. 441 (1899). And if the widow is acquainted with the condition of the estate and what is included therein, then her election once made is binding. *Horton v. Lee*, 99 N. C. 227, 5 S. E. 404 (1888).

Other Rights Not Impaired.—The right of the widow to dissent from her husband's will cannot be attended with the deprivation or impairment of other rights because of an unsuccessful opposition to the will. Under this principle the wife may, if the validity of the will is established, claim and accept any benefit given her by the will. *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452 (1887).

Failure to Dissent within Time Allowed.—Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance given her by § 30-15, such action is not maintainable. *Perkins v. Brinkley*, 133 N. C. 86, 45 S. E. 465 (1903).

Same—Where the Estate Is Insolvent.—The failure of a widow to dissent from her husband's will within six months does not prevent her from claiming dower, or its equivalent in lands devised, when it appears that the estate is insolvent. *Trust Co. v. Stone*, 176 N. C. 270, 97 S. E. 8 (1918).

Dissent of Infant Widow Made in Person.—Where a widow, being a minor and having no guardian, dissented in person and in open court from her husband's will, her dissent is made erroneously; however if she is assigned her dower by a court of competent jurisdiction her right to it cannot be impeached in an action of ejectment. *Cheshire v. McCoy*, 52 N. C. 376 (1860).

Dissent by Next Friend of Infant Widow.—Where the widow is a minor without a guardian, she may be represented by her next friend duly appointed, when dissenting from her deceased husband's will. *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99 (1899).

Acts Constituting Election.—The widow will not be precluded from the exercise of the legal right herein provided for by an agreement, even under seal, which she may be induced by the executor to sign, in ignorance of the condition of the estate.

Richardson v. Justice, 125 N. C. 409, 34 S. E. 441 (1899).

The institution of proceedings by the widow to have her dower allotted in order to protect her estate from creditors was held not to amount to a renunciation of the will. *Lee v. Giles*, 161 N. C. 541, 77 S. E. 852 (1913).

Where the widow entered a caveat to a will and contested its validity, it was held that she was not prevented from accepting any benefit given her by the will, nor was she prevented from entering her dissent thereto within the proper time. *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452 (1887).

Where a widow appointed executrix proves the will and qualifies, she cannot afterwards renounce and dissent, but must carry out the will in all its provisions. *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452 (1887).

The entry of a dissent to a will by the widow is an incident to the jurisdiction of the probate, and as this jurisdiction has been conferred upon the clerk of the superior court, the widow's dissent is to be made and entered in his office. *Ramsour v. Ramsour*, 63 N. C. 231 (1869).

Where clerk of superior court was one of the executors of a will, he was not disqualified to receive and file the widow's written dissent. The act of filing the dissent is purely ministerial. In *re Smith's Estate*, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

Notice to Executors and Devisees.—The fact that no previous notice of filing of widow's dissent to husband's will was given to the executors or devisees is immaterial as the statute does not require notice. In *re Smith's Estate*, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

Disposal of Motion to Strike Dissent.—Where widow duly filed dissent, and executor moved to strike on the ground that husband had obtained a decree of absolute divorce, and widow moved in the court in which the divorce decree had been rendered to set aside the decree for want of legal service and for fraud, it was held that while the motion to set aside the divorce decree is pending, it was error for the court to strike out the dissent. In *re Smith's Estate*, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

Applicability of Doctrine of Estoppel.—Where a widow agrees to adhere to the provisions of a will, and in consequence thereof the executor proceeds to pay legacies and assume obligations which would cause loss to him if the widow were to dissent, she will be estopped by her agree-

ment, and will not be allowed to dissent; but where in such case she offers to put the estate in statu quo, and the executor has not acted under her agreement so as to cause him any loss whatever, she is not estopped. *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452 (1887).

A widow taking under the will in one state, cannot go to another and enter her dissent and claim dower. In other words she will not be allowed to take under the will in one state and against it in another. *Jones v. Gerock*, 59 N. C. 190 (1861), cit-

ing *Mendenhall v. Mendenhall*, 53 N. C. 287 (1860).

Dissent to Will Probated in Another State.—Testator died in South Carolina and his will was duly probated there. His widow filed a dissent valid under the laws of the state. The court held that she was entitled to her dower rights in lands owned by testator within North Carolina upon the filing of an authenticated copy of the will as proven and probated, without also dissenting here. *Coble v. Coble*, 227 N. C. 547, 42 S. E. (2d) 898 (1947).

§ 30-2. Effect of dissent.—Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate. (R. C., c. 118, s. 12; 1868-9, c. 93, s. 38; Code, s. 2109; Rev., s. 3081; C. S., s. 4097.)

Cross References.—As to distribution in case of intestacy, see § 28-149. As to descent in case of intestacy, see § 29-1, Rule 8.

Meaning of "Rights and Estates."—The "estate" referred to is dower; the "rights" referred to are the year's support and child's support as a distributee, both of which are legal rights, enforceable at law, and not cognizable in a court of equity except when equity may be invoked to enforce her legal rights. *Drewry v. Bank, etc., Co.*, 173 N. C. 664, 92 S. E. 593 (1917).

The words "as if he had died intestate" are not limited to the ordinary meaning of the husband dying without making a will, but include the case of his death without effectually disposing of his property. *Corporation Commission v. Dunn*, 174 N. C. 679, 94 S. E. 481 (1917).

Method of Determining Widow's Share.—In ascertaining the distributive share of a widow who dissents from her husband's will, all of his personal estate, whether consisting of advancements heretofore made to children, or legacies to grandchildren or to strangers, is to be brought together, and

her share is to be taken out of it pursuant to the statute of distributions. *Arrington v. Dorten*, 77 N. C. 367 (1877).

Dissent Accelerates the Vesting of the Property.—Where property is devised to the widow during her life and then to a university and she dissents thereto, such property vests immediately in the university if the property is not given to the widow in her dower. *Trustees v. Borden*, 132 N. C. 476, 44 S. E. 47 (1903).

Dower Right Subject to Inheritance Tax.—The dower right in lands of the husband taken by the dissenting widow is subject to the inheritance tax. *Corporation Commission v. Dunn*, 174 N. C. 679, 94 S. E. 481 (1917).

Where the widow is the donee of a discretionary power, by dissenting from the will she renounces all gifts whether of estates or powers under it, at least of such powers as imply personal trust and confidence. *Hinton v. Hinton*, 68 N. C. 100 (1873).

Stated in In re Smith's Estate, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

§ 30-3. Widow's interest not liable for husband's debts.—The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life. (1791, c. 351, s. 4; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; Code, ss. 2104, 2105; Rev., s. 3082; C. S., s. 4098.)

Generally.—This section secures a provision out of the husband's land to the widow in two cases: (1) Where dower has been actually assigned, as in cases of intestacy and dissent from the husband's will, and (2) where the husband devises lands to the wife, which are presumed to be in lieu of dower. *Simonton v. Houston*, 78 N. C. 408 (1878).

Exempt from Debts and Legacies.—Dower assigned to a widow who dissents from her husband's will is subject to neither debts nor legacies. *Bray v. Lamb*, 17 N. C. 372 (1833). And where the personalty is insufficient to pay the debts the lands of the husband are sold subject to this right of dower. *Curry v. Curry*, 183 N. C. 83, 110 S. E. 579 (1922).

Lands Devised to Wife.—When, for the payment of a deceased husband's debts, it becomes necessary to resort to the lands devised by him to his wife, she is remitted to her right of dower, which, as in other cases, is not subject to those debts during her life. *Ex parte Avery*, 64 N. C. 113 (1870). But her right of dower is not protected against the debt due the vendor for the purchase money of the land. *Kirby v. Dalton*, 16 N. C. 195 (1828).

Where wife joins in mortgage of husband

to exclude claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower. *American Blower Co. v. Mackenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

Stated in *Shackelford v. Miller*, 91 N. C. 181 (1884); *Boyd v. Redd*, 118 N. C. 680, 24 S. E. 429 (1896).

ARTICLE 2.

Dower.

§ 30-4. **Who entitled to dower.**—Widows shall be endowed as at common law as in this chapter defined: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower. (1871-2, c. 193, s. 44; 1868-9, c. 93, s. 32; Code, s. 2102; 1889, c. 499; Rev., s. 3083; C. S., s. 4099.)

Cross References.—As to right to year's support, see § 30-15 and note. As to curtesy, see § 52-16 and note to § 52-7. As to acts barring reciprocal property rights of husband and wife, see § 52-19 et seq.

Reconciliation May Prevent Forfeiture.—The forfeiture, by this section, takes effect, not when the wife shall commit adultery, but when she does so and "shall not be living with her husband at his death." In other words, the door stands open until the death of the husband for a reconciliation and return of the wife. *Leonard v. Leonard*, 107 N. C. 171, 12 S. E. 60 (1890).

Single Act of Adultery Sufficient.—See *Walters v. Jordan*, 35 N. C. 361 (1852).

Wrongdoing of Husband No Defense.—The violation of the marriage vows by the husband will not justify the wife in violating her vows, and since the dower right is given for the benefit of the guiltless

and not those standing in *pari delicto*, her adultery will bar the widow's right to dower. *Phillips v. Wiseman*, 131 N. C. 402, 42 S. E. 861 (1902).

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate.—The fact that this and other sections forfeiting a murderer's interest in the estate of his victim (§§ 28-10 and 52-19) apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845 (1948). For suggested revival of this section and related statutes, see 26 N. C. Law Rev. 232.

Applied in *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948).

Stated in *Lee v. Thornton*, 176 N. C. 208, 97 S. E. 23 (1918); *Higdon v. Higdon*, 206 N. C. 62, 173 S. E. 273 (1934).

§ 30-5. **In what property widow entitled to dower.**—Subject to the provision in § 30-4, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling house in which her husband usually resided, together with offices, outhouses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully

appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow. This section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling house in which the husband usually resided, when the widow shall request that the same be allotted in other property. (1827, c. 46; R. S., c. 121, s. 3; R. C., c. 118, s. 3; 1869-70, c. 176; 1883, c. 175; Code, s. 2103; Rev., s. 3084; 1908, c. 132; C. S., s. 4100.)

I. General Consideration of Dower.

II. Property Subject to Dower.

A. In General.

B. Estates and Interests; Seizin Required.

III. Pleading and Practice.

I. GENERAL CONSIDERATION OF DOWER.

Cross References.—As to liability for husband's debts and legacies, see § 30-3 and note. As to allotment of dower, see § 30-11 et seq.

Editor's Note.—For suggested change in section, see 11 N. C. Law Rev. 272.

Right of Dower Is a Legal Right.—The dower right of a widow is a legal right and is prior to that of the heir. *Campbell v. Murphy*, 55 N. C. 357 (1856). It does not arise from the estate of the heir but is a continuation of that of her husband. *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961 (1896).

Based on Positive Law.—The contract of marriage does not vest in the wife her right of dower. This right is not regarded as springing from contract, although the contract of marriage is a prerequisite to its existence, but from the positive terms of the common law or statute law. *Corporation Commission v. Dunn*, 174 N. C. 679, 94 S. E. 481 (1917). See *Rose v. Rose*, 63 N. C. 391 (1869).

What Law Governs.—The existence and incidents of the right of dower are determined by the law of the state in which the real estate lies and not by that of the place of the marriage or the domicile of the parties. The law existing when the estate becomes consummated by the husband's death is the governing law. *Corporation Commission v. Dunn*, 174 N. C. 679, 94 S. E. 481 (1917).

The dissent from the husband's will authorized in this section evidently has reference to property which may be the subject of a devise. *Alexander v. Fleming*, 190 N. C. 815, 130 S. E. 867 (1925).

Where Lands Held by Defeasible Fee.—Where a husband acquired title to lands in fee, defeasible in the event of his death

without bodily heirs, the limitation overtook effect and his fee was defeated the instant he died without such heirs; but this did not defeat his widow's dower interest in such lands. See *Pollard v. Slaughter*, 92 N. C. 72 (1885). He had no devisable estate in the lands, and as to them he did not die intestate within the meaning of this section. Therefore, his widow was not required to dissent from his will disposing of all his real and personal estate in order to lay claim to dower in the lands held in defeasible fee. As he had no legal right to devise the defeasible fee, his widow was not claiming dower in opposition to the will. *Alexander v. Fleming*, 190 N. C. 815, 130 S. E. 867 (1925).

The widow's right of dower becomes consummate upon her husband's death, and is a fixed and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property assigned, which estate is subject to all the incidents of any other life estate, and is considered a continuation of the husband's estate. *Citizens Bank, etc., Co. v. Watkins*, 215 N. C. 292, 1 S. E. (2d) 853 (1939).

Nature of Inchoate Dower.—Inchoate dower is not an estate in land but is a subsisting, substantial right of the wife in the lands of her husband during his life, possessing some of the incidents of property, and which has a present cash value capable of computation, and becomes a right of dower upon the husband's death if she survive him. *American Blower Co. v. MacKenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

The inchoate right of the wife to dower in her husband's land is a valuable interest that may pass by a conveyance. It has a present value, as property, depending on the ages of both, their health, habits and other circumstances tending to show the probabilities as to the length of the life of each. And when she encumbers it by joining in a mortgage to secure his debt she becomes his surety. *Gore v. Townsend*, 105 N. C. 223, 11 S. E. 160 (1890).

Although inchoate dower has a present

value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the wife surviving her husband. *Higdon v. Higdon*, 206 N. C. 62, 173 S. E. 273 (1934). See *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318 (1893).

Not Allotted until Death of Husband.—And the wife cannot in the lifetime of her husband have her dower allotted even though his lands are sold under execution. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318 (1893).

The widow has no right to select the lands to constitute her dower. The provision of this section that the commissioners need not select the dwelling house, if the widow requests otherwise, merely affords relief from the otherwise mandatory duty of the commissioners to select the dwelling house. *Varnoy v. Green*, 206 N. C. 77, 173 S. E. 277 (1934).

Valuation of Dower.—In determining the present value of inchoate dower or dower consummate, the full value of the dowerable lands, encumbered as well as unencumbered, and without deducting the mortgage debt, constitutes the proper basis of computation. *Virginia Trust Co. v. White*, 215 N. C. 565, 2 S. E. (2d) 568 (1939).

The rule by which the present value of the wife's inchoate right of dower in her husband's lands is obtained is to ascertain the present value of an annuity for her life equal to the interest on one-third of the value of his lands to which her contingent right of dower attaches, and then deduct from the present value of the annuity for life the value of the annuity during the joint lives of herself and husband, the difference being the present value of her contingent right. *American Blower Co. v. MacKenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

As the individual and joint life expectancies according to the mortuary tables are dependent in part upon health and habits, the question of the present value of the inchoate right of dower must be submitted to a jury under proper instruction from the court unless otherwise agreed to by the parties interested. *American Blower Co. v. MacKenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's rights of

inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband. *American Blower Co. v. MacKenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

Where Trustees and Cestuis Are Identical Persons.—Under an active trust, which gives trustees power to sell and convey lands, in their discretion, such trustees and cestuis being identical persons, the respective wives of the trustees have no dower interests in the land and are not necessary parties to a conveyance. *Blades v. Norfolk Southern Ry. Co.*, 224 N. C. 32, 29 S. E. (2d) 148 (1944).

Applied in *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948).

Cited in *Honeycutt v. Burleson*, 198 N. C. 37, 150 S. E. 634 (1929).

II. PROPERTY SUBJECT TO DOWER.

A. In General.

Where Dwelling House Constitutes Entire Estate.—If the deceased had no other property but his dwelling house, then only a third can be set aside as dower. *Caudle v. Caudle*, 176 N. C. 537, 97 S. E. 472 (1918).

As to inclusion of dwelling house in which husband usually resided, see *Howell v. Parker*, 136 N. C. 373, 48 S. E. 762 (1904).

Valuation of Property.—A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his lifetime. *Campbell v. Murphy*, 55 N. C. 357 (1856).

Damages for Being Kept Out of Possession.—The widow's claim of dower becomes a vested right upon allotment, continuing from the death of her husband, and from that time she is entitled to damages, measured by the rental value, for the time she has been kept out of possession. *In re Gorham*, 177 N. C. 271, 98 S. E. 717 (1919).

Where Lands Sold to Pay Debts of Deceased.—In case of a sale of the lands to make assets to pay the debts of the deceased, the widow is entitled to interest on her proportionate part from the sale until payment, charging her interest in return, for such sums as she may be indebted to the estate. *In re Gorham*, 177 N. C. 271, 98 S. E. 717 (1919).

Partnership Property.—Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners only so far as a surplus may be left after paying the partnership debts.

Stroud v. Stroud, 61 N. C. 525 (1868). See Summey v. Patton, 60 N. C. 601 (1864).

Mortgaged Property.—Under this section where an entire transaction was in effect an indirect mortgage on the property of a father, and his children received no consideration and acquired no beneficial interest in the lands, the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to her dower rights in the lands. Stack v. Stack, 202 N. C. 461, 163 S. E. 589 (1932).

B. Estates and Interests; Seizin Required.

Rule in Shelley's Case.—Where testator devised all his lands to his son for life, "and after his death to his lawful heirs, born of his wife," it was held that the son did not take a fee simple, under the rule in Shelley's Case, so as to give his widow dower therein. Thompson v. Crump, 138 N. C. 32, 50 S. E. 457 (1905).

A testator devised land in trust for the sole benefit of his son and the son's family, specifying that the whole of the property, with all its increase, on the death of the son, was to go on to his lawful heirs, share and share alike. It was held that the son did not take the fee under the rule in Shelley's Case but only a life estate, and therefore his widow was not entitled to dower therein. Gilmore v. Sellars, 145 N. C. 283, 59 S. E. 73 (1907). For discussion of the rule in Shelley's Case, see note to § 41-1.

Seizin of Estate of Inheritance Necessary.—The seizin to render the estate dowerable must be of an estate of inheritance, with the freehold vested in the deceased husband. Barnes v. Roper, 90 N. C. 189 (1884).

The widow's right to dower rests upon the theory that during coverture her deceased husband died intestate, seized of an estate which any child she may have borne him might have taken by descent. Alexander v. Fleming, 190 N. C. 815, 130 S. E. 867 (1925).

Same—Seizin in Law or in Deed.—A widow is entitled to dower only in an estate of inheritance of which her husband had a seizin in law or in deed at any time during the coverture, Houston v. Smith, 88 N. C. 312 (1883), the latter being the actual possession of a freehold estate and the former the right to the immediate possession or enjoyment of a freehold estate. Redding v. Vogt, 140 N. C. 562, 53 S. E. 337 (1906).

Possession cannot supply the seizin of an inheritable estate necessary to support

the right of dower. Barnes v. Roper, 90 N. C. 189 (1884); Efland v. Efland, 96 N. C. 488, 1 S. E. 858 (1887). See Weir v. Tate, 39 N. C. 264 (1846).

When Husband Deemed to Be Seized.—The husband is generally deemed to be seized of land when he may have had any right, title or interest in the inheritance. Boyd v. Redd, 118 N. C. 680, 24 S. E. 429 (1896).

Seizin of Estate in Remainder.—The widow of a remainderman is not entitled to dower where the life tenant survives the remainderman, because the husband in such case is never seized of such an estate of inheritance in the land as is required. Royster v. Royster, 61 N. C. 226 (1867).

Seizin of Purchaser at Judicial Sale.—Where a purchaser at a judicial sale gave his bond for the purchase money and died before the sale was reported to or confirmed by the court, it was held that he was seized of such an equitable estate as would entitle the widow to dower in such lands. Klutts v. Klutts, 58 N. C. 80 (1859).

Seizin under Unrecorded Deed.—Where title to land is claimed under a deed it is essential that such deed be registered for otherwise the widow is not entitled to dower out of the premises covered by the unrecorded deed. Thomas v. Thomas, 32 N. C. 123 (1849). But in Tyson v. Harrington, 41 N. C. 329 (1849), it is held that the widow of a man, to whom a deed for land had been delivered, but from whom it had been abstracted before registration, has a right to her dower in such land, the husband having an incomplete legal title.

And where the purchaser had paid the purchase price and been put in possession, but no deed had been executed, it was held that his widow was entitled to have such property valued in allotting her dower. Howell v. Parker, 136 N. C. 373, 48 S. E. 762 (1904).

III. PLEADING AND PRACTICE.

Cross Reference.—See § 30-12 and note.

This section contemplates that dower must be sought in but one special proceeding for the purpose. Proceedings for the assignment of dower instituted and determined in the county of the deceased husband's last residence are a bar to subsequent proceedings for the same purpose in another county to affect lands therein located. Askew v. Bynum, 81 N. C. 350 (1879).

Where Petition Filed.—Petition for dower should be filed in the county of the husband's last usual residence, Howell v. Parker, 136 N. C. 373, 48 S. E. 762 (1904),

but the jury of allotment may assign the same in one or more tracts situated in one or more counties. *Askew v. Bynum*, 81 N. C. 350 (1879).

The rationale of this section tends to indicate that there should be only one proceeding for the allotment of dower, whether it is a dower proceeding or a proceeding for partition of land, in which widow is entitled to dower, and that proceeding should be in the county where

“the dwelling house in which her husband usually resided” is situated. *High v. Pearce*, 220 N. C. 266, 17 S. E. (2d) 108 (con. op. 1941).

There is no statute of limitations in regard to the writ of dower; and if her case is not affected by the statute of presumptions the widow is not bound to account for a delay. *Campbell v. Murphy*, 55 N. C. 357 (1856).

§ 30-6. Dower not affected by conveyance of husband; exception.—No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: Provided, that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed. (1868-9, c. 93, s. 35; Code, s. 2106; Rev., s. 3085; C. S., s. 4101.)

Cross Reference.—As to nonjoinder of insane wife, see § 30-9.

Restriction on Right of Alienation.—The provision that the wife must join in a conveyance by her husband constitutes one of the restrictions on the right of alienation of land. But this and the other restrictions must be construed so as to carry out the kindly purpose for which they were created, with no more restraint on the power of alienation than is necessary to make them effectual. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437 (1889).

Rights of Purchasers Where Dowable Property Retained.—Where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of the lands descended and according to the provisions of this section, the purchasers have a right to require that

dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved by the widow's claim. *Harrington v. Harrington*, 142 N. C. 517, 55 S. E. 409 (1906).

Wife Not Joining in Deeds of Trust to Secure Purchase Money.—Where a debt secured by a purchase money deed of trust was divided, and two deeds of trust were substituted for the original deed of trust, which was canceled and the wife of the grantee did not join in executing any of the deeds of trust, she acquired no dower right in the land, the original debt for the purchase money not having been extinguished. *Case v. Fitzsimons*, 209 N. C. 783, 184 S. E. 818 (1936).

Applied in *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948).

Cited in *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930).

§ 30-7. Dower conveyed by wife's joinder in deed.—The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with the husband in the deed of conveyance and by her acknowledgment of the same as provided by law. (1868-9, c. 93, s. 36; Code, s. 2107; Rev., s. 3086; C. S., s. 4102; 1945, c. 73, s. 1.)

Cross Reference.—See note to § 30-8.

Editor's Note.—The 1945 amendment substituted at the end of the section the words “by her acknowledgment of same as provided by law” for the words “being privately examined as to her consent thereto in the manner prescribed by law.”

Inchoate Right of Dower as Collateral Security.—The wife by joining in her husband's mortgage given on his lands may convey, as additional security to his debt, her inchoate right of dower. *Griffin v. Griffin*, 191 N. C. 227, 131 S. E. 585

(1926)

Same—Foreclosure.—A deed of trust given by the husband and joined in by the wife unreservedly may be enforced under its terms and conditions to pay off the debt it secures, and completely bars the inchoate right of dower. *Griffin v. Griffin*, 191 N. C. 227, 131 S. E. 585 (1926).

Where a wife joins in the execution of a mortgage or deed of trust she conveys her dower interest as security for the debt, and upon foreclosure after her

husband's death she may not assert her dower in the land as against the purchaser at the foreclosure sale, although, her position being analogous to that of a surety, she is entitled to assert a claim against her husband's estate to the amount of the value of her dower. *Realty Purchase Corp. v. Hall*, 216 N. C. 237, 4 S. E. (2d) 514 (1939).

Same—Equity Will Not Intervene.—Equity will not interfere in behalf of the wife who has unreservedly joined in a mortgage on her husband's lands, to restrain the sale according to the terms of the instrument, by first ordering a foreclosure sale of the lands outside of the wife's inchoate interest, and if not sufficient, subject her interest to sale for the payment of her husband's debt. *Griffin v. Griffin*, 191 N. C. 227, 131 S. E. 585 (1926).

Joinder Makes Wife a Surety.—When

the wife encumbers her inchoate right of dower by joining in a mortgage of his land to secure his debt she becomes his surety, and is entitled to call upon her husband to exonerate her estate from the debt. *Gore v. Townsend*, 105 N. C. 228, 11 S. E. 160 (1890).

Dower Need Not Be Sold When Estate Is Solvent.—The widow may subject her dower to the payment of the debts of her husband's estate by joining in his mortgage deed or conveyance in conformity to the requirements of this section, yet if his estate is solvent the dower need not be sold, and in the event that it is insolvent the estate must be administered according to the established rules. *Holt v. Lynch*, 201 N. C. 404, 160 S. E. 469 (1931).

Cited in *Higdon v. Higdon*, 206 N. C. 62, 173 S. E. 273 (1934).

§ 30-8. Conveyance of home site by wife's joinder in deed or other conveyance.—No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife except upon the wife joining with her husband in the deed or other conveyance and her acknowledgment of same as provided by law: Provided, the wife does not commit adultery, or has not abandoned and does not abandon the husband and live separate and apart from him: Provided, further, that all married women under the age of twenty-one shall have the same privilege to renounce their dower rights in and to the home site as is now conferred upon married women twenty-one years and over, and the deed or other conveyance thereof made by the owner of a home site with the joinder and acknowledgment of his wife, even though the wife be under twenty-one years of age, shall be valid and immediately pass possession and title thereto as though said married women were twenty-one years or over: Provided, further, that all conveyances of a home site, as defined in this section, made prior to February twenty-seven, one thousand nine hundred and thirty-seven, by the owner thereof, with the voluntary signature and assent of his wife, signified on her private examination according to law, shall be valid and pass the title and possession thereto as of the date thereof, even though the wife of said owner was under twenty-one years of age at the time of such signature and assent. (1919, c. 123; C. S., s. 4103; 1937, c. 69; 1945, c. 73, s. 2.)

Cross References.—As to conveyance without joinder of insane wife, see § 30-9. As to mortgage of household and kitchen furniture, see § 45-3.

Editor's Note.—The 1937 amendment added the second proviso and the last proviso as it formerly appeared.

The 1945 amendment substituted the exception clause immediately preceding the first proviso for the words "without the voluntary signature and assent of his wife, signified on her private examination according to law." The amendment also made a somewhat similar substitution in the second proviso.

In *Coker v. Virginia-Carolina Joint-Stock Land Bank*, 208 N. C. 41, 178 S. E. 863 (1935), it was held that § 30-10 had no application where a minor's wife joined in a mortgage placed by her husband upon his home site, and declared void the mortgage upon its disaffirmance by the wife within three years after she attained her majority. In order to obviate such a result in the future, the amendment was passed to make valid and binding the properly executed renunciation of her dower rights in her husband's home site by a married woman under the age of 21. This amendment is logical and will

tend further to stabilize real estate titles. 15 N. C. Law Rev. 354.

In General.—In *Southern State Bank v. Summer*, 188 N. C. 687, 125 S. E. 489 (1924), the court said: "The value of the 'home site' is not fixed by the statute. It is not certain as to whether it is intended to be in addition to, or included within, the homestead right. Nothing is said as to whether it is superior to the rights of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration."

Validity of Section.—This section is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void. *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

Distinguished from § 45-3.—See note to § 45-3.

Property Constituting a "Home Site."—Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of this section, and 54.75 acres of farm land has been held not excessive for the purpose. *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

Deed to "Home Site" without Wife's Joinder Not Void.—This section limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of the "home site" under such deed until the death of the husband, when it

then passes to the grantee subject only to the dower right of the wife if she survives him. *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

The husband, without joinder of his wife, conveyed the home site to his wife and one of his sons. In special proceedings for partition instituted after the husband's death, it was determined that the wife was entitled to dower in all of his lands but no dower was actually allotted to her, and the lands other than the home site were partitioned among all the children. It was found as a fact that the value of the home site did not exceed the value of one-third interest in all the lands of which the husband died seized. It was held that the allotment to the wife of a life estate in the home site as and for the value of her dower is without error, since the grantees in the deed took subject to dower. *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948).

Rights of Parties under Foreclosure of Mortgage on "Home Site" in Which the Wife Did Not Join.—Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of this section and the purchaser at the foreclosure sale of such mortgage does not acquire under his deed the right to immediate title or possession to the land. *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 78 (1929).

Homestead Distinguished.—Homestead exemption should not be confused with the wife's interest under this section. The wife's interest in the husband's "home site" exists by this section and a different principle applies as to a conveyance without her valid execution. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490 (1924).

§ 30-9. Conveyance without joinder of insane wife; certificate of lunacy.—Every man whose wife is a lunatic or insane may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust, or lease, without the signature of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the State, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed, free and exempt from the dower rights and all other interests of his wife:

Provided, this section shall not apply to the homestead of the husband which has been actually allotted. (1923, c. 65, s. 1; C. S., s. 4103(a); 1945, c. 73, s. 3.)

Editor's Note.—Section 2 of the act of 1923, from which this section was codified, repealed all laws conflicting therewith to the extent of such conflict, and § 30-8 was specifically mentioned.

The 1945 amendment struck out the words "or private examination" formerly appearing after the word "signature" shortly preceding the proviso to the first sentence.

§ 30-10. Renunciation of dower.—All married persons under the age of twenty-one years shall have the same privilege to renounce their dower rights and rights of curtesy and to give their written assent to conveyances of real property as are now conferred upon married persons twenty-one years old and over. (1923, c. 67, s. 2; C. S., s. 4103(b); 1935, c. 18.)

Cross Reference.—See § 52-13, and note to § 30-8.

and 39-7. See 13 N. C. Law Rev. 375, for an analysis of this section.

Editor's Note.—It was stated in 1 N. C. Law Rev. 271, that while this section does not refer to any section, it should be considered as an amendment to §§ 30-7

The 1935 amendment made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

ARTICLE 3.

Allotment of Dower.

§ 30-11. By agreement between widow and heir.—If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower. (1868-9, c. 93, s. 39; Code, s. 2110; Rev., s. 3087; C. S., s. 4104.)

Widow's Selection of Dower.—There is nothing in this or the following section to indicate that the widow may select her

dower or "endow herself." *Vannoy v. Green*, 206 N. C. 77, 173 S. E. 277 (1934).

§ 30-12. Petition filed in superior court.—If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she failed to make such application within three months after the death of her husband, any heir, devisee, owner, or other person having any interest in said land, or claiming estates in, may file a petition reciting the facts that the widow is entitled to dower in certain lands and has not applied for it and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings. And in all such cases the clerk of the superior court, upon application by the widow, shall have authority to issue a writ of assistance to place her in possession of the land allotted to her as dower. (1868-9, c. 93, ss. 40, 41; Code, ss. 2111, 2112; 1891, c. 133; Rev., s. 3088; C. S., s. 4105; 1945, c. 116; 1947, c. 141.)

Cross References.—As to statute of limitations for allotment of dower upon lands not in actual possession of widow, see § 1-47, subsection 5. As to the settlement of dower on partition, see § 46-15 and note.

of dower at common law. *McMillan v. Turner*, 52 N. C. 436 (1860).

Editor's Note.—The 1945 amendment inserted in the first sentence the words "owner, or other person having any interest in said land, or claiming estates in." And the 1947 amendment added the last sentence.

Special Proceeding.—A proceeding for dower is a special proceeding. *Tate v. Powe*, 64 N. C. 644 (1870).

Substitute for Common-Law Action.—The remedy by petition, as prescribed by this section, is a substitute for the action

Where Equitable Element Involved.—While the assignment of dower is a special proceeding of which the clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a court of equity, the superior court in term has jurisdiction, and the application for dower becomes a civil action. *Efland v. Efland*, 96 N. C. 488, 1 S. E. 858 (1887).

This section, providing a method for the allotment of dower, was not intended to deprive the superior court of its equitable jurisdiction in respect thereto. *Citizens Bank, etc., Co. v. Watkins*, 215 N. C. 292, 1 S. E. (2d) 853 (1939).

Where Question of Title Raised.—In a petition for a partition of land, in a court of law, where the defendant denies the tenancy in common by a plea of sole seizin in himself, the proper course is for the court to try the question of title thus raised, and not to force the plaintiff to resort to an action of ejectment for that purpose. *Purvis v. Wilson*, 50 N. C. 22 (1857).

Summons Returnable to Clerk.—A summons in a proceeding for the allotment of dower is returnable before the clerk of the superior court and not to the court in term. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318 (1893).

Legal Right Personal to Widow.—The right to apply for allotment of dower by special proceeding under this section is a legal right, personal to the widow, and cannot be transferred by assignment. *Parton v. Allison*, 109 N. C. 674, 14 S. E. 107 (1891).

Dissent Essential to Jurisdiction.—The entry of a dissent by the widow is an incident to the jurisdiction of probate, and as this jurisdiction has been conferred upon the clerk of the superior court, the widow's dissent is to be made and entered in his office. *Ramsour v. Ramsour*, 63 N. C. 231 (1869).

Assignment before Allotment.—Where the right to a dower has been assigned before allotment, the assignee's remedy to enforce it is by civil action in term; the clerk of the superior court has no jurisdiction. *Parton v. Allison*, 109 N. C. 674, 14 S. E. 107 (1891).

Allotment by Heirs.—In *McMillan v. Turner*, 52 N. C. 436 (1860), there is strong intimation that the heirs could assign the widow her dower, and also that twenty years continuous possession by the widow of a certain tract of land claimed as dower is sufficient to raise a presumption that such assignment had been made. But as to allotment by heirs, see *Freeman's Heirs v. Ramsey*, 189 N. C. 790,

128 S. E. 404 (1925), where it is held that the statutory method of allotment of dower is exclusive.

Administrator as a Party.—If there is no prayer against the administrator he is not a necessary party to a bill for the assignment of dower. *Campbell v. Murphy*, 55 N. C. 357 (1856).

Creditors as Parties.—Creditors are not necessary parties to the proceedings, *Ramsour v. Ramsour*, 63 N. C. 231 (1869); but the court may permit a creditor of a person who died seized and possessed of lands to be made a party to the proceeding and contest the claim of the widow. *Welfare v. Welfare*, 108 N. C. 272, 12 S. E. 1025 (1891).

Creditors Must Make Exceptions within Allowed Time.—While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue their remedy in apt time by excepting to the report of the jury, and their motion to be made parties in order to contest the allotment of dower, made almost three months after approval by the court of the clerk's confirmation of the jury's report, is too late. *Poindexter v. Call*, 208 N. C. 62, 179 S. E. 335 (1935).

Judgment Conclusive upon All Claimants.—The judgment in a special proceeding for the allotment of dower to a widow is intended by this section to be and is conclusive upon the heirs, devisees or other claimants who may be parties as to the title of the husband and the rights of the widow. *Boyd v. Redd*, 118 N. C. 680, 24 S. E. 429 (1896).

Same—Where Lessee Not Made Party.—The lessee of lands for a term during the continuance of the lease after the death of the deceased owner is a proper and necessary party to proceedings to lay off the widow's dower wherein the locus in quo had been included, and where he has not been made a party he is not bound by the judgment in his action of ejectment and to recover damages against the widow, administrator and heirs at law. *Ingram v. Corbit*, 177 N. C. 318, 99 S. E. 18 (1919).

§ 30-13. Assignment of dower.—If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to the clerk of the superior court.

When the husband dies seized and possessed of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summons three or more persons, as may be asked in said application, qualified to act as jurors, to go upon the lands of said husband in the county of said sheriff and assess the value of the same after being duly sworn by the sheriff for that purpose, and report their assessment under their hands and seals through the sheriff, who shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign the dower accordingly. But if agreeable to and convenient to the jury summoned or appointed, as the case may be, in the county where the proceeding is pending, for the allotment of dower, said jury may go upon, view and assign and allot the land which lies in any other county or counties; and when so viewed, assessed or allotted, if it or any part of it be allotted as dower, their acts shall be valid and their allotment of dower be as valid, as if all of the land of the deceased husband lay in the county where the proceeding was brought and pending, upon properly certified copy of such allotment being filed and recorded in such other county or counties, other than the county in which the original proceedings were instituted, in which lands acted upon do lie.

If either party to the proceeding shall demand it, the clerk shall appoint three persons qualified to act as jurors, unless one of the parties demands a greater number, and then not exceeding twelve, who shall meet on the premises or some part thereof, and after being duly sworn by the clerk or someone authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands, or the hands of a majority of them, within five days to the clerk of the superior court; and when the jurors are so appointed the sheriff will not countersign the report nor take any part in the proceedings, except that the clerk may cause notice to be served on the jurors so appointed, if he deems or finds it necessary. (1868-9, c. 93, s. 42; Code, s. 2113; 1893, c. 314; Rev., s. 3089; C. S., s. 4106; 1931, c. 393; 1939, c. 339.)

Cross References.—As to property subject to dower, see § 30-5 and note. As to valuation of property of deceased husband, see note to § 30-5. As to conclusiveness of judgment in proceeding, see note to § 30-12.

Editor's Note.—The 1931 amendment added the last paragraph, and the 1939 amendment added the second sentence of the second paragraph.

Signature of Sheriff Unnecessary.—It is not required that the sheriff attest the report of the jury by signing the same. *Brickhouse v. Sutton*, 99 N. C. 103, 5 S. E. 380 (1888).

Where Secondary Evidence of Report Admissible.—Where it appeared that the report of the jury fully described the dower of the widow, but had been lost, and the omission of a certain line in the report was made in copying it upon the record, it was held that the report is a part of the record and secondary evidence of its contents is admissible. *Wells v.*

Harrell, 152 N. C. 218, 67 S. E. 534 (1910).

Manner of Allotment of Mortgaged Lands.—In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment should not be in part of the lands as if unencumbered or subject to the same encumbrance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor as he seeks to enforce his security. *Askew v. Askew*, 103 N. C. 285, 9 S. E. 646 (1889).

The remedy against an excessive assignment of dower is by exceptions to the report of the jury, upon the hearing of which it is competent for the court to hear affidavits, with a view to ascertain the facts. *Welfare v. Welfare*, 108 N. C. 272, 12 S. E. 1025 (1891).

Power of Court.—Ordinarily the court, before which exceptions to the report of the jury in the allotment of dower are

heard, is the sole judge whether a re-assignment or successive reassignments shall be made. *Poindexter v. Call*, 208 N. C. 62, 179 S. E. 335 (1935).

Setting Aside the Allotment.—Where the report of the jury allotting dower is returned, and exceptions are taken by one thereby aggrieved, the court will set aside the allotment, and order a new allotment, if sufficient cause be shown. *Stiner v. Cawthorn*, 20 N. C. 640 (1839). But if the report is confirmed, a petition to set aside the allotment will not be heard at a subse-

quent term. *Bowers v. Bowers*, 30 N. C. 247 (1848).

Order Directing Reallotment of Dower.—The Supreme Court will not disturb an order directing a reallotment of dower, made after hearing the case on argument on both sides and all the papers, including conflicting affidavits concerning value, since the trial court, in the exercise of sound discretion, is the judge of how often, for just cause, it will direct a reallotment. *Wilson v. Featherstone*, 118 N. C. 840, 24 S. E. 714 (1896).

§ 30-14. **Notice to parties of meeting of jury.**—The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting. (1868-9, c. 93, s. 43; Code, s. 2114; Rev., s. 3090; C. S., s. 4107.)

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. **When widow entitled to allowance.**—Every widow of an intestate, or of a testator from whose will she has dissented, shall, unless she has forfeited her right thereto as provided by §§ 52-19 and 52-20, be entitled, in addition to her distributive share in her husband's personal estate, to an allowance therefrom of the value of five hundred dollars for her support for one year after his decease. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the husband. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C. S., s. 4108.)

Cross References.—As to property subject to allowance, see § 30-18 and note. As to effect of wife's adultery, see § 52-20. As to allowance to children, see § 30-17.

Purely Statutory Right.—The right of a widow to a year's support is purely statutory. *Broadnax v. Broadnax*, 160 N. C. 432, 76 S. E. 216 (1912). See *Drewry v. Raleigh Sav. Bank, etc., Co.*, 173 N. C. 644, 92 S. E. 593 (1917).

Priority over Creditors.—The widow is given her right to a year's support against all general creditors, but no better title to the property assigned her than her husband had. She is entitled to her year's allowance in preference to the special lien acquired by an execution bearing teste prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner and plight in which her husband held it. *Williams v. Jones*, 95 N. C. 504 (1886). Her priority extends over the funeral expenses and costs of administration. *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116 (1896).

Mortgage Registered after Husband's

Death.—Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support, it was held that the widow took the property subject to the mortgage lien. *Williams v. Jones*, 95 N. C. 504 (1886).

Where widow fails to dissent from will, and brings an action after six months from the probate for a year's allowance, such action is not maintainable. *Perkins v. Brinkley*, 133 N. C. 86, 45 S. E. 465 (1903).

When Husband Died a Citizen of Another State.—It has been held that the widow of a man who dies a citizen of another state is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the laws of his domicile. *Simpson v. Cureton*, 97 N. C. 113, 2 S. E. 668 (1887). See *Medley v. Dunlap*, 90 N. C. 527 (1884).

But in *Jones v. Layne*, 144 N. C. 600, 57

S. E. 372 (1907), it is held that a widow, whose husband died domiciled in another state, is entitled to her year's support in this State in which there is a fund due her husband, if the widow is a bona fide resident in the State. The reason given for this ruling is that the fiction of personal property being considered as belonging to the domicile of the owner applies only to the distribution of the assets of the one deceased, and has no application to payment of debts, legacies, costs of administration, etc. See *Moye v. May*, 43 N. C. 131 (1851). Further support may be found in the object of the statute giving to the widow her year's support. See *Kimball v. Deming*, 27 N. C. 418 (1845); *In re Hayes*, 112 N. C. 76, 16 S. E. 904 (1893).

Adultery Prior to Enactment of Section Not a Bar.—A widow is not barred of her right to a year's support under this section by reason of adultery committed

prior to the passage of the statute. *Cook v. Sexton*, 79 N. C. 305 (1878).

Antenuptial Contract as a Bar.—A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 133 N. C. 80, 45 S. E. 465 (1903).

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off the widow her year's support, provided for her in the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the award and cannot maintain a proceeding under this section. *Flippin v. Flippin*, 117 N. C. 376, 23 S. E. 321 (1895).

Applied in *In re Stewart*, 140 N. C. 28, 52 S. E. 255 (1905).

§ 30-16. Duty of personal representative or justice to assign allowance.—It shall be the duty of every administrator, collector, or executor of a will from which the widow of the testator has dissented, on application in writing, signed by the widow, at any time within one year after the decease of the husband, to assign to her the year's allowance as provided in this chapter, deducting therefrom the value of any articles consumed by her between the death of her husband and the time of the assignment.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a justice of the peace, as provided in § 30-20, for ten days after the widow has filed the aforesaid request, or if the widow is the personal representative, the widow may make the application to the justice, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative.

Where the widow and personal effects of the deceased husband shall have been removed from the township or county where the deceased husband resided before his death, the widow may apply to any justice of the peace of the township or county where such personal property is located, and it shall be the duty of such justice to assign the year's allowance as if the husband had resided and died in that township. (1868-9, c. 93, s. 12; 1870-1, c. 263; Code, ss. 2120, 2122; 1889, cc. 496, 531; 1891, c. 13; Rev., ss. 3096, 3098; C. S., ss. 4113, 4115.)

Cross Reference.—As to assignment of allowance not precluding subsequent petition for increased allowance, see notes to §§ 20-20, 20-26.

Next Friend as Representative of Minor Widow.—In dissenting from her husband's

will and applying for a year's allowance, the widow, being a minor without guardian, may be represented by a next friend, duly appointed. *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99 (1899).

§ 30-17. When children entitled to an allowance.—Whenever any parent dies leaving any child under the age of fifteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of fifteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its distributive share of the personal estate of such deceased parent, to an allowance of one hundred fifty dollars (\$150.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from

any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within ten days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a justice of the peace, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396.)

The background and effect of this section are summarized in part as follows in 17 N. C. Law Rev. 357: Since 1796 statutes have been in force in North Carolina providing for the allotment of a portion of the property of a deceased person for the support of his widow and family for one year after his death. See *In re Stewart*, 140 N. C. 28, 52 S. E. 255 (1905). By these statutes the widow, in addition to her dower and distributive share of her husband's estate, has been given a year's allowance out of his personal property; the year's allowance has included not only a certain sum for her own maintenance, but also an additional sum for each child of hers or her husband's under fifteen years of age. The entire amount of this allowance was at one time held to be personal to the widow—her own property to be used at her pleasure. *Simpson v. Cureton*, 97 N. C. 112, 2 S. E. 668 (1887). As a consequence, if the husband died leaving no widow, or if the widow died before her year's allowance was assigned to her, no

allowance could be set aside for the surviving children as such. *Kimball v. Deming*, 27 N. C. 418 (1845). To remedy this situation, Public Laws 1889, c. 496, provided that in case there was no widow, or if she died before the allowance had been set aside, an allotment still could be made for the benefit of the members of the family surviving under the age of fifteen years. The 1939 amendment rewrote this statute so as to dissociate completely the year's allowance for a child from the concept of its inclusion in the widow's allotment, and to give him an independent legal status for the purpose of receiving a year's allowance.

As to purpose of this and foregoing sections, see *Kimball v. Deming*, 27 N. C. 418 (1845), approved in *In re Hayes*, 112 N. C. 76, 16 S. E. 904 (1893).

Applied, as to child dying before application for allowance, in *In re Hayes*, 112 N. C. 76, 16 S. E. 904 (1893); as to making entire allowance to widow, in *Drewry v. Bank, etc., Co.*, 173 N. C. 664, 92 S. E. 593 (1917).

§ 30-18. From what property allowance assigned.—Such allowance shall be assigned from the crop, stock and provisions or any other personal property of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased. (1868-9, c. 93, s. 9; Code, s. 2117; Rev., s. 3095; C. S., s. 4112; 1925, c. 92.)

"Stock."—In *Van Norden v. Prim*, 3 N. C. 149 (1801), the word "stock" in this section was construed to mean livestock.

Time of valuation.—The widow's allowance must be made on the basis of the property's value at the time of the allowance, and not at the time of the testator's death. *Hunter v. Husted*, 45 N. C. 97 (1852).

Damages for Wrongful Death.—The

right of action for wrongful death is conferred by statute at death, and any recovery therefor never belonged to the deceased and is not assets of the estate, therefore the widow is not entitled to have her year's support assigned to her therefrom. *Broadnax v. Broadnax*, 160 N. C. 432, 76 S. E. 216 (1912).

Failure to Pay Deficiency.—An administrator is personally liable if he has assets

to pay a deficiency and he fails to pay it. *Irvin v. Hughes*, 82 N. C. 210 (1880).

Sale of Land—Retention of Character as Realty.—In case of the sale of lands for assets to pay debts of a decedent, the surplus, after paying the debts and costs, re-

mains real estate and cannot be applied to the payment of a judgment against the administrator in favor of the widow for the balance of her year's allowance. *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116 (1896).

Part 2. Assigned by Justice of the Peace.

§ 30-19. **Value of property ascertained.**—The value of stock, crop and provisions or any other personal property assigned to the widow and children, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C. S., s. 4114.)

§ 30-20. **Procedure for assignment.**—Upon the application of the widow, or whenever it shall appear that a child is entitled to an allowance as provided by § 30-17, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially as commissioners shall, with him, ascertain the person or persons entitled to an allowance according to the provisions of this chapter, and examine the crop, stock, and provisions and any other personal property on hand, and assign to the widow and to the children, if any, so much thereof as they shall be entitled to by law. Any deficiencies shall be made up from any of the personal estate of the deceased, and also from any debt or debts known to be due the deceased. Such assignment shall vest in the widow and children such property, and the right to collect the debts thus allotted. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C. S., s. 4115.)

Cross Reference.—As to recovery of deficiency, see § 30-18 and note.

Assignment Not Precluding Increase of Allowance.—The assignment of a year's

provision under this section does not serve to preclude the widow's right to an increase thereof under § 30-26 et seq. *Mann v. Mann*, 173 N. C. 20, 91 S. E. 355 (1917).

§ 30-21. **Report of commissioners.**—The commissioners shall make and sign three lists of the articles assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the widow, one of these lists shall be delivered to her. Where the allowance is to a child, one of these lists shall be delivered to the widow or surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said widow or surviving parent; or to the child if said child is not living with the widow or surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the justice, within twenty days after the assignment, to the superior court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the person entitled to the allowance. (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C. S., s. 4116.)

Filing of List of Articles Mandatory.—The filing and recording of the list of articles allotted to the widow, as her year's support, as required by this section, is essential to its validity, and to the vesting in her of the property or debt allotted to the widow. *Kiff v. Kiff*, 95 N. C. 72 (1886).

Reasonable Certainty Required.—The

allotment to the widow must be made with such reasonable certainty, in regard to the thing allotted, as to indicate what property was intended by the commissioners, otherwise the allotment will be void. Under this principle the item, "labor for 3½ years, \$173," was held void. *Kiff v. Kiff*, 95 N. C. 72 (1886).

§ 30-22. **Fees of commissioners.**—Any person appointed by any justice

of the peace to allot or set apart to any widow and/or child a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar a day or fraction of a day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18; C. S., s. 3900.)

§ 30-23. Right of appeal.—The personal representative, or the widow, or child by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (1868-9, c. 93, s. 16; Code, s. 2124; 1897, c. 442; Rev., s. 3100; C. S., s. 4117.)

Findings Supported by Evidence Not Reviewed.—The findings of the judge in the special proceedings for the allotment of the year's support will not be reviewed

on appeal where there is evidence to support such findings. *Drewry v. Bank, etc., Co.*, 173 N. C. 664, 92 S. E. 593 (1917).

§ 30-24. Hearing on appeal.—At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners. (1868-9, c. 93, s. 17; Code, s. 2125; Rev., s. 3101; C. S., s. 4118.)

§ 30-25. Personal representative entitled to credit.—Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him. (1868-9, c. 93, s. 18; Code, s. 2126; Rev., s. 3102; C. S., s. 4119.)

§ 30-26. When above allowance is in full.—If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowances for the year's support of his widow and the children shall not, in any case, exceed the value prescribed above; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C. S., s. 4120.)

Assignment Not Barring Increased Allowance.—The assignment of an allowance to a widow under § 30-20 is not a bar to a subsequent petition for an increased allowance. The very language of the statute

plainly indicates that the widow may have a further allowance in addition to the first, if the estate exceeds \$2,000. *Mann v. Mann*, 173 N. C. 20, 91 S. E. 355 (1917).

Part 3. Assigned in Superior Court.

§ 30-27. Widow or child may apply to superior court.—It shall not, however, be obligatory on a widow or child to have the support assigned as above prescribed. Without application to the personal representative, the widow, or the child through his guardian or next friend, may at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted to have a year's support assigned. (1868-9, c. 93, s. 20; Code, s. 2128; Rev., s. 3104; C. S., s. 4121.)

Irrelevant Allegations in Answer.—Upon petition for allotment of a widow's year's allowance, allegations in the answer to the effect that the widow did not need an allotment for her support, that deceased's will evidenced a desire that the widow

should receive no part of the estate, and that defendants were the aged and infirm parents of deceased dependent upon the estate left them by the will, are irrelevant to the issues and could not be shown in evidence, and were properly stricken upon

motion, since even the reading of the pleadings would be highly prejudicial to the petitioner. *Edwards v. Edwards*, 230 N. C. 176, 52 S. E. (2d) 281 (1949).

§ 30-28. **Nature of proceeding; parties.**—The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties. (1868-9, c. 93, s. 21; Code, s. 2129; Rev., s. 3105; C. S., s. 4122.)

§ 30-29. **What complaint must show.**—In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not an allowance has been made to plaintiff and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by plaintiff since the death of decedent. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C. S., s. 4123.)

§ 30-30. **Judgment and order for commissioners.**—If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock and provisions, or any other personal property of the decedent on hand, a sufficiency for plaintiff's support for one year from decedent's death; and, if there be a deficiency, to assess such deficiency, to be paid by the personal representative from any other personal assets of the decedent, deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by plaintiff before such assignment and also any sum previously assigned. (1868-9, c. 93, s. 23; Code, s. 2131; Rev., s. 3107; C. S., s. 4124.)

§ 30-31. **Duty of commissioners; amount of allowance.**—The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the plaintiff a value sufficient for the support of plaintiff according to the estate and condition of the decedent and without regard to the limitations set forth in this chapter; but the value allowed shall be fixed with due consideration for other persons entitled to allowances for year's support from the decedent's estate; and the total value of all allowances shall not in any case exceed the one-half of the average annual net income of the deceased for three years next preceding his death. This report shall be returned by the justice to the court. (1868-9, c. 93, s. 24; Code, s. 2132; Rev., s. 3108; C. S., s. 4125.)

Meaning of Annual Net Income.—The provision of this section that the allowance shall not exceed "the one-half of the annual net income of the deceased for three years next preceding his death" means the one-half of one year's net income, determined by the average annual income for the three years next preceding the decease, and not one-half of the sum total of the annual net income for the three year period. *Holland v. Henson*, 189 N. C. 742, 128 S. E. 145 (1925).

Allowance Sustained Where Discretion Not Abused.—Where the estate of the deceased husband is large and in good condition, and he received a net annual income for three years prior to his death of over \$38,500, an allowance of \$12,500 for a year's support to his widow with minor son, less the value of the household furniture, is not an abuse of the superior court's discretion which the Supreme Court will review. *Drewry v. Raleigh Sav. Bank, etc., Co.*, 173 N. C. 664, 92 S. E. 593 (1917).

§ 30-32. **Exceptions to the report.**—The personal representative, or any creditor, distributee or legatee of the deceased, within ten days after the return

of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (1868-9, c. 93, s. 25; Code, s. 2133; Rev., s. 3109; C. S., s. 4126; 1947, c. 484, s. 1.)

Editor's Note.—The 1947 amendment substituted "ten days" for "twenty days" in the first sentence. Section 5 of the amendatory act provides that estates, proceedings and actions pending on June 30th, 1947, shall not be affected by its provisions.

§ **30-33. Confirmation of report; execution.**—If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases. (1868-9, c. 93, s. 26; Code, s. 2134; Rev., s. 3110; C. S., s. 4127.)

Chapter 31.

Wills.

Article 1.

Execution of Will.

- Sec.
 31-1. Infants incapable.
 31-2. Married woman capable.
 31-3. Formal execution.
 31-4. Execution of power of appointment by will.

Article 2.

Revocation of Will.

- 31-5. Revocation by writing or by cancellation or destruction.
 31-6. Revocation by marriage; exceptions.
 31-7. No revocation by altered circumstances.
 31-8. No revocation by subsequent conveyance.

Article 3.

Witnesses to Will.

- 31-9. Executor competent witness.
 31-10. Beneficiary competent; interest rendered void.
 31-10.1. Corporate trustee not disqualified by witnessing of will by stockholder.

Article 4.

Depository for Wills.

- 31-11. Depositories in offices of clerks of superior court where living persons may file wills.

Article 5.

Probate of Will.

- 31-12. Executor may apply for probate; jurisdiction when clerk interested party.
 31-13. Executor failing, beneficiary may apply.
 31-14. Clerk to notify legatees and devisees of probate of wills.
 31-15. Clerk may compel production of will.
 31-16. What shown on application for probate.
 31-17. Proof and examination in writing.
 31-18. Manner of probate.
 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.
 31-20. Wills filed in clerk's office.
 31-21. Validation of wills heretofore certified and recorded.

Sec.

- 31-22. Certified copy of will proved in another state or country.
 31-23. Probate of will made out of the State; probate when witnesses out of State.
 31-24. Probate when witnesses are non-resident; examination before notary public.
 31-25. Probate when witnesses in another county.
 31-26. Probate of wills of members of the armed forces.
 31-27. Certified copy of will of nonresident recorded.
 31-28. Probates validated where proof taken by commissioner or another clerk.
 31-29. Probates in another state before 1860 validated.
 31-30. Validation of wills recorded without probate by subscribing witnesses.
 31-31. Validation of wills admitted on oath of one subscribing witness.
 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

Article 6.

Caveat to Will.

- 31-32. When and by whom caveat filed.
 31-33. Bond given and cause transferred to trial docket.
 31-34. Prosecution bond required in actions to contest wills.
 31-35. Affidavit of witness as evidence.
 31-36. Caveat suspends proceedings under will.
 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

Article 7.

Construction of Will.

- 31-38. Devise presumed to be in fee.
 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.
 31-40. What property passes by will.
 31-41. Will relates to death of testator.
 31-42. Lapsed and void devises pass under residuary clause.
 31-43. General gift by will an execution of power of appointment.

Sec.

31-44. Gifts to children dying before testator pass to their issue.

Sec.

31-45. After-born children share in testator's estate.

ARTICLE 1.

Execution of Will.

§ 31-1. **Infants incapable.**—No person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years. (1811, c. 280; R. C., c. 119, s. 2; Code, s. 2137; Rev., s. 3111; C. S., s. 4128.)

Editor's Note.—For article on drafting and probate of wills, see 23 N. C. Law Rev. 306.

Under the prior law it was held that an infant between twenty-one and eighteen could dispose of personal estate by will.

Williams' Legatees v. Heirs at Law, 44 N. C. 271 (1853).

Applied, as to will executed in another state, in *In re Reynolds*, 206 N. C. 276, 173 S. E. 789 (1934).

§ 31-2. **Married woman capable.**—A married woman owning real or personal property may dispose of the same by will. (1844, c. 88, s. 8; R. C., c. 119, s. 3; Code, s. 2138; Rev., s. 3112; C. S., s. 4129.)

Curtsey in Separate Estate Defeated.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. *Hally-*

burton v. Slagle, 132 N. C. 947, 44 S. E. 655 (1903); *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218 (1905).

§ 31-3. **Formal execution.**—No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate. (1784, c. 204, s. 11; c. 225, s. 5; 1840, c. 62; 1846, c. 54; R. C., c. 119, s. 1; Code, s. 2136; Rev., s. 3113; C. S., s. 4131.)

I. In General.

II. Signing, Attestation and Date.

III. Holographic Wills Found among Valuable Papers, etc., or Deposited for Safekeeping.

I. IN GENERAL.

The right to dispose of property by will is conferred and regulated by statute. It is not a natural right. *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915); *Wescott v. First, etc.*, Nat. Bank, 227 N. C. 39, 40 S. E. (2d) 461 (1946).

The testamentary disposition of property is governed by statute. In *re Will of Puett*, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

Compliance with Statute Required.—In order that a paper-writing, designed as a

testamentary disposition of property, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. In *re Will of Puett*, 229 N. C. 8, 47 S. E. (2d) 488 (1948). See *Wescott v. First, etc.*, Nat. Bank, 227 N. C. 39, 40 S. E. (2d) 461 (1946).

Same—Compared with English Statute.—With regard to attested wills, the requisites of the English statute, and this section, except as to the number of witnesses, are substantially the same. The courts, in both countries, have demanded a strict compliance with these provisions of the law. The same policy must govern the courts of this State when they come to decide whether the requisites of this section have been complied with in the execution of a paper-writing, propounded as

a holograph will. See *Little v. Lockman*, 49 N. C. 495 (1857).

Necessity of Animus Testandi.—The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written animus testandi. It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it. In *re Perry*, 193 N. C. 397, 137 S. E. 145 (1927).

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made animus testandi, and where the other formalities have been observed, a "pack" of letters containing a note in his favor, with the indorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack," will not operate either as a valid holograph will or codicil. In *re Perry*, 193 N. C. 397, 137 S. E. 145 (1927).

Where the animus testandi appears as doubtful the question is for the jury. In *re Will of Harrison*, 183 N. C. 457, 111 S. E. 867 (1922).

Otherwise Where Animus Testandi Conclusively Presumed.—Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the animus testandi is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders. In *re Rowland's Will*, 206 N. C. 456, 174 S. E. 284 (1934).

Nuncupative Wills Not Precluded.—The language of this section does not preclude the validity of nuncupative wills in this State; for § 31-18, par. 3 expressly provides for their probate. The different sections of the Code must be construed together. *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

Writing Drafted from Dictations after Testator's Death.—A paper-writing drafted by an attorney from a stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

Holographic Will Not Defeated by Unessential Words Not in Testator's Hand-

writing.—When all the words appearing on a paper in the handwriting of the deceased person are sufficient to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be her last will and testament. In *re Will of Lowrance*, 199 N. C. 782, 155 S. E. 876 (1930); In *re Parson's Will*, 207 N. C. 584, 178 S. E. 78 (1935), wherein the unessential words had been printed on the paper before the testator used it.

Letter as Will.—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying "Brother Richard, take good care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house . . . I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will. *Wise v. Short*, 181 N. C. 320, 107 S. E. 124 (1921).

Letters written by a member of the armed forces which are not offered or proven in the manner or form prescribed by this section and § 31-26 are ineffectual as a testamentary disposition of property. *Wescott v. First, etc., Nat. Bank*, 227 N. C. 39, 40 S. E. (2d) 461 (1946).

Note Held to Be Codicil.—A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as § 31-18 requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. In *re Will of Thompson*, 196 N. C. 271, 145 S. E. 393 (1928).

An agreement to adopt a minor and make her his heir, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, indicates that the instrument is not intended as a will. *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398 (1938).

References as to Certain Questions.—See 2 N. C. Law Rev. 107, for article on

(1) what is sufficient subscription; (2) what are valuable papers; (3) what is meant by depositing with someone for safekeeping; (4) *animus testandi*.

As to devisability of possibility of reverter before condition broken, see *Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902).

Applied in *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936); *In re Will of Goodman*, 229 N. C. 444, 50 S. E. (2d) 34 (1948).

Quoted in *Cartwright v. Jones*, 215 N. C. 108, 1 S. E. (2d) 359 (1939).

Cited in *Grantham v. Grantham*, 205 N. C. 363, 171 S. E. 331 (1933); *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935); *In re Williams' Will*, 215 N. C. 259, 1 S. E. (2d) 857 (1939).

II. SIGNING, ATTESTATION AND DATE.

In General.—In order to be a valid written will with witnesses, the same should be signed by the testator or some other person in his presence and by his direction, or the signature should be acknowledged by the testator, and subscribed in his presence by at least two witnesses. *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089 (1913). As to witnesses to will, see §§ 31-9 and 31-10.

A codicil must be executed with the same formality as the will. *Paul v. Davenport*, 217 N. C. 154, 7 S. E. (2d) 352 (1940).

Distinction between Signing and Subscribing.—The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915).

Name in Body of Will Sufficient Signature.—It is well settled that if the name of the testator appears in his handwriting in the body of the will this is a signing within the meaning of the statute. *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474 (1904); *Richards v. Ritter Lbr. Co.*, 158 N. C. 54, 73 S. E. 485 (1911); *Boger v. Cedar Cove Lbr. Co.*, 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116 (1914); *Burriss v. Starr*, 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D,

71 (1914); *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915).

Under this section a paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will. *In re Rowland*, 202 N. C. 373, 162 S. E. 897 (1932).

Same—Example.—"I, John Jones, do make and publish this my last will and testament" is good if John Jones wrote the quoted words even though he did nothing further in the way of signing or attesting the instrument concerned. 2 N. C. Law Rev. 107.

Signature Made for Testatrix in Her Presence.—An instruction that it was not required that the will should be manually signed by the alleged testatrix if her name was signed thereto by someone in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will, was held correct. *In re Will of Johnson*, 182 N. C. 522, 109 S. E. 373 (1921).

Signing in Presence of Witnesses Not Necessary.—It is not required that testator sign the will in the presence of the attesting witnesses. *In re Will of Etheridge*, 229 N. C. 280, 49 S. E. (2d) 480 (1948).

This section does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such. *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089 (1913); *In re Fuller's Will*, 189 N. C. 509, 127 S. E. 549 (1925).

Witnesses Need Not Sign in Presence of Each Other.—It is not required that the subscribing witnesses sign the will in the presence of each other. *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089 (1913); *In re Will of Johnson*, 182 N. C. 522, 109 S. E. 373 (1921).

But Attestation in Presence of Testator Is Essential.—It is essential that the will be subscribed in the presence of the testator by at least two witnesses. *In re Thomas*, 111 N. C. 409, 16 S. E. 226 (1892).

When a witness who had properly signed as such, no other witness signing, had the will copied upon different paper in the absence of the testator, signed the copy, left

it at the home of the testator with the original, who afterwards procured the due attestation and signature of the other witness on the copy, both of which were found among the papers of the testator after his death, but the original was destroyed, the copy is not valid as a will, and evidence that the first draft was identical with the copy is incompetent, the first witness having signed before the testator, and not in his presence, there being no physical connection between the original and copy, and not upon the same paper as that of the signature of the testator. In *re Baldwin*, 146 N. C. 25, 59 S. E. 163 (1907).

Evidence tending to show that one of the subscribing witnesses signed the will as such in the presence of testatrix and the other subscribing witness warrants the jury in finding that the witness' subscription met the requirements of this section, notwithstanding that the witness wavered somewhat in her testimony. In *re Redding's Will*, 216 N. C. 497, 5 S. E. (2d) 544 (1939).

Relation in Point of Time of Signing and Attestation.—Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that if the signature of the latter precede the signing by the testator the will is void. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. In *re Baldwin*, 146 N. C. 25, 59 S. E. 163 (1907).

Where a witness subscribes his name to an instrument during the afternoon, and the purported testatrix signs the instrument the following night, but not in the presence of the witness, the signing of the instrument by the parties cannot be construed as one and the same transaction, and the instrument is not validly witnessed and attested by him, and, upon proof that the instrument was properly subscribed by one other witness, a peremptory instruction in favor of caveators is without error for want of proof that the instrument was subscribed by two witnesses. In *re McDonald's Will*, 219 N. C. 209, 13 S. E. (2d) 239 (1941).

The attestation by witnesses must be on the sheet of paper containing the testator's signature, or else upon some paper physically connected with that sheet. In

re Baldwin, 146 N. C. 25, 59 S. E. 163 (1907).

Attestation Does Not Invalidate Holographic Will.—The fact of there being a signature of one subscribing witness to a will of land does not prevent it from being proved as a holograph will; and it is no objection to the probate of a script as a holograph will that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. *Hill v. Bell*, 61 N. C. 122 (1867).

Necessity of Date—Signature Required.—The testator's signature to the will is required though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator. *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915).

A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will under this section and § 31-13, subsection 2, and it is not necessary that the writing be dated or show the place of execution. In *re Parson's Will*, 207 N. C. 584, 178 S. E. 78 (1935), citing *In re Will of Lowrance*, 199 N. C. 782, 155 S. E. 876 (1930).

Where Only One of Inconsistent Wills Dated.—Where the decedent has left several paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had indorsed under his signature, thereon, the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy. *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915).

Question for Jury.—It is for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient to submit the question to the jury. In *re Kelly's Will*, 206 N. C. 551, 174 S. E. 453 (1934).

III. HOLOGRAPHIC WILLS FOUND AMONG VALUABLE PAPERS, ETC., OR DEPOSITED FOR SAFEKEEPING.

Cross Reference.—See § 31-18 and note.

Construction of Section.—The requirements of this section that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient. In re Will of Groce, 196 N. C. 373, 145 S. E. 689 (1928).

Found among the Valuable Papers "or" Effects.—The word "and" appearing in the phrase "among the valuable papers and effects" should be taken in its alternative rather than in its conjunctive sense. The change of the conjunctive "or" which originally appeared in place of "and" did not affect the construction of the section. This for the reason that if the word "and" is taken in its strict conjunctive sense, the statute would be virtually repealed or its benefits greatly diminished, as only few persons who manage their business with order and system keep their valuable papers and effects mixed up together. Hughes v. Smith, 64 N. C. 493 (1870).

What Constitutes Proper Depositing under This Section.—A script purporting to be a holograph will was found in a drawer inside of a desk, between a bag of gold coins and a bag of silver coins; and immediately above the drawer in pigeon holes, were found notes, bonds and other valuable papers, arranged in files; the drawer and pigeon holes were secured by the same door and lock: It was held, that the script was properly deposited, under this section defining the requisites of holograph wills. Hughes v. Smith, 64 N. C. 493 (1870).

In Drawer of Bookcase with Deeds, etc.—Where the proof showed that the script propounded as a holograph will was found in a small drawer of a bookcase, in the room which the alleged testator occupied at his death, with his deeds and other papers, it was held to be such a finding "among the valuable papers of the decedent" as will, in connection with the other evidence required by the statute in respect to handwriting, authorize its probate. Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78 (1891).

A paper-writing found after testator's

death in the pockets of the clothes he was wearing, with large sums of money and other papers of value was held to be effective as his will. In re Will of Groce, 196 N. C. 373, 145 S. E. 689 (1928).

Need Not Be Found among Most Valuable Papers.—The phrase, "among the valuable papers and effects of," etc., used in this section does not necessarily and without exception mean among the most valuable papers, etc. So the fact that decedent kept valuable papers in a tin box in a bank which were intrinsically more valuable than papers kept in a trunk where the will was found would not prevent the latter from being a depository within the meaning of the section. Winstead v. Bowman, 68 N. C. 170 (1873).

Deposit among Useless Papers and Rubbish.—In Little v. Lockman, 49 N. C. 495 (1857), the script propounded was found in the drawer of a bureau, among some useless papers and rubbish, and there were valuable papers and effects kept in another drawer of the same bureau. Under such circumstances the court properly held that the script was not found in such a place of deposit as was contemplated by the statute. Hughes v. Smith, 64 N. C. 493 (1870).

What Constitutes Valuable Papers.—Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value. Much depends upon the condition and business and habits of the decedent in respect to keeping his valuable papers. Winstead v. Bowman, 68 N. C. 170 (1873).

Evidence of Finding among Valuables.—That a holograph script was seen among the valuable papers and effects of the decedent eight months before his death is no evidence that it was found there at or after his death. Adams v. Clark, 53 N. C. 56 (1860).

Evidence that the will of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers and papers she desired to keep for their sentimental value, and that it was transferred after her death, together with the other papers, to her trunk where they were found, was held sufficient, under the circumstances of the case. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531 (1924).

Jury to Determine Intention in Depositing with Valuables.—It was entirely proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper-

writing was deposited by the deceased among his valuable papers with the intention that it should be his will. *Simms v. Simms*, 27 N. C. 684 (1845); *Hill v. Bell*, 61 N. C. 122 (1867).

What Constitutes Depositing with Someone for Safekeeping.—In *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15 (1896), a brother in Texas wrote to his sister in North Carolina that if he got sick or died in Texas he wanted her to have his farm. He simply mailed her the letter. Subsequently he died in Texas and his sister undertook to probate the letter as a holographic will in this State. The question arose whether it had been deposited "with someone for safekeeping"; the court held that this constituted depositing with someone for safekeeping and that the will should be probated. In view of the fact that a testamentary disposition must be accompanied with animus testandi, the decision seems to be clearly unsound, in-

asmuch as the letter in question discloses no such intention. This conclusion is supported by later decisions of the court which in express terms refuses to follow the doctrine of *Alston v. Davis*. See *Spencer v. Spencer*, 163 N. C. 83, 79 S. E. 291 (1913). It is believed that if the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it as a will, the letter would be admitted to probate as such. See *In re Ledford's Will*, 176 N. C. 610, 97 S. E. 482 (1918); 12 N. C. Law Rev. 199.

Deposit in a Trunk Left with a Friend for Safekeeping.—The placing of a holographic will in a trunk, left for safekeeping with a friend, and having it in the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the point of deposit. *Hill v. Bell*, 61 N. C. 122 (1867).

§ 31-4. **Execution of power of appointment by will.**—No appointment, made by will in the exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. (1844, c. 88, s. 9; R. C., c. 119, s. 4; Code, s. 2139; Rev., s. 3114; C. S., s. 4132.)

Cross Reference.—See § 31-43 and note.

ARTICLE 2.

Revocation of Will.

§ 31-5. **Revocation by writing or by cancellation or destruction.**—No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safekeeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least: Provided, that where a married person makes a will or testament devising or bequeathing property to his or her spouse, a subsequent absolute divorce of the parties shall operate as a revocation of that portion of the will or testament which devises or bequeaths property to the spouse of the testator or testatrix and the property described in such portion of the will shall

pass under an appropriate residuary clause, if any, of the will. If there is no appropriate residuary clause, such property shall descend or be distributed as if the testator or testatrix had died intestate. (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.)

Editor's Note.—The 1945 amendment added the proviso at the end of the section.

Material Alteration Necessary.—In order for there to be a revocation of a will, in whole or in part, under the provisions of this section there must not only exist the intent of the testator to cancel, but there must be the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N. C. 714, 120 S. E. 479 (1923).

Same—Primary Controlling Clause Unaltered, Effect.—Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. In re Love's Will, 186 N. C. 714, 120 S. E. 479 (1923).

Presumption as to Second Will.—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of a prior date. In re Wolfe's Will, 185 N. C. 563, 117 S. E. 804 (1923), holding that where testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters, the two wills were not inconsistent and the latter did not revoke the former.

Presumption of Revocation Where Will Cannot Be Found.—It being shown that

a will was once in existence and last heard of in possession of the testator, but could not be found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it. Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719 (1887).

Such presumption is not conclusive, but it imposes upon the person asserting the will the burden of proving that it was not so destroyed, or that the testator was not of sound mind at the time of such presumed destruction. Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719 (1887).

Revocation of Holographic Will.—It seems clear that a holographic will may be revoked just as an attested will may, i. e., (1) by burning, tearing, canceling or obliterating or (2) by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with. No witnesses are necessary on the holographic revocation. See 14 L. R. A., N. S., 968 and 112 Am. St. Rep. 822, 2 N. C. Law Rev. 110.

Revocatory Paper Must Be a Testamentary Paper.—Where the writing offered as operating a revocation of the will of the testator contains none of the elements of a testamentary paper, it cannot be helped by evidence aliunde, and hence has no revocatory effect. Davis v. King, 89 N. C. 441 (1883).

Effect of Disposal of Articles Already Bequeathed.—A bequest of personal property in a trunk which contained the holograph will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testatrix. In re Foy, 193 N. C. 494, 137 S. E. 427 (1927).

Interlineations and Annotations Held Insufficient to Show Revocation.—Where testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed, and marks through certain words of the will, and it appears that such alterations are insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the notations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annota-

tions are insufficient to show a revocation of the will, intent to revoke being essential to revocation by defacement or obliteration of the will by testator under this section. *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936).

Revocation by Parol Prior to Section.—See *Giles v. Giles*, 1 N. C. 377 (1801), decided prior to the enactment of this section, where it is held that a will of real estate in writing may be revoked by parol

if the words of revocation denote a present intention to revoke.

Revival by Parol Declaration.—A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. *Giles v. Giles*, 1 N. C. 377 (1801).

Cited in *In re Will of Watson*, 213 N. C. 309, 195 S. E. 772 (1938); *In re Will of Goodman*, 229 N. C. 444, 50 S. E. (2d) 34 (1948).

§ 31-6. Revocation by marriage; exceptions.—A will is revoked by the subsequent marriage of the maker, except as follows:

(1) A will made prior to the marriage of the maker which contains an express statement to the effect that it is made in contemplation of marriage to a person named therein is not revoked by the maker's marriage to such person.

(2) A will made in the exercise of a power of appointment, or so much thereof as is made in the exercise of a power of appointment, if the real or personal estate thereby appointed would not, in default of such appointment, pass to the maker's heirs or next of kin, is not revoked by the maker's subsequent marriage. (1844, c. 88, s. 10; R. C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116; C. S., s. 4134; 1947, c. 110.)

Editor's Note.—The 1947 amendment inserted the provision contained in subsection (1) and made changes in the provision contained in subsection (2).

Republication by Parol Is Not Effective.—Where the will of a married woman was revoked by another marriage contracted after the will was made, her verbal declaration, during the last coverture, that said paper-writing was her last will and testament, without any further execution thereof in accordance with the statute, did not constitute a reexecution and republication of it. *Means v. Ury*, 141 N. C. 248, 53 S. E. 850 (1906).

A holograph will revoked by testator's marriage can only be revived by a written instrument setting forth his intention, and duly attested by two witnesses, or by a writing by the testator himself, found among his valuable papers, or handed to one for safekeeping. *Sawyer v. Sawyer*, 52 N. C. 133 (1859).

Republication by Codicil.—A will which has been revoked by the marriage of the testator is revived and republished by a codicil properly executed subsequent to the marriage which refers to the prior will and expresses an intention of the testator that the will should be effective except as altered by the codicil. *In re Coffield's Will*, 216 N. C. 285, 4 S. E. (2d) 870 (1939).

Evidence of Undue Influence.—This section revokes, with certain exceptions, any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. *In re Will of Bradford*, 183 N. C. 4, 110 S. E. 586 (1922).

Applied in *Potter v. Clark*, 229 N. C. 350, 49 S. E. (2d) 636 (1948).

Cited in *In re Will of Watson*, 213 N. C. 309, 195 S. E. 772 (1938).

§ 31-7. No revocation by altered circumstances.—No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (1844, c. 88, s. 11; R. C., c. 119, s. 24; Code, s. 2178; Rev., s. 3117; C. S., s. 4135.)

Subsequent Birth or Adoption of Child.—The subsequent birth of a child, or the adoption of one under our statute, does not revoke the will of the father under this section as in case of subsequent marriage under § 31-6. *Sorrell v. Sorrell*, 193 N. C. 439, 137 S. E. 306 (1927).

Right of After-Born Child Does Not Effect Revocation.—While after-born chil-

dren not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under § 31-45, it does not amount to revocation of the entire will. *Fawcett v. Fawcett*, 191 N. C. 679, 132 S. E. 796 (1926).

Applied in *In re Will of Watson*, 213 N. C. 309, 195 S. E. 772 (1938).

§ 31-8. **No revocation by subsequent conveyance.**—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (1844, c. 88, s. 2; R. C., c. 119, s. 25; Code, s. 2179; Rev., s. 3118; C. S., s. 4136.)

Conveyance, etc., Not to Affect Provisions of Will.—No conveyance or act done after the execution of a will, unless it amounts to a revocation, will affect its provisions. Wood v. Cherry, 73 N. C. 110 (1875).

Construction.—This statute was construed in Wood v. Cherry, 73 N. C. 110 (1875), cited in Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61 (1890); Cobb v. Edwards, 117 N. C. 244, 23 S. E. 241 (1895); Herring v. Sutton, 129 N. C. 107, 39 S. E. 772 (1901); Sykes v. Boone, 132 N. C. 199, 43 S. E. 645 (1903); Avery v. Stewart, 136 N. C. 426, 48 S. E. 775

(1904); Chappell v. White, 146 N. C. 571, 60 S. E. 635 (1908).

Parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. Chappell v. White, 146 N. C. 571, 60 S. E. 635 (1908).

This statute was enacted in view of the decision in Cook v. Redman, 37 N. C. 623, (1843), in which such a trust was upheld. Chappell v. White, 146 N. C. 571, 60 S. E. 635 (1908).

Cited in Wright v. Wright, 198 N. C. 754, 153 S. E. 321 (1930).

ARTICLE 3.

Witnesses to Will.

§ 31-9. **Executor competent witness.**—No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. (R. C., c. 119, s. 9; Code, s. 2146; Rev., s. 3119; C. S., s. 4137.)

Purpose of Section.—This section was intended to give the benefit of an executor's testimony to every person who should be interested, either in the establishment, or defeat of a paper-writing propounded as a will. Pannell v. Scoggin, 53 N. C. 408 (1861).

Executor or Administrator C. T. A. Competent Witness.—An executor or administrator cum testamento annexo, who is also a subscribing witness to a will, is competent to testify to the execution thereof; and the same rule applies to one who was competent at the time of the making of the will, but subsequently acquired an interest therein. Vester v. Collins, 101 N. C. 114, 7 S. E. 687 (1888).

Same—Rule Prior to Section.—An executor, before the enactment of this section, could not be a witness in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. Gunter v. Gunter, 48 N. C. 441 (1856).

May Be Examined for Both Parties.—Under this section one named as executor in a receipt, propounded as a will, though named as plaintiff in an issue devisavit vel non, may be examined as a witness for the caveator as well as for the propounder. Pannell v. Scoggin, 53 N. C. 408 (1861).

§ 31-10. **Beneficiary competent; interest rendered void.**—If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. (R. C., c. 119, s. 10; Code, s. 2147; Rev., s. 3120; C. S., s. 4138.)

In General.—This section avoids only the devise or bequest to the attesting wit-

ness and to his and her wife or husband and privies, and leaves the other disposi-

tions made of the testator's property in unimpaired force and operation. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687 (1888).

This section applies only to wills that have attesting witnesses, and to the attesting witness. Hence a devisee under a holographic will is a competent witness to prove the will without losing his interest thereunder. His interest in the results affects only the credit to be given to his testimony. *Hampton v. Hardin*, 88 N. C. 592 (1883).

One who is beneficiary under a holograph will may testify to such competent, relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re *Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531 (1924).

Object in Avoiding Witnesses' Interest.—It was to remove all improper influences and secure impartiality, in such as are called to attest the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away. *Hampton v. Hardin*, 88 N. C. 592 (1883).

Interest of One Who Signs, but Not

§ 31-10.1. **Corporate trustee not disqualified by witnessing of will by stockholder.**—A corporation named as a trustee in a will is not disqualified to act as trustee by reason of the fact that a person owning stock in the corporation signed the will as a witness. (1949, c. 44.)

ARTICLE 4.

Depository for Wills.

§ 31-11. **Depositories in offices of clerks of superior court where living persons may file wills.**—The clerk of the superior court in each county of North Carolina shall be required to keep a receptacle or depository in which any person who desires to do so may file his or her will for safekeeping; and the clerk shall make a charge of fifty cents for the filing of such will, and shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator: Provided, that the contents of said will shall not be made public or open to the inspection of anyone other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. (1937, c. 435, s. 1.)

Local Modification.—Guilford: 1937, c. 435, s. 2.

Editor's Note.—This section represents a rather progressive step in the law of wills. If taken advantage of by testators, it may prevent the loss or fraudulent destruction of many validly executed wills,

as Witness, Not Avoided.—One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. *Boone v. Lewis*, 103 N. C. 40, 9 S. E. 644 (1889).

Devisee May Testify to Finding Script among Valuable Papers.—The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valuable papers of the deceased. *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78 (1891).

Competency of Witness Is Question of Law.—If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy and it is error in the judge to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the court, to be raised when he offers to testify, and to be determined by the court. *McLean v. Elliott*, 72 N. C. 70 (1875).

Section 8-51 does not apply to wills, which are governed by this section. *Cox v. Lumber Co.*, 124 N. C. 78, 32 S. E. 381 (1899).

Applied in *Barrett v. Williams*, 215 N. C. 131, 1 S. E. (2d) 366 (1939).

and may tend to prevent the offer of forged wills for probate and contests of wills upon the grounds of fraud, undue influence, and mental incapacity. Similar statutes have been enacted in several states in this country. 15 N. C. Law Rev. 353.

ARTICLE 5.

Probate of Will.

§ 31-12. **Executor may apply for probate; jurisdiction when clerk interested party.**—Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. If such will is fraudulently suppressed, stolen or destroyed, or has been lost, and an action or proceeding shall be commenced within two years from the death of the testator or devisor to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise. If the clerk of the superior court having jurisdiction to probate any will be a subscribing witness thereto, or a devisee or legatee therein, or if said clerk shall have any pecuniary interest in the property disposed of by said will, then the clerk of the superior court of any adjoining county shall have jurisdiction to probate said will, and upon petition filed before him by anyone interested in any way in said will, he shall proceed to have said will produced before him, and the said will shall thereupon be probated, recorded, and filed as provided by this chapter, and a duly certified copy of the said will, together with the probate of the same, and the said petition, under the hand and seal of the said clerk, shall be filed and recorded in the book of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee therein, or who had a pecuniary interest in the property disposed of by said will and the clerk in said last mentioned county is hereby authorized to issue letters to personal representatives, who may qualify and administer the estate in said will as if originally probated in said county, and the title to all property, both real and personal, conveyed and devised in said will, shall be as good and effectual as if the said will had been originally probated and recorded in said last mentioned county. (C. C. P., s. 439; Code, s. 2151; Rev., s. 3122; 1919, c. 15; C. S., s. 4139; 1921, c. 99; 1923, c. 14.)

Cross References.—As to jurisdiction of clerk, see §§ 28-1, 28-2. As to disqualification of clerk, see §§ 2-17 through 2-21. As to conveyances within two years of death of decedent where there is no will, see § 28-83. As to rights of innocent purchasers when will withheld from probate, see § 31-39.

Editor's Note.—The provision as to the probate of wills where the clerk is a subscribing witness was added by the 1921 amendment, and the similar provision where such clerk is a devisee or legatee, or has a pecuniary interest in the property disposed of by the will, was added by the 1923 amendment.

"The obvious purpose of the two amending statutes was to provide a simple and speedy method of obtaining the probate of a will, when the clerk was disqualified, and this has been done; but how far it was intended to change the former practice, if at all, in case of interest, is not clearly shown." 1 N. C. Law Rev. 314, citing *Land Co. v. Jennett*, 128 N.

C. 3, 37 S. E. 954 (1901).

This section and § 31-15 require the probate of a will, by implication at least. *Wells v. Odum*, 207 N. C. 226, 176 S. E. 563 (1934).

No Limitation to Probate a Will—Exception.—In the absence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven, and when duly proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it. *Steadman v. Steadman*, 143 N. C. 345, 55 S. E. 784 (1906). But this section now sets a period of limitation after which a will may not be valid to pass property as against innocent purchasers for value and without notice. Ed. Note.

Limitation as to Lost Wills.—See *McCormick v. Jernigan*, 110 N. C. 406, 14 S. E. 971 (1892), where it is held that no statute of limitation applies to the probate of a lost will. This case was decided prior to the amendment of 1919, which

sets a limitation to the probate of wills where the rights of bona fide purchasers are involved. Ed. Note.

Title Descends to Heirs Subject to Be Divested.—The title of the land descends to the heirs of the testator, subject to be divested in favor of the devisee, when the will is duly admitted to probate. *Floyd v. Herring*, 64 N. C. 409 (1870).

Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being ex parte, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally. In *re Rowland*, 202 N. C. 373, 162 S. E. 897 (1932).

The probate of a will in common form

§ 31-13. **Executor failing, beneficiary may apply.**—If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days' notice thereof to the executor. (C. C. P., s. 440; Code, s. 2152; Rev., s. 3123; C. S., s. 4140.)

Cross Reference.—As to who may apply for letters of administration in case of intestacy, see § 28-6 et seq.

Notice to Executor in Probating a Codicil.—Where an executor has probated and

without citation to those in interest "to see the proceedings," is an *ex parte* proceeding and not binding on caveators upon the issue of devisavit vel non raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitutes reversible error. *Wells v. Odum*, 205 N. C. 110, 170 S. E. 145 (1933).

Appointment Is Reviewable.—The power, conferred by this section, to appoint administrators is reviewable by the judge of the superior court of the county. In *re Estate of Wright*, 200 N. C. 620, 158 S. E. 192 (1931).

qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. *Spencer v. Spencer*, 163 N. C. 83, 79 S. E. 291 (1913).

§ 31-14. **Clerk to notify legatees and devisees of probate of wills.**—The clerks of the superior court of the State are hereby required and directed to notify by mail, all legatees and devisees whose addresses are known, designated in wills filed for probate in their respective counties. All expense incident to such notification shall be deemed a proper charge in the administration of the respective estates. (1933, c. 133.)

While this requirement appears to be mandatory, it does not seem to be prerequisite to the probate of the will itself. Nor does it assume the status and importance of a citation to devisees and legatees as in

the case of the probate of a will in solemn form. Apparently the purpose of the statute is to expedite the settlement of the estate of a person who has died testate. 11 N. C. Law Rev. 263.

§ 31-15. **Clerk may compel production of will.**—Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the State, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt. (C. C. P., s. 442; Code, s. 2154; Rev., s. 3124; C. S., s. 4141.)

Cross References.—See note to § 31-12. As to larceny, concealment, or destruction of wills, see § 14-77.

In General.—A petition before the clerk of the superior court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is

a proceeding under this section to compel the production of a will. *Williams v. Bailey*, 177 N. C. 37, 97 S. E. 721 (1919).

Failure of Petitioners to Pursue Proceedings—Discharge of Respondents.—Where the respondents in proceedings to compel the production of a will appear before the clerk at the time set for the hearing, and in writing under oath fully deny

the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial docket, and the rule against the respondents should be discharged at the petitioner's cost. *Williams v. Bailey*, 177 N. C. 37, 97 S. E. 721 (1919).

Issue of Wrong Venue No Excuse.—Where the clerk of the court of G. county issued a notice to the respondent, who had the will of the deceased in his possession, to exhibit the same for probate, it was the duty of the respondent to obey the summons, and he could have raised in his answer the question of whether the will should be probated in G. or L. county. In *re Scarborough's Will*, 139 N. C. 423, 51 S. E. 931 (1905).

Impossibility to Comply with Order as Excuse.—An order of the clerk of the court of G. county which adjudges the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent cannot comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of

the will and has refused to surrender it to the respondent. In *re Scarborough's Will*, 139 N. C. 423, 51 S. E. 931 (1905).

Allowance of Reasonable Expenses.—Where the law imposes a duty upon a person, or group of persons, with respect to probating and establishing the validity of a will, in the performance of such duty, in good faith, reasonable expenses thereby incurred should be allowed and paid out of the fund or property which is the subject of the litigation. *Wells v. Odum*, 207 N. C. 226, 176 S. E. 563 (1934).

Attachment for Contempt—Scope of Proceedings.—In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and cannot be passed upon. In *re Scarborough's Will*, 139 N. C. 423, 51 S. E. 931 (1905).

Motion to Dismiss Proceedings.—Where a rule issued under this section in proceedings to compel the production of a will should be discharged, a motion by the respondents to dismiss the proceedings will be treated as a motion to discharge them. *Williams v. Bailey*, 177 N. C. 37, 97 S. E. 721 (1919).

§ 31-16. **What shown on application for probate.**—On application to the clerk of the superior court, he must ascertain by affidavit of the applicant—

1. That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

2. The value and nature of the testator's property, as near as can be ascertained.

3. The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of the parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate. (C. C. P., s. 441; Code, s. 2153; Rev., s. 3125; C. S., s. 4142.)

Applied in *In re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

§ 31-17. **Proof and examination in writing.**—Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office. (C. C. P., s. 437; Code, s. 2149; Rev., s. 3126; C. S., s. 4143.)

Former Practice.—Formerly the court of pleas and quarter sessions had jurisdiction of the probate of wills, and there was at that time no provision in the statute requiring the taking of the proofs in writing or for recording the probate. The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the min-

utes of the adjudication, and the clerk, acting upon the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases. *Poplin v. Hatley*, 170 N. C. 163, 86 S. E. 1028 (1915).

Presumption of Valid Probate and Rec-

ordination.—The requirements of this section did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. *Poplin v. Hatley*, 170 N. C. 163, 86 S. E. 1028 (1915).

Same—Vacating Probate in Collateral Proceedings.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding insti-

tuted for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones*, 78 N. C. 402 (1878); *McClure v. Spivey*, 123 N. C. 678, 31 S. E. 857 (1898).

Foreign Records conforming to Section Sufficient.—Where a nonresident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of this section, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

Applied in In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

§ 31-18. **Manner of probate.**—Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the State, or cannot after due diligence be found within the State, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safekeeping.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the State, to call in the widow and next of kin to contest such will if they think proper. (C. C. P., s. 435; Code, s. 2148; 1893, c. 269; 1901, c. 276; Rev., s. 3127; C. S., s. 4144.)

Local Modification.—Burke, Scotland: vania, Wake: C. S. 4156; 1929, c. 313; 1939, C. S. 4154; Cleveland, Henderson, Transyl- c. 34; Halifax: 1924, c. 10; 1929, c. 313;

1939, c. 34; Haywood: C. S. 4157; Lee: 1029, c. 313; 1939, c. 34.

I. In General—Attested Wills.

II. Holographic Wills.

III. Nuncupative Wills.

I. IN GENERAL—ATTESTED WILLS.

Compliance with Statutory Requirements.—In order that a paper-writing, designed as a testamentary disposition of property, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948). See Westcott v. First, etc., Nat. Bank, 227 N. C. 39, 40 S. E. (2d) 461 (1946).

Proof Required Where Only One Witness Alive.—The statute seems to require that, when the will purports to be signed by the testator himself and only one of the subscribing witnesses is alive and competent, some evidence should be introduced as to the handwriting of the testator or the genuineness of the signature. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089 (1913).

It is not required, in order to have a valid probate, that the surviving witness should testify that he saw the other witness subscribe his name to the instrument. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089 (1913).

Proof De Novo on Issue of Devisavit Vel Non.—The authorities seem to hold that in the trial of an issue of devisavit vel non, on caveat duly entered, the proof as to the formal execution of the will shall be made de novo. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089 (1913), citing In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025 (1909).

Evidence Must Show Subscribing in Presence of Testator.—Under § 31-3 and this section, it is essential, not only that the document shall be subscribed in the presence of the testator by at least two witnesses, but that the evidence upon which the will is admitted to probate must show that fact. In re Thomas, 111 N. C. 409, 16 S. E. 226 (1892).

Applied in In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

Quoted in Cartwright v. Jones, 215 N. C. 108, 1 S. E. (2d) 359 (1939).

Cited in In re Will of Thompson, 196 N. C. 271, 145 S. E. 393 (1928); In re Will of Shemwell, 197 N. C. 332, 148 S. E. 469 (1929); In re Will of Stewart, 198 N. C. 577, 152 S. E. 685 (1930); In re Will of Lowrance, 199 N. C. 782, 155 S. E. 876

(1930); McMillan v. Robeson, 225 N. C. 754, 36 S. E. (2d) 235 (1945).

II. HOLOGRAPHIC WILLS.

The phrase, "among the valuable papers and effects of," etc., used in this section, does not necessarily and without exception mean among the most valuable papers, etc. Winstead v. Bowman, 68 N. C. 170 (1873). Generally as to finding among valuable papers and effects, see § 31-3 and note.

Testimony of witnesses that the paper-writing propounded as the holograph will of deceased was found in his home in a washstand or bureau drawer in which he also kept deeds and receipts, is sufficient to be submitted to the jury on the question of whether the paper-writing was found among his valuable papers and effects as required by this section since the requirement of the statute is met if the paper-writing is found among papers and effects regarded by decedent as valuable. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857 (1939).

Difference in Terminology of This and § 31-5.—The statute with reference to revocation by holographic will and that with reference to probate of a holographic will are worded somewhat differently. As to revocation it must be "lodged by him with some person for safekeeping or left by him in some secure place, or among his valuable papers and effects." As to probate it is sufficient if it "was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safekeeping." 2 N. C. Law Rev. 110. As to wording in respect to formal execution, see § 31-3.

Effect of Provisions of § 8-51.—Where the validity of a holograph will depends upon its having been left with the beneficiary for safekeeping, his testimony thereof, after the death of the testator, is a transaction or communication of which he may not testify under § 8-51. McEwan v. Brown, 176 N. C. 249, 97 S. E. 20 (1918), overruling Hampton v. Hardin, 88 N. C. 592 (1883).

Handwriting Goes to Jury on Testimony of Three Witnesses.—Testimony of three witnesses that the paper-writing propounded as the holograph will of decedent was in his handwriting takes the case to the jury as to this requirement, notwithstanding conflicting testimony of caveator. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857 (1939).

Destroyed Will.—In an action to probate a destroyed holographic will, the proponent must show that the instrument in the handwriting of the deceased and signed

by him once existed and was destroyed under circumstances that would defeat an inference of revocation. Upon failure of such proof, there is a failure of the proof of the res and a nonsuit is proper. *Hewett v. Murray*, 218 N. C. 569, 11 S. E. (2d) 867 (1940).

III. NUNCUPATIVE WILLS.

Similarity to English Statute of Frauds.

—The statutory provisions in relation to nuncupative wills have existed in this State since 1784, and they are substantially the same as those in the English Statute of Frauds, 29 Car. II, ch. 3, §§ 19, 20; and these provisions have always been strictly construed and enforced by the courts, both in this State and in England. *Smith v. Smith*, 63 N. C. 637 (1869).

The language of § 31-3 does not preclude the validity of nuncupative wills for paragraph 3 of this section expressly provides for their probate. The sections must be construed together. *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

Strict Compliance Necessary—Purpose of Requirements.—The requisites of this statutory provision must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent practices on the part of such persons as would be disposed to obtain undue advantage of persons in their last sickness as to the final disposition of their property; and also to prevent mischiefs that might arise from the ignorance, misapprehension or dishonest purposes of persons called upon to be the witnesses of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to observe them strictly. *Brown v. Brown*, 6 N. C. 350 (1818); *Rankin v. Rankin*, 31 N. C. 156 (1848); *Webster v. Webster*, 50 N. C. 95 (1857); *Haden v. Bradshaw*, 60 N. C. 259 (1864); *Smith v. Smith*, 63 N. C. 637 (1869); *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423 (1890); *Long v. Foust*, 109 N. C. 114, 13 S. E. 889 (1891).

The testator must state his wishes in the presence of two witnesses and specially require them to bear witness thereto in order to constitute a valid nuncupative will. *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

Where a woman in her last illness, without expressing any purpose to make a will said she wanted to give to her sister certain articles of personal property, and called her to her bedside and gave them to her, in the presence of two other persons but did not call them, or either of them, to

witness the transaction, it was held that this did not constitute a nuncupative will. *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423 (1890).

Designation of Witnesses by Name Not Necessary.—It is sufficient that the testator saw the witnesses and charged them to bear witness to his will, and they did so, and it is not a good objection that he failed to designate them particularly by name. That he required them, each, all of them, to bear witness, was what the section requires. The purpose is that the testator shall require two witnesses at least to take notice and bear witness that he makes his will. He must require and direct a competent person, and that person must be able to testify that he was one of the persons—the witnesses—so required, and that he did take notice and bear witness. *Long v. Foust*, 109 N. C. 114, 13 S. E. 889 (1891).

Sufficiency of Showing.—Under this section, it is sufficient to show, on the question of the testator's requesting that the witness "bear witness" to the will, that believing himself to be in extremis, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had therefore expressed his wish to make a written will, and had failed in his effort to do so, the matter sought to be established as the nuncupative will were declared at a time when he was apprehensive that he would become unable to talk, and about four days before his death. *In re Garland's Will*, 160 N. C. 555, 76 S. E. 486 (1912).

Where a person, being in extremis, and conscious of it, sent for a friend with whom he had often talked on the subject of a will and told him what disposition he wanted to make of his property, and then such friend replied that if he wanted to do anything of that kind he had better have some other person in the room, and thereupon the speaker went out and brought in another person, and in the presence of the sick man repeated the proposed disposition of the property, to which the latter assented, it was held, to be a sufficient rogatio testium to satisfy the requirements of a nuncupative will. *Smith v. Smith*, 63 N. C. 637 (1869).

No Probate until Citation or Publication—Limitation of Six Months.—After the contents of the will are established within the time and in the manner prescribed by this section it cannot be admitted to probate until the citation or publication, and the probate based thereon shall be com-

pleted within six months from the making of the alleged will. The limitation of six months refers only to the proof and establishment of the contents, and that only where it is not reduced to writing within ten days of its making. In *re Haygood's Will*, 101 N. C. 574, 8 S. E. 222 (1888).

The purpose of the statute is not to prevent the examination of the witnesses of the will, after such lapse of six months, on the trial of the issue *devisavit vel non* in the course of a contest of it, but it is to require that they shall not be allowed to prove it in the first instance, when it is first presented for probate after that time, unless it shall have been put in writing within ten days next after the making thereof. In *re Haygood's Will*, 101 N. C. 574, 8 S. E. 222 (1888).

Will Reduced to Writing May Be Proved before or after Six Months.—A just interpretation of the provision relative to the proof of a nuncupative will is, that if such will shall be put in writing within ten days next after it was made, it may be proved by the witnesses thereof either before or after the lapse of six months next after the making thereof, because the will being in writing with the sanction of the witnesses, their recollection so as to what it was is helped and strengthened thereby, and they could the better be trusted to testify as to the making of the same, and what it was in its detail, at any time within a reasonable period. In *re Haygood's Will*, 101 N. C. 574, 8 S. E. 222 (1888).

It will be observed that it is not required that the will shall not be proved by the witnesses until the citation and notice provided for shall be made, but it shall not

be proved—that is, proved in the sense of admitting it to probate at once—until citation shall be made, the purpose being to give the widow and next of kin opportunity to contest the will—the proof thereof by the witnesses thereof—if they shall see fit to do so. In *re Haygood's Will*, 101 N. C. 574, 8 S. E. 222 (1888).

Writing Dictated to One Witness but Execution Postponed.—A paper-writing which the deceased had therefore dictated but postponed executing from time to time and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative will: (1) his intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law “during his last sickness.” *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

The declaration of a testator made in the presence of two witnesses that a paper-writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will: (1) the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216 (1909).

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.—Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal. Provided, that whenever in a will so probated or recorded a bank or trust company shall be named executor and/or trustee and shall have at the time of such probate and recording become absorbed by or consolidated with another bank or trust company or shall have sold and transferred all its assets and liabilities to another bank or trust company doing business in North Carolina, such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company. (C. C. P., s. 438; Code, s. 2150; Rev., s. 3128; C. S., s. 4145; 1929, c. 150; 1941, c. 79.)

Editor's Note.—The 1929 amendment added the proviso with the exception of the words, “or shall have sold and transferred all its assets and liabilities to another bank or trust company doing business in North Carolina,” which were added by the 1941 amendment.

Conclusively Valid until Declared Void.

—When executed, proven and recorded in manner and form as prescribed, a paper-writing designed as a testamentary disposition of property is given conclusive legal effect as the last will and testament of the decedent, subject only to be vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted

for that purpose. Until so set aside it is presumed to be the will of the testator. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

A will probated in common form before the clerk of the superior court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Holt v. Ziglar, 163 N. C. 390, 79 S. E. 805 (1913). See In re Beauchamp's Will, 146 N. C. 254, 59 S. E. 687 (1907).

Cannot Be Attacked Collaterally.—Where a will has been admitted to probate a party claiming property disposed of by it to another cannot, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded. Varner v. Johnston, 112 N. C. 570, 17 S. E. 483 (1893).

A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. Mills v. Mills, 195 N. C. 595, 143 S. E. 130 (1928). Until so set aside it is conclusively presumed to be the will of the testator. In re Will of Cooper, 196 N. C. 418, 145 S. E. 782 (1928).

Same—Even for Fraud.—A will which has been duly probated in common form may not be collaterally attacked even for fraud. Crowell v. Bradsher, 203 N. C. 492, 166 S. E. 731 (1932).

Same—Muniment of Title.—A probated will constitutes a muniment of title unsalable except in a direct proceeding. Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129 (1945); In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

Same—Offer of Subsequent Will.—Where a paper-writing has been duly probated in common form, offer of proof of a will alleged to have been subsequently executed by the testatrix is a collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

Probate a Judicial Act—Conclusive Presumption of Validity.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Mayo v. Jones, 78 N. C. 402 (1878); McClure v. Spivey, 123 N. C. 678, 31 S. E. 857 (1898).

An order of the clerk adjudging a will to be fully proved in common form is not

“conclusive in evidence of the validity of the will” under this section, on the issue of *devisavit vel non*, raised by a caveat filed thereto. Wells v. Odum, 205 N. C. 110, 170 S. E. 145 (1933).

The probate of a will may be set aside upon motion after notice where it is clearly made to appear that the court was imposed upon or misled, but otherwise the probate is conclusive and cannot be collaterally attacked, and the paper-writing stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat under § 31-32. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

Clerk May Not Set Aside Probate on Grounds Determinable by Caveat.—While the clerk of the superior court in proper instances may set aside a probate in common form, he may not do so on grounds which are properly determinable by caveat. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

After Cause Transferred to Civil Issue Docket.—See note to § 31-36.

Effect of Order of Clerk.—An order of the clerk adjudging paper-writing to be fully proved in common form is not “conclusive in evidence of the validity of the will,” under this section, on the issue of *devisavit vel non*, but as between the probated instrument and the prior purported wills, the former stands until “declared void by a competent tribunal.” In re Neal's Will, 227 N. C. 136, 41 S. E. (2d) 90 (1947).

Rents and profits of lands devised belonged to beneficiaries and their ancestors until the probate was set aside and the will adjudged void. Hinton v. Whitehurst, 214 N. C. 99, 198 S. E. 579 (1938).

When devisees entitled to Rents and Profits until Probate Set Aside.—Where there is no evidence tending to show that at any time prior to the institution of the caveat proceeding, the defendants, or their ancestors, had any knowledge or intimation that the plaintiffs would attack the validity of the will and there is no evidence tending to show that any of the devisees in said will procured its execution by undue or fraudulent influence, the defendants and their ancestors were entitled to the rents and profits of the lands devised to them until the probate was set aside and the will adjudged void. Whitehurst v. Hinton, 209 N. C. 392, 184 S. E. 66 (1936).

Effect of Revocation of Probate upon Administration.—The revocation of the probate in common form did not have the effect of annulling the administration properly granted. Floyd v. Herring, 64 N. C. 412 (1870).

Title of Innocent Purchasers Not Affected by Judgment Setting Aside Will.—Where the devisees named in a will, which has been duly probated in common form, sell and dispose of part of the lands devised to innocent purchasers for value without notice, and thereafter caveat proceedings are instituted and the will set aside, the heirs at law, by operation of the judgment setting aside the will, become tenants in common in the lands not disposed of, but

the title conveyed by the devisees named in the paper-writing to purchasers for value without notice, or knowledge of facts from which a purpose to file caveat proceedings could be intimated, is not affected, the probate in common form being conclusive evidence of the validity of the will until it is attacked by caveat proceedings duly instituted. *Whitehurst v. Hinton*, 209 N. C. 392, 184 S. E. 66 (1936).

§ 31-20. **Wills filed in clerk's office.**—All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records. If said will contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the State in which said land is situated with the same effect as to passing the title to said real estate as if said will had originally been probated and filed in said county and the clerk of the superior court of said last mentioned county had had jurisdiction to probate the same. (1777, c. 115, s. 59; R. C., c. 119, s. 19; Code, s. 2173; Rev., s. 3129; C. S., s. 4146; 1921, c. 108, s. 1.)

Cross References.—See § 31-39. And see note to § 31-21.

Editor's Note.—All but the first sentence of this section was added by the 1921 amendment.

Will Taken from Record as Evidence of Testator's Handwriting.—An original will

taken from the records of the court is competent, without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of testator to the instrument in controversy. *Croom v. Sugg*, 110 N. C. 259, 14 S. E. 748 (1892).

§ 31-21. **Validation of wills heretofore certified and recorded.**—All wills which have prior to March 9, 1921, been certified and recorded in the office of the clerk of the superior court of any county, substantially following the provisions of § 31-20 are hereby validated and approved as to the conveyance and transfer of any title to real estate as contained therein, to the same extent as if said wills had originally been probated and filed in said county, and the clerk of the superior court of said county had had jurisdiction to probate the same, provided the probates and witnesses to the said wills are sufficient and according to law. (1921, c. 108, s. 2; C. S., s. 4146(a).)

Statute Not Retroactive.—Public Laws 1921, ch. 108 (§§ 31-20, 31-21), does not control rights which accrued prior to its enactment. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot

convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

§ 31-22. **Certified copy of will proved in another state or country.**—When a will, made by a citizen of this State, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this State, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording such copy as by law might be taken upon the

production of the original. (1802, c. 623; R. C., c. 44, s. 9; C. C. P., s. 445; Code, s. 2157; Rev., s. 3130; C. S., s. 4147.)

Defective Certificate of Clerk.—The certificate of probate of a will executed in another state, disposing of real estate in this State, is defective which does not show affirmatively that the will was executed according to the laws of this State. *Raleigh, etc., Ry. Co. v. Glendon, etc., Mfg. Co.*, 113 N. C. 241, 18 S. E. 208 (1893).

§ 31-23. Probate of will made out of the State; probate when witnesses out of State.—Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the State, or that a will has been made in the State and the witnesses thereto have moved out of the State, disposing of or charging land or other property within the State, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded. (C. C. P., s. 443; Code, s. 2155; 1899, c. 55; Rev., s. 3131; C. S., s. 4148.)

Defective Certificate.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence, as departing from the requirements of this section. *Hunter v. Kelly*, 92 N. C. 285 (1885).

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this State, reside in another state, or in another county in this State than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside; and the affidavits, so taken and subscribed, shall be transmitted by the notary public, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; C. S., s. 4149; 1933, c. 114.)

Editor's Note.—The 1933 amendment inserted in the first sentence the words "or in another county in this State than the one in which the will is being probated." **probate of wills** where difficulty is encountered in securing the personal appearance of witnesses who reside within the State but at a distance from the county of probate. 11 N. C. Law Rev. 262.

§ 31-25. Probate when witnesses in another county.—When a will is offered for probate in one county of this State and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the

clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (1899, c. 55; Rev., s. 3132; 1911, c. 13; C. S., s. 4150; 1923, c. 59.)

Editor's Note.—The 1923 amendment inserted in the second sentence the words "or inside of the county," so that in case of physical disability of the witness, either within or outside of the county, the clerk may order the deposition to be taken. See 1 N. C. Law Rev. 315.

Identifying Paper-Writing as Part of

§ 31-26. **Probate of wills of members of the armed forces.**—In addition to the methods already provided in existing statutes therefor, a will executed by a person while in the armed forces of the United States or the Merchant Marine, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the State at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification. (1919, c. 216; C. S., s. 4151; Ex. Sess. 1921, c. 39; 1943, c. 218; 1945, c. 81.)

Editor's Note.—Prior to the 1943 amendment this section applied only to soldiers and sailors.

The 1945 amendment substituted in the first sentence the words "a will executed by a person while in the armed forces of the United States or the merchant marine"

Depositions.—Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached, and it was held competent for the commissioner to identify the paper-writing as a part of the deposition. In re Clodfelter's Will, 171 N. C. 528, 88 S. E. 625 (1916).

for the words "the will of a member of the armed forces of the United States, or the merchant marine, executed while in the active service of the United States." For comment on the amendment, see 21 N. C. Law Rev. 381.

§ 31-27. **Certified copy of will of nonresident recorded.**—Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk. But when any will contains any devise or disposition of real estate in this State, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this State, and that fact must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise, in such certified copy or exemplification of the will and probate proceedings, and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proofs touching the execution of the will, as prescribed in § 31-22, and the same may be adjudged duly proved, and shall be recorded as herein provided. (C. C. P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C. S., s. 4152; 1941, c. 381.)

Editor's Note.—The 1941 amendment inserted the words "and of the proceedings had in connection with the probate thereof," in the first sentence and made other changes in the section. The amendment

provided that it should not affect pending litigation. For comment on the amendment, see 19 N. C. Law Rev. 547.

Orderly Arrangement of Pages of Exemplification.—Where the will has been

admitted to probate in the court having jurisdiction to admit wills and testaments to probate, even though the pages of the manuscript exemplified copy are not orderly arranged, the will will be admitted to probate and record in this State, under the provisions of this section. *Roscoe v. Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899); *Roper Lumber Co. v. Hudson*, 153 N. C. 96, 68 S. E. 1065 (1910).

Authentication by Clerk of Court and Not Register of Deeds.—It is necessary to the registration of a copy of a will in this State that the copy or exemplification of the will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed, and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another state it is ineffectual as evidence in a claimant's chain of title. *Riley v. Carter*, 158 N. C. 484, 74 S. E. 463 (1912).

Appearance and Examination of Attesting Witness Not Necessary.—Under the provisions of this section, it is not required that a will executed and admitted to probate in another state be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State. The doctrine of *Hunter v. Kelly*, 92 N. C. 285 (1885), is no more the law. *Vaught v. Williams*, 177 N. C. 77, 97 S. E. 737 (1919).

Due Record and Certificate of Foreign Probate—Effect.—Where a nonresident testator devises land in this State, and the record of foreign court of probate, duly certified, contains the certificate of probate,

which refers to the certified examinations of the witnesses, in accordance with the requirements of § 31-17, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

A will, duly proven and allowed in New York according to this section, when it appears that an exemplified copy thereof so showing has been recorded here in the county where the land lies, is admissible in evidence in the courts of this State, as a link in a chain of title. *Vance v. Guy*, 223 N. C. 409, 27 S. E. (2d) 117 (1943).

Dissent Proceedings.—The will of a South Carolina testator was duly probated there and his widow filed a valid dissent thereto. An authenticated copy of the will to be recorded here, under this section, should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court in the county in which the will was probated. *Coble v. Coble*, 227 N. C. 547, 42 S. E. (2d) 898 (1947).

Subscription by Two Witnesses Must Appear from Certificate.—Where a certified copy from another state has been recorded, the fact of subscribing by at least two witnesses must appear affirmatively "in the certificate probate or exemplification of the will." The mere recitation in the attestation clause is not affirmative evidence. *Raleigh, etc., Ry. Co. v. Glendon, etc., Mfg. Co.*, 113 N. C. 241, 18 S. E. 208 (1893).

Applied in *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571 (1924); *In re Will of Chatman*, 228 N. C. 246, 45 S. E. (2d) 356 (1947).

§ 31-28. Probates validated where proof taken by commissioner or another clerk.—In all cases of the probate of any will made prior to March 8, 1899, in common form before any clerk of the superior courts of this State, where the testimony of the subscribing witnesses has been taken in the State or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this State, and the will admitted to probate upon such testimony, the proceedings are validated. (1899, c. 680; Rev., s. 3134; C. S., s. 4153.)

§ 31-29. Probates in another state before 1860 validated.—In all cases where any will devises land in this State, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this State, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and is hereby

declared to be, good and valid for the purpose of passing title to the lands devised thereby, situated in this State, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this State in accordance with the laws of this State. (1913, c. 93, s. 1; C. S., s. 4155.)

§ 31-30. Validation of wills recorded without probate by subscribing witnesses.—In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and seventy-five, and which appear as recorded in the record of last wills and testaments to have had two or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this State prior to the first day of January, one thousand eight hundred and eighty-eight, without having been duly proven as provided by law, and such wills were presented to the clerk of the superior court in any county in this State where the makers of said wills owned property, and where the makers of such wills lived and died, and were by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two subscribing witnesses thereto in the manner provided by law of this State. Nothing herein shall be construed to prevent such wills from being impeached for fraud. (1921, c. 66; C. S., s. 4157(a).)

§ 31-31. Validation of wills admitted on oath of one subscribing witness.—In all cases where last wills and testaments which appear as recorded in the record of last wills and testaments to have had two witnesses thereto and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this State prior to the first day of January, one thousand eight hundred and ninety, upon the oath and examination of one of the witnesses, such proof being taken in writing and recorded, and the certificate of probate of the clerk of the court states that such a will is proven by one of the subscribing witnesses thereto and the handwriting of the other subscribing witness being a nonresident is proven under oath, and such a will and certificate has been recorded in the record of wills of the proper county, such probate is hereby validated as fully as if the proof of the handwriting of the nonresident witness had been taken in regular form in writing and recorded. (1929, c. 41, ss. 1, 2.)

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.—Whenever any last will and testament has been probated, based upon the examination of the subscribing witness or the subscribing witnesses, taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, it is hereby in all respects validated and shall be sufficient to pass the title to all real and personal property purported to be transferred thereby.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probate of any wills, deeds and other instruments required or permitted by law to be recorded, are hereby validated. Nothing herein contained shall affect pending litigation. (1945, c. 822.)

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or insane, or

imprisoned, then such person may file a caveat within three years after the removal of such disability. (C. C. P., s. 446; Code, s. 2158; Rev., s. 3135; 1907, c. 862; C. S., s. 4158; 1925, c. 81.)

Probate in Common Form Is Valid until Set Aside.—The probate of a will in common form is valid until set aside. In *re* Beauchamp's Will, 146 N. C. 254, 59 S. E. 687 (1907). See § 31-19 and note.

And Good Faith Claimants Are Protected until Probate Attacked.—All persons who claim in good faith under a will which has been duly probated in common form as provided by statute are protected by its provisions, until the probate is attacked by a caveat proceeding instituted as provided by this section. *Whitehurst v. Hinton*, 209 N. C. 392, 184 S. E. 66 (1936).

When Proceeding in Nature of Caveat Necessary.—Where there is no allegation that the probate of the will was otherwise than in strict accord with the statute, and there is no suggestion that the court was imposed upon or misled, the validity of the will may be attacked only by direct proceeding in the nature of a caveat under this section. In *re* Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488 (1948), citing *In re Little's Will*, 187 N. C. 177, 121 S. E. 453 (1924).

The proceedings in the matter of the probate of a will is summary and in rem, and the contest of the probate is begun by a caveat under this section. In *re* Haygood's Will, 101 N. C. 574, 8 S. E. 222 (1888).

Statute Gives Right and Outlines Procedure.—In this jurisdiction the right to contest a will by caveat is given by statute, and the procedure to be followed is outlined in the statute conferring the right. In *re* Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

Often the issue *devisavit vel non* is subdivided, according to the angle or nature of the attack, into ancillary issues, the most common of which are those relating to undue influence and testamentary capacity; but every caveat to a will leads to the simple inquiry *devisavit vel non*, and the rules of procedure are framed with reference to that feature. In *re* Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

The Contest Is a Special Proceeding in Rem.—The contest of a will by caveat is not an ordinary civil action, but a special proceeding in rem leading to the establishment of the will as a testamentary act under the issue *devisavit vel non*. The in rem nature of the proceeding dominates the investigation, and in many important respects the parties litigant have little of the usual control over the course of trial

on the issue. In *re* Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948). See *In re* Will of Westfeldt, 188 N. C. 702, 125 S. E. 531 (1924).

A caveat entered to the probate of a will is an in rem proceeding. In effect it is nothing more than a demand that the will be produced and probated in open court, affording caveators an opportunity to attack it for the causes and upon the grounds set forth and alleged in the caveat. It is an attack upon the validity of the instrument purporting to be a will and not an "action affecting the title to real property." The will and not the land devised is the res involved in the litigation. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

Jury Trial Required.—See note to § 31-33.

And No Nonsuit Can Be Taken.—Once the will is propounded for probate in solemn form the proceeding must go on until the issue *devisavit vel non* is appropriately answered; and no nonsuit can be taken by the propounders or by the caveators. In *re* Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948). See *In re* Will of Westfeldt, 188 N. C. 702, 125 S. E. 531 (1924); *In re* Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

A caveat to a will may be filed only by persons "entitled under such will or interested in the estate." And § 31-33, directing the issue of citations, "to all devisees, legatees, or other parties in interest," does not enlarge the definition of interest given in this section. In *re* Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

Where a will is probated in common form any interested party may appear and enter a caveat. In *re* Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025 (1909); *In re* Thompson's Will, 178 N. C. 540, 101 S. E. 107 (1919); *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

The right to interfere in a question of probate belongs to a party in interest, which must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party. In *re* Thompson's Will, 178 N. C. 540, 101 S. E. 107 (1919). See *Armstrong v. Baker*, 31 N. C. 109 (1848).

Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by

setting aside the will, is "a person interested." In re Thompson's Will, 178 N. C. 540, 101 S. E. 107 (1919).

And it is immaterial whether those appearing and protesting call themselves interveners, objectors or caveators if they place themselves in opposition to the propounders. By a caveat legal rights are put in stake. In re Will of Rowland, 202 N. C. 373, 162 S. E. 897 (1932); In re Will of Fuett, 229 N. C. 8, 47 S. E. (2d) 488 (1948).

It takes only one interested person to caveat a will under this section, and it becomes the duty of the clerk thereupon to bring in interested persons under § 31-33. When they come in they may align themselves as they will. Bailey v. McLain, 215 N. C. 150, 1 S. E. (2d) 372 (1939), discussed in 18 N. C. Law Rev. 76.

Purchasers from Heirs May File Caveat.—The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of this section. In re Thompson's Will, 178 N. C. 540, 101 S. E. 107 (1919).

Heirs Not Cited under § 31-33.—The heirs at law of a deceased testator whose will is duly probated and who have no knowledge of proceedings to caveat the will, and who were not cited under the provisions of § 31-33, are not estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. Mills v. Mills, 195 N. C. 595, 143 S. E. 130 (1928).

Limitation of Actions.—Prior to the 1907 amendment there was no express period of limitation upon the right to file a caveat to the probate of a will, but it was judicially recognized that the right might be lost by unreasonable delay. Gray v. Maer, 20 N. C. 41 (1838); Etheridge v. Corprew, 48 N. C. 14 (1855); In re Beauchamp's Will, 146 N. C. 254, 59 S. E. 687 (1907); In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025 (1909); In re Dupree, 163 N. C. 256, 79 S. E. 611 (1913); In re Bateman's Will, 168 N. C. 234, 84 S. E. 272 (1915); In re Witherington's Will, 186 N. C. 152, 119 S. E. 11 (1923).

While the 1907 amendment fixed seven years after probate as a limitation, and permitted seven years after its ratification as to wills theretofore proven, it did not apply to revive a cause of action theretofore barred. In re Beauchamp's Will, 146 N. C. 254, 59 S. E. 687 (1907).

By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be

left open to uncertainties for an indefinite length of time. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373 (1921).

Caveat in Spite of Outstanding Life Estate.—One who is authorized by law to caveat a will is not required to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a caveat to a will may be filed. In re Will of Witherington, 186 N. C. 152, 119 S. E. 11 (1923).

When Application to Clerk within Time No Excuse for Delay.—Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required by law, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. In re Dupree, 163 N. C. 256, 79 S. E. 611 (1913).

Married Women.—Prior to the 1925 amendment the proviso also applied to married women as well as to minors and insane or imprisoned persons.

Since the enactment of statutes fully emancipating a feme covert from her disabilities, the provisions of this section barring the right to caveat a will after seven years with certain exceptions, apply equally to her. In re Will of Witherington, 186 N. C. 152, 119 S. E. 11 (1923).

Effect of Infancy and Absence from State.—Where the common-law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevailed, the matters of infancy and absence from the State were not necessarily controlling, but they are considered as relevant facts bearing on the question as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. In re Dupree, 163 N. C. 256, 79 S. E. 611 (1913).

Applied in In re Will of Roediger, 209 N. C. 470, 184 S. E. 74 (1936); In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

§ 31-33. Bond given and cause transferred to trial docket.—When a caveator shall have given bond with surety approved by the clerk, in the sum of two hundred dollars (\$200.00), payable to the propounder of the will, conditioned upon the payment of all costs which shall be adjudged against such caveator in the superior court by reason of his failure to prosecute his suit with effect, or when a caveator shall have deposited money or given a mortgage in lieu of such bond, or shall have filed affidavits and satisfied the clerk of his inability to give such bond or otherwise secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the State, and cause publication to be made, for four weeks, in some newspaper printed in the State, for non-residents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding. (C. C. P., s. 447; Code, s. 2159; 1899, c. 13; 1901, c. 748; Rev., s. 3136; 1909, c. 74; C. S., s. 4159; 1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote the first sentence down to the semicolon. For brief comment on amendment, see 25 N. C. Law Rev. 478.

Proceedings Transferred to Civil Issue Docket.—Where a caveat to a will is duly filed, with the required bond, etc., it is required of the clerk to transfer the proceedings to the civil issue docket for trial of the issue of *devisavit vel non*, and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. In *re Little's Will*, 187 N. C. 177, 121 S. E. 453 (1924).

For Trial by Jury.—When an issue of *devisavit vel non* is raised by caveat it is tried in the superior court by a jury. In *re Will of Chisman*, 175 N. C. 420, 95 S. E. 769 (1918); In *re Rowland*, 202 N. C. 373, 162 S. E. 897 (1932).

Which Cannot Be Waived.—Upon the proper filing of a caveat the cause must be transferred to the civil issue docket where the proceeding is in *rem* for trial by jury, and neither party may waive jury trial, consent that the court hear the evidence and find the determinative facts or have nonsuit entered at his instance. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947). See In *re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936).

Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will *per testes* in solemn form. In *re Will of Chisman*, 175 N. C. 420, 95 S. E. 769 (1918); In *re Rowland*, 202 N. C.

373, 162 S. E. 897 (1932).

Upon the filing of a caveat to a will probated in common form the propounder must prove the will *per testes* in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents, if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement. In *re Hedgepeth*, 150 N. C. 245, 63 S. E. 1025 (1909).

Bringing in Interested Persons.—In this State it takes only one interested person to caveat a will under § 31-32 and it becomes the duty of the clerk, under this section, to bring in interested persons. When they come in they may align themselves as they will. *Bailey v. McLain*, 215 N. C. 150, 1 S. E. (2d) 372 (1939).

The persons interested are not cited as parties to the proceeding but merely as interested persons to view proceedings and participate if they elect to do so, although no doubt the court, when properly and timely advised, would cause citation to issue to anyone designated by statute as interested who has been omitted. In *re Will of Brock*, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

In a caveat proceeding, neither the grantees in deeds executed by testator prior to his death nor the persons to whom such grantees have conveyed the property, either before or after testator's death, nor the heirs at law of deceased grantees are necessary parties to the determination of the issue of *devisavit vel non* when such

persons are not beneficiaries under the will nor heirs of testator, and therefore, even if it be conceded they are proper parties, the trial judge, in the exercise of his discretion, is under no legal obligation to order citations to bring them in. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

When Personal Representative of Executrix Not Necessary Party.—Where the executrix has fully administered the estate

and filed her final account prior to the filing of a caveat, and has died pending the caveat proceeding, it is not necessary that the court appoint a personal representative for the deceased executrix nor an administrator d. b. n. for the estate of the testator so that they may be made parties to the proceeding. In re will of Brock, 229 N. C. 482, 50 S. E. (2d) 555 (1948).

Cited in Mills v. Mills, 195 N. C. 595, 143 S. E. 130 (1928).

§ 31-34. Prosecution bond required in actions to contest wills.—When any action is instituted to contest a will the clerk of the superior court will require the prosecution bond required in other civil actions: Provided, however, that provisions for bringing suit in forma pauperis shall also apply to the provisions of this section. (1937, c. 383.)

Editor's Note.—The purpose of this section is not entirely clear. The usual method of contesting a will is to file a caveat, either at the time the will is presented for probate, or within seven years thereafter. This is said to be neither a civil action nor a special proceeding, but is in the nature of a proceeding in rem, in which the pro-

ponent has the burden of establishing the formal execution of the will, and the caveators the burden of showing that it is not a valid will. It may be the purpose of the statute to require the propounder to give bond, when a caveat is filed, so as to have the costs secured by both parties. 15 N. C. Law Rev. 352.

§ 31-35. Affidavit of witness as evidence.—Whenever the subscribing witness to any will shall die, or be insane or mentally incompetent, or be absent beyond the State, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (1899, c. 680, s. 2; Rev., s. 3121; C. S., s. 4160; 1947, c. 781.)

Editor's Note.—The 1947 amendment inserted the words "or be insane or mentally

incompetent." For brief comment on amendment, see 25 N. C. Law Rev. 478.

§ 31-36. Caveat suspends proceedings under will.—Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts and payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court, until a decision of the issue is had. (C. C. P., s. 448; Code, s. 2160; Rev., s. 3137; C. S., s. 4161; 1927, c. 119.)

Purpose of Section.—This section is manifestly intended, in cases to which it is applicable, to dispense with the necessity of appointing an administrator pendente lite, and confers very similar forms upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered. Syme v. Broughton, 86 N. C. 153 (1882). The prosecution of the action in order to collect the debts is evidently sanctioned by the statute and in furtherance of the purpose of its enactment. Hughes v. Hodges, 94 N. C. 57 (1886).

Effect of Caveat upon Rights and Duties of Representative.—The filing of a caveat suspends further proceedings in the

administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. Elledge v. Hawkins, 208 N. C. 757, 182 S. E. 468 (1935).

The executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the issue touching the will is made up to be tried; nor is there a necessity meanwhile for the appointment of an administrator pendente lite. The function of the executor is suspended only until the controversy is ended, and he is still required to take care of the estate in his hands and may proceed in the collection of debts due the deceased. Randolph v. Hughes, 89 N. C. 428 (1883); In

re Palmer, 117 N. C. 133, 23 S. E. 104 (1895).

In the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or he may apply to the clerk in his probate jurisdiction for such authorization. *Hardy & Co. v. Turnage*, 204 N. C. 538, 168 S. E. 823 (1933).

Office of Representative Continued.—The proper construction of this section is that after probate is granted in common form and there is an executor who acts or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the power and is subjected to all the liabilities of an administrator or an executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. In *re Palmer*, 117 N. C. 133, 23 S. E. 104 (1895).

Effect of Absence of Order to Suspend Proceeding.—In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by this section, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968 (1905).

May Be Sued and Sell Land; May Not Pay Legacies.—An executor, or administrator c. t. a., after the will is proved in

common form, may be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or exercise other special powers given in the will, where issues upon a caveat are pending; the right to execute the will is suspended until the determination of the suit. *Syme v. Broughton*, 86 N. C. 153 (1882).

The clerk of a superior court cannot enter an order vacating the probate of a will after a caveat has been filed and the cause transferred to the civil issue docket of the superior court for trial in term. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947). See note to § 31-19.

Where the clerk of the superior court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause transferred to the civil issue docket, the clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

Error Held Not Cured by Affirmance of Order.—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 in making the order is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order, for the jurisdiction of the superior court in such a case is derivative, and § 1-276 does not apply. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.—Wherever a caveat is filed with the clerk of the superior court of any county in the State to any last will and testament which has been admitted to probate in said office, it shall be the duty of such clerk, and he is hereby directed to give notice of the filing of such caveat by making an entry upon the page of the will book where such last will and testament is recorded, evidencing that such caveat has been filed and giving the date of such filing. When such caveat and proceedings resulting therefrom shall have resulted in final judgment with respect to such will, the clerk of the court shall make a further entry upon the page of the will book where such last will and testament is recorded to the effect that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81.)

Applied in *Lewis v. Furr*, 228 N. C. 88, 44 S. E. (2d) 604 (1947).

ARTICLE 7.

Construction of Will.

§ 31-38. **Devise presumed to be in fee.**—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. (1784, c. 204, s. 12; R. C., c. 119, s. 26; Code, s. 2180; Rev., s. 3138; C. S., s. 4162.)

Section Changes Common-Law Rule.—The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by this section. *Henderson v. Western Carolina Power Co.*, 200 N. C. 443, 157 S. E. 425 (1931).

And it is similar to § 39-1 pertaining to deeds. Hence, what has been held in applying the rule of construction as to wills is pertinent in applying the rule of construction as to deeds. *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1943). See *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308 (1889).

No technical words of conveyance are required in wills. *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15 (1896); *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (1899).

The testator's intent gathered from the entire will controls its interpretation. This rule applies to the construction of this section when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. *Rees v. Williams*, 165 N. C. 201, 81 S. E. 286 (1914).

And a General Interest Prevails over a Particular Interest.—The provisions of this section, while laying down a rule of construction, still leave the question of the intention of the testator open for construction, and where there is a particular and a general paramount interest apparent in the same will, and they clash, the general interest must prevail. *Leeper v. Neagle*, 94 N. C. 338 (1886).

Unrestricted Devise Passes Fee.—It has been uniformly held, since the passage of this statute in 1784, that an unrestricted devise of real estate passes the fee. *Roane v. Robinson*, 189 N. C. 628, 127 S. E. 626 (1925); *Barbee v. Thompson*, 194 N. C. 411, 139 S. E. 838 (1927); *Bell v. Gillam*, 200 N. C. 411, 157 S. E. 60 (1931); *Stephens v. Clark*, 211 N. C. 84, 189 S. E. 191 (1937); *Strickland v.*

Johnson, 213 N. C. 581, 197 S. E. 193 (1938).

An unrestricted devise of realty, nothing else appearing, constitutes a devise in fee. *Elder v. Johnston*, 227 N. C. 592, 42 S. E. (2d) 904 (1947).

A devise generally or indefinitely with power of disposition creates a fee. But a devise for life with power of disposition creates a life estate only. *Hardee v. Rivers*, 228 N. C. 66, 44 S. E. (2d) 476 (1947).

A testator devised to his daughters, B. and M., all of his real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee simple estate, the intent of the testator being to provide for T., who remained unmarried and is now deceased, during her widowhood. *Barbee v. Thompson*, 194 N. C. 411, 139 S. E. 838 (1927).

Unless it appears from the will that the testator intended to convey an estate of less dignity, a devise of real property will be construed to be in fee simple. *Bell v. Gillam*, 200 N. C. 411, 157 S. E. 60 (1931); *Jolley v. Humphries*, 204 N. C. 672, 169 S. E. 417 (1933); *Taylor v. Taylor*, 228 N. C. 275, 45 S. E. (2d) 368 (1947).

The presumption established by this section that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. *Roberts v. Saunders*, 192 N. C. 191, 134 S. E. 451 (1926).

A general devise of realty does not pass the fee when it clearly appears from the will that the testator intended to convey an estate of less dignity. *Hampton v. West*, 212 N. C. 315, 193 S. E. 290 (1937); *Strickland v. Johnson*, 213 N. C. 581, 197 S. E. 193 (1938).

The clause "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes a devise in fee simple. *Buckner v. Hawkins*, 230 N. C. 99, 52 S. E. (2d) 16 (1949).

A devise of real estate to devisees "to

do as they like with it", with subsequent provision that after their death whatever property is left should go to testatrix' niece, vests the fee simple in the beneficiaries first named. *Taylor v. Taylor*, 228 N. C. 275, 45 S. E. (2d) 368 (1947).

A devise generally to one person with limitation over to another of "whatever is left" at the death of the first taker is regarded as a devise in fee simple. *Taylor v. Taylor*, 228 N. C. 275, 45 S. E. (2d) 368 (1947), citing *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684 (1881); *Carroll v. Herring*, 180 N. C. 369, 104 S. E. 892 (1920).

Devise with Full Power of Disposal.—A devise to a husband with full power of disposal, but on certain conditions any part undisposed of by him to go to a nephew, vests a fee simply in the husband. *Roane v. Robinson*, 189 N. C. 628, 127 S. E. 626 (1925); *Heefner v. Thornton*, 216 N. C. 702, 6 S. E. (2d) 506 (1940).

A devise of real estate to testator's son for his own use and benefit with the expressed intent that it should vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life, gives the devisee a fee simple title. *Lineberger v. Phillips*, 198 N. C. 661, 153 S. E. 118 (1930).

A will devising to wife all of testator's property, with full power to manage, control, sell and dispose of it at her discretion, also provided that it was the testator's will and desire that she should devise whatever property she had not thus disposed of during her natural life, or the proceeds thereof, to the person who had been the "kindest to us in aiding and comforting us in our old age." It was held that the wife acquired a fee simple title. *Weaver v. Kirby*, 186 N. C. 387, 119 S. E. 564 (1923).

Devise with Limited Power of Disposal.—A general devise to testator's wife with subsequent items providing that one-half the estate "remaining" at her death should go to his adopted son in fee, and the other half, in the event the wife did not dispose of the residue of the estate by will, to go to the children of L., is held to show an intent to convey an estate of less dignity than a fee simple to testator's wife, rebutting the presumption that the general devise to the wife should be construed to be in fee, the power of disposition of part of the estate, at least, being limited to disposition by will, and the widow does not have the power to convey the entire estate by deed in fee simple. *Hampton v. West*, 212 N. C. 315, 193 S. E. 290 (1937).

A devise to testator's wife of all of his estate absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judge or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it", was in fee absolute. *Fellowes v. Durfey*, 163 N. C. 305, 79 S. E. 621 (1913).

Devise of Proceeds of Land.—Under this section the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker. *Hambright v. Carroll*, 204 N. C. 496, 168 S. E. 817 (1933).

Devise with Power of Appointment.—A devise to A, and to such persons as he shall appoint, vests the absolute property in A, without an appointment. But if it be to him for life and after his death to such person as he shall appoint, he must make an appointment in order to entitle that person to anything. The express life estate to him repels the implication of a fee simple for himself. *Levy v. Griffis*, 65 N. C. 236 (1871).

A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under this section. *Levy v. Griffis*, 65 N. C. 236 (1871).

Estate Tail Converted into Fee Simple.—There was a devise of lands to wife of testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies. It was held that, after the death of the widow, the devise was not a trust created in the children as trustees for the "heirs of their bodies," and there being no expression in the will to show an intent to create an estate of less degree than fee, it constituted an estate tail, converted by our statute into a fee simple. *Washburn v. Biggerstaff*, 195 N. C. 624, 143 S. E. 210 (1928).

Fee Simple Defeasible upon Condition.—Where testator devises realty to grandson, and in the event of death of the latter without children, then the land to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. *Whitfield v. Garris*, 131 N. C. 148, 42 S. E. 568 (1902); *Whitfield v. Garris*, 134 N. C. 24, 45 S. E. 904 (1903).

An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body." *Jarman v. Day*, 179 N. C. 318, 102 S. E. 402 (1920).

Vested Remainder to Be Divested upon Condition.—Under a devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow Heirs", it was held that, after the falling-in of the life estate, G. and M. take the fee in the remainder defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principles of a shifting use operating by way of an executory devise. *Kirkman v. Smith*, 174 N. C. 603, 94 S. E. 423 (1917).

For precatory words in a will to be regarded as creating a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character. *Springs v. Springs*, 182 N. C. 484, 109 S. E. 839 (1921).

Where the testator, after bequeathing or devising property to a person, expresses a wish or desire as to its use or disposition, such expression will not be construed to create a trust in the legatee or devisee unless it clearly appears from the instrument as a whole that testator so intended since the devise or bequest will be deemed absolute in the absence of a clearly expressed intention to convey an estate of less dignity, but precatory words will create a trust when it appears from the instrument as a whole that the testator so intended, provided testator has pointed out with sufficient clearness and certainty both the subject matter and objects of the intended trust. *Brinn v. Brinn*, 213 N. C. 282, 195 S. E. 793 (1938).

Subsequent Expressions Not Affecting Devise of Fee.—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will. *Fellows v. Durfey*, 163 N. C. 305, 79 S. E. 621 (1913).

In the absence of a contrary intent ex-

pressed in the will an unrestricted or indefinite devise of real property is a devise in fee simple, and a subsequent clause expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee will not be allowed to defeat the devise nor limit it to a life estate. *Taylor v. Taylor*, 228 N. C. 275, 45 S. E. (2d) 368 (1947).

An unrestricted devise followed by a provision that in the event the devisee died intestate, testator wished such devisee's share to descend to her children, vests the fee in the devisee, the precatory words being repugnant to the estate previously devised and sufficient to limit or divest it. *Croom v. Cornelius*, 219 N. C. 761, 14 S. E. (2d) 799 (1941).

Devise for "Use and Benefit without Let or Hindrance."—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her own use and benefit without let or hindrance," upon such demand and compliance therewith, the wife takes and can convey a fee simple, notwithstanding a further provision in the will that a third person should take a life estate in property remaining in the hands of trustees at the wife's death. *O'Quinn v. Crane*, 189 N. C. 97, 126 S. E. 174 (1925).

Devise to Trustee Granting No Beneficial Interest.—The rule that a devise of real estate shall be construed to be in fee simple is inapplicable where the testamentary words negative the idea of the investiture of title in fee, or for life, or the granting of any other beneficial interest to the devisee, and express the intent, rather, to impose upon him duties as executor and trustee of an active trust, with directions as to the use of the property and as to how the income shall be applied during his life and after his death. *Stephens v. Clark*, 211 N. C. 84, 189 S. E. 191 (1937).

The construction required by this statute may not be invoked where no estate in fee is attempted to be devised and where the plain intent is not to grant an estate, but to impose a trust and direct the collection of rent for application to a specific purpose. *Stephens v. Clark*, 211 N. C. 84, 189 S. E. 191 (1937), citing *Young v. Young*, 68 N. C. 309 (1873); *Witherington v. Herring*, 140 N. C. 495, 53 S. E. 303, 6 Ann. Cas. 188 (1906); *Fellows v. Durfey*, 163 N. C. 305, 79 S. E. 621 (1913).

Devise Creating Life Estate.—A devise for life with power of disposition creates a life estate only. *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357 (1912); *Tillett v. Nixon*, 180 N. C. 195, 104 S. E. 352 (1920);

Alexander v. Alexander, 210 N. C. 281, 186 S. E. 319 (1936). The estate devised being specifically limited to the life of the devisee, the power of disposition does not enlarge the estate devised or convert it into a fee. *Hardee v. Rivers*, 228 N. C. 66, 44 S. E. (2d) 476 (1947).

Testator devised to his wife all of his "estate real and personal," and by a later paragraph all of the rest of his property "as above stated" during her widowhood, and should she remarry her dower "according to law". It was held that only a life estate was given to his widow, the statutory presumption of a fee simple title being inoperative. *Roberts v. Saunders*, 192 N. C. 191, 134 S. E. 451 (1926).

§ 31-39. **Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.**—No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the will has been fraudulently withheld from probate. (1784, c. 225, s. 6; R. C., c. 119, s. 20; Code, s. 2174; Rev., s. 3139; 1915, c. 219; C. S., s. 4163.)

Cross Reference.—For further provisions as to wills fraudulently withheld from probate, see § 31-12.

Probate an Indispensable Prerequisite.—The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. *Osborne v. Leak*, 89 N. C. 433 (1883); *Paul v. Davenport*, 217 N. C. 154, 7 S. E. (2d) 352 (1940).

Prior to the 1915 amendment there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to a will. The will became effective from the death of the testator, ordinarily passing the title to devisees from that date against all dispositions or conveyances from the heirs to the contrary. *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919). See *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915).

The amendment fixed the time at two years within which a will must be probated and recorded in order to affect the rights of innocent purchasers for value from the heirs at law, and this limitation is exclusively within the authority of the

Void Restraint on Alienation.—Where a restraint on alienation was declared void, the devise was unrestricted and vested the fee in the devisee. *Williams v. McPherson*, 216 N. C. 565, 5 S. E. (2d) 830 (1939).

Applied in *Morris v. Waggoner*, 209 N. C. 183, 183 S. E. 353 (1936).

Cited in *West v. Murphy*, 197 N. C. 488, 149 S. E. 731 (1929); *Brown v. Lewis*, 197 N. C. 704, 150 S. E. 328 (1929); *Merritt v. Inscoe*, 212 N. C. 526, 193 S. E. 714 (1937); *Early v. Tayloe*, 219 N. C. 363, 13 S. E. (2d) 609 (1941); *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941).

legislature to make. *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919).

Ownership under will is not made dependent upon the certified copy directed to be recorded in the county where the land lies. The only purpose of the certified copy is to give information to abstractors and to direct their attention to the source of title. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129, 159 A. L. R. 380 (1945).

Section Not Retroactive.—This section requiring copies of wills to be recorded in the county where the devised lands are situate, is prospective and refers only to wills proved after November 1, 1883. *Curles v. Smith*, 91 N. C. 172 (1884).

The 1915 amendment was prospective in effect, and the former right of devisees to have unlimited time to probate a will was not affected except from the effective date of the amendment. *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919).

Section 47-18, our ordinary registration act, has no application to wills. *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915). See *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919).

§ 31-40. **What property passes by will.**—Any testator, by his will duly

executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (1844, c. 88, s. 1; R. C., c. 119, s. 5; Code, s. 2140; Rev., s. 3140; C. S., s. 4164.)

A conveyance of "all the property I possess," where there is no apparent motive for making an exception, conveys all property the party owned. *Hollowell v. Manly*, 179 N. C. 262, 102 S. E. 386 (1920).

Right of Entry for Condition Broken.—"And also to all rights of entry for conditions broken," etc., evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. *Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902).

Where a church receives an absolute fee in land, subject to be defeated only by the breach of a condition, and this condition is not broken until after the death of the grantor and a daughter, neither the grantor nor the daughter have any estate in the land (before the breach of the condition, the testator having a mere pos-

sibility of reverter) at the time of their death which can be willed or inherited, and upon breach of the condition the estate goes to the heirs at law of the grantor. *Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902).

Possibility of Reverter Not Devisable.—A mere possibility of reverter cannot be the subject of a devise. *Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902); *Hollowell v. Manly*, 179 N. C. 262, 102 S. E. 386 (1920).

Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy. *Holmes v. York*, 203 N. C. 709, 166 S. E. 889 (1932).

§ 31-41. **Will relates to death of testator.**—Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (1844, c. 88, s. 3; R. C., c. 119, s. 16; Code, s. 2141; Rev., s. 3141; C. S., s. 4165.)

The general rule is that a will speaks as of the date of the death of the testator, and any property acquired after the making of a will, by reversion or otherwise, is subject to its terms. *Ferguson v. Ferguson*, 225 N. C. 375, 35 S. E. (2d) 231 (1945).

The general rule seems to be established that where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of his death. *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106 (1899).

Exception to General Rule.—Ordinarily a will will be construed as though executed immediately prior to testator's death, and it is only when the will describes a specific subject of gift with sufficient particularity to show that an object

in existence at the date of the execution of the will was intended that the general rule is excluded. *Tyer v. Meadows*, 215 N. C. 733, 3 S. E. (2d) 264 (1939).

Where the testator refers to a specific subject of gift, with sufficient particularity in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106 (1899).

Section Relates to Subject Matter and Not to Objects of Will.—This section, making the will speak from the death of

the testator, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. *Robbins v. Windley*, 56 N. C. 286 (1857); *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106 (1899).

This section has no retroactive effect, and does not apply to wills made prior to its enactment, though the testator dies subsequent to its enactment. Such wills, with reference to the property they devise, speak as of the date of their execution, and not as of the date of testator's death under the rule of construction promulgated by this section. *Williamson v. Williamson*, 58 N. C. 142 (1859).

Devise of "the Whole of My Lands" Passes After-Acquired Property.—A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of his will when no intention to the contrary appears. A subsequent clause in the will, directing "my other property of every kind not before mentioned to be sold," refers to other personal property. *Edwards v. Warren*, 90 N. C. 604 (1884).

Effect of Will Speaking as of Time of Testator's Death.—Inasmuch as a will speaks as of the time of testator's death, a devise by O. of her "undivided interest and property in the estate of the late G. C." passes no such part of the distributive

share in such estate as has been collected and received by O., for, immediately upon its payment to O., it became her property and ceased to be a part of the estate of G. C. *Aydlett v. Small*, 115 N. C. 1, 20 S. E. 163 (1894).

Designation of Quantity of Land Does Not Prevent Operation of Rule.—Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise. *Brown v. Hamilton*, 135 N. C. 10, 47 S. E. 128 (1904).

Land under Contract of Purchase after Execution of Will.—In *re Champion*, 45 N. C. 246 (1853), the devise was to testator's wife: Item 1: "All my real estate, consisting of several lots in Shelby," etc., and in item 2: "All of my personal estate of whatever nature." After the date of the will he contracted to purchase another tract, but had not paid for it at his death. It was held that his rights in the unpaid for land passed to his wife, on the ground that looking at the whole instrument, the intention to give the whole estate to his wife was manifest. *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106 (1899).

Cited in *Wright v. Wright*, 198 N. C. 754, 153 S. E. 321 (1930).

§ 31-42. Lapsed and void devises pass under residuary clause.—Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will. (1844, c. 88, s. 4; R. C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C. S., s. 4166.)

Section as Copy of English Statute.—This section, as enacted in 1844 (the proviso being added in 1919), is a copy of the English statute upon the same subject. *Holton v. Jones*, 133 N. C. 399, 45 S. E. 765 (1903).

This section is not ambiguous. The intention of the General Assembly in its enactment is expressed in language which leaves no room for judicial construction. The distinction found in the common law for purposes of devolution is recognized and preserved. *Farnell v. Dongan*, 207 N. C. 611, 178 S. E. 77 (1935); *Beach v. Gladstone*, 207 N. C. 876, 178 S. E.

546 (1835).

And it should not be construed with § 31-44. Neither section is ambiguous and they are not interrelated. *Beach v. Gladstone*, 207 N. C. 876, 178 S. E. 546 (1935).

Rule as to Residuary Clause Applies Only in Absence of Contrary Intention.—A lapsed devise of lands will not fall within the residuary clause of a will, under this section, where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provisions for his widow, and gives her, in the residuary clause, "all other property

not herein specified," and the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow or her devisees under her will. *Howell v. Mehegan*, 174 N. C. 64, 93 S. E. 438 (1917).

And if the will expresses an intent that a legacy shall not lapse in the event the legatee predeceases testatrix, the statutory provision for lapse does not apply. This intent need not be stated in exact terms, but is to be ascertained from the four corners of the will. *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948), wherein will showed no intent that legacy should not lapse upon prior death of legatee.

No particular mode of expression is necessary to constitute a residuary clause in a will, and while the words "rest," "residue," or "remainder" are commonly used for the purpose, naturally placed at the end of the dispositive portion of the will, all that is required is an adequate designation of what has not been otherwise disposed of; and the fact that a provision so operating is not spoken of in the will as the residuary clause is immaterial. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

And It Is Dependent upon the Intention of the Testator.—Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. *Stevenson v. Wachovia Bank, etc., Co.*, 202 N. C. 92, 161 S. E. 728 (1932).

"All of the Residue" Embraces Personality and Realty.—General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Construction of Residuary Clause in General.—In a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what

is excluded; and one must find words sufficiently large, definite and distinct to enable him to say that some item is excluded, so that what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Construction to Prevent Intestacy.—A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Intestacy Not Favored.—No one supposes that he has failed in his intention to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Effect of Failure to Name Devisee.—There was a devise of land "to my" without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons. It was held, that the failure to name the devisee brings the devise within the terms of the statute as to void devisees, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Devise Failing for Misdescription.—A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. *Faison v. Middleton*, 171 N. C. 170, 88 S. E. 141 (1916).

Subject Matter of Void Legacy Included in Residuary Legacy.—Under the provisions of this section, the property which is the subject matter of a void legacy, is included within the residuary legacy provided by the will, and should be delivered by the executor to the residuary legatees. *Wilmington Sav., etc., Co. v. Cowan*, 208 N. C. 236, 180 S. E. 87 (1935).

Lapse of Shares of Some of Residuary Legatees.—Where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been estab-

lished, the beneficiaries whose names have been thus erased take nothing, and the whole estate, under the residuary clause, goes to the others therein named together with such legacies as may have lapsed. *Barfield v. Carr*, 169 N. C. 574, 86 S. E. 498 (1915).

Legacy Not Lapsed by Fact That Legatee Predeceased Testator.—In *Beach v. Gladstone*, 207 N. C. 876, 178 S. E. 546 (1935), a judgment that a legacy did not lapse by reason of fact that legatee predeceased testator is affirmed, it appearing that legatee would have been distributee of testator had she survived him.

Who Are Distributees.—A distributee is a person who has the right under the statute of distribution to a share in the surplus estate of an intestate; one entitled to take a share of an estate of a decedent, under the statute of distribution; one to whom something has to be distributed in the division of an estate; a person upon whom personal property devolves by act of law in cases of intestacy. The determinative criterion is the right to share in the distribution of the personal estate of the intestate. Those who take by succession the estate of a person who dies intestate are named and defined in § 28-149. *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

Must Be Determined as of Date of Death of Testatrix.—Who would have been distributees of the estate had the testatrix died intestate must be deter-

mined as of the date of her death and not as of the date of the execution of her will. *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

Wife Surviving Testator Not Heir at Law but Distributee.—Where the owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife, the collateral heirs at law of the testator are entitled to the real property, the devise to the wife having lapsed by reason of her prior death, and the provisions of this section, not applying to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse, but should go to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. *Farnell v. Dongan*, 207 N. C. 611, 178 S. E. 77 (1935).

Where a wife dies leaving her husband but no issue he is her sole distributee, and her collateral kin are not entitled to share in the estate and are not "distributees." *Wachovia Bank, etc., Co. v. Shelton*, 229 N. C. 150, 48 S. E. (2d) 41 (1948).

§ 31-43. General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (1844, c. 88, s. 5; R. C., c. 119, s. 8; Code, s. 2143; Rev., s. 3143; C. S., s. 4167.)

Cross Reference.—See § 31-4.

Conveyance in General Terms.—Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of appointment is governed by this section in respect to the exercise of such power by will. *Schaeffer v. Haseltine*, 228 N. C. 484, 46 S. E. (2d) 463 (1948).

Intent Manifested by Entire Will.—Where the execution by will of a power

is not exercised in express terms by reference to the power or the subject, a construction must be given by looking to the whole instrument and giving effect to the intent therein manifested. *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92 (1895); *Walsh v. Friedman*, 219 N. C. 151, 13 S. E. (2d) 250 (1941).

Residuary Devise Executes Power Unless Contrary Intention Shown.—Unless there is something to show a contrary in-

tention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of property by will. *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92 (1895); *Walsh v. Friedman*, 219 N. C. 151, 13 S. E. (2d) 250 (1941).

Where the donee of a power to dispose of property by will to certain persons devises the property to such persons by a residuary clause, without referring to the

power, the devise will be considered an intentional and not an accidental exercise of the power. *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92 (1895).

Valid Exercise of Power.—Will held a valid exercise of power of appointment under this section, there being nothing in the will to indicate any contrary intent. *Schaeffer v. Haseltine*, 228 N. C. 484, 46 S. E. (2d) 463 (1948).

§ 31-44. Gifts to children dying before testator pass to their issue.—When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (R. C., c. 119, s. 8; Code, s. 2143; Rev., s. 3143; C. S., s. 4168.)

Former Law.—As to law prior to the year 1816, see *Smith v. Smith*, 58 N. C. 305 (1860).

Section Not Intended for Benefit of Deceased Child's Creditors.—This section giving the legacy intended for a deceased child to his or her children, where such child died in the lifetime of the testator, was held not to be intended for the benefit of the creditors of such deceased child. *Smith v. Smith*, 58 N. C. 305 (1860).

Where Motive of Devise Was Dependent upon Devisee's Surviving Testator.—Where it appeared that the sole motive with a testator for leaving the greater part of his estate to a son was that the latter should live with him and help him pay his debts, and also treat his parents with "humanity and kindness," and such son died in the lifetime of the testator, it was held that the devise lapsed and that the son's interest in the condition was not "real or personal estate" within the meaning of this section, which gives such estate to the issue of a son dying under such circumstances. *Lefler v. Rowland*, 62 N.

C. 143 (1867).

Legatee Not in Existence at Time of Bequest.—This section was intended to apply to a lapsed, and not a void, legacy, and where the legacy is void by reason of the fact that the legatee was not in existence at the time the will was made, his (legatee's) children do not take anything under the will. *Scales v. Scales*, 59 N. C. 163 (1860).

A devise to a brother who dies before the testator does not come within the provisions of this section as to "a child or other issue of the testator" and lapses by reason of his prior death to that of the testator. *Howell v. Mehegan*, 174 N. C. 64, 93 S. E. 438 (1917). See *Gordon v. Pendleton*, 84 N. C. 98 (1881).

This section should not be construed with § 31-42. Neither section is ambiguous and they are not interrelated. *Beach v. Gladstone*, 207 N. C. 876, 178 S. E. 546 (1935).

Applied in *Phillips v. Phillips*, 227 N. C. 438, 42 S. E. (2d) 604 (1947).

§ 31-45. After-born children share in testator's estate.—Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §§ 28-153 to 28-158. (1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C. S., s. 4169.)

Editor's Note.—For rules under common law and civil law, see *Christian v. Carter*, 193 N. C. 537, 137 S. E. 596 (1927).

Section Not Intended to Direct Parent to Make Provision for Child.—This sec-

tion is construed as not intending to control a parent as to the provision he should make for his child, but to apply when by inadvertence or mistake the after-born child has not been provided for. Unless

the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936 (1912).

“Without Making Any Provision” Construed.—The true meaning of the section has been held in *Mearns v. Mearns*, 26 N. C. 192 (1843), and *King v. Davis*, 91 N. C. 142 (1884), to be that “without making any provision” is not intended to be construed to mean that there must be a gift of certain property or thing for the children, for what would be merely adopting the popular misconception of “cutting one off with a shilling,” but that “without making any provision” means any arrangement or circumstances tending to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. *Thomason v. Julian*, 133 N. C. 309, 45 S. E. 636 (1903).

Express Exclusion of Children Tantalment to Making Provision.—A will expressly excluding the children of the testator born after the execution thereof “makes a provision for them” within the meaning of this section and such children do not share in the estate as though the testator had died intestate. *Thompson v. Julian*, 133 N. C. 309, 45 S. E. 636 (1903).

Inadequacy of Provision Immaterial.—If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made. *King v. Davis*, 91 N. C. 142 (1884).

Knowledge of Testator as to Child En ventre Sa Mere Immaterial.—The beneficent provisions of this section are not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the

fact that the child was born thereafter. It is the subsequent birth, not the father’s knowledge, which effects the partial revocation. *Christian v. Carter*, 193 N. C. 537, 137 S. E. 596 (1927).

Child Will Inherit Land Subjected to Dower.—A child for whom no provision was made will, under the rule of descent, § 29-1, and under this section, inherit the real estate of which his father dies seized, subjected to the dower of the widow, his mother. *Nicholson v. Nicholson*, 190 N. C. 122, 129 S. E. 148 (1925).

Under this section where there is a devise to a wife “to do with as she thinks best for herself and the children,” and a child is born two months after the testator’s death, such child is not entitled to a share in the estate but is provided for as one of “the children” under the will in view of Rule 7, § 29-1. *Rowls v. Durham Realty, etc., Co.*, 189 N. C. 368, 127 S. E. 254 (1925).

Not Applicable to Adopted Children—Illegitimate Children.—This section applies only to natural born children of the testator, and does not apply to adopted children. *Sorrell v. Sorrell*, 193 N. C. 439, 137 S. E. 306 (1927). Illegitimate children subsequently adopted, however, fall within the class of natural children. *King v. Davis*, 91 N. C. 142 (1884). For note on “Inheritance by Child Adopted after Execution of Adopting Parent’s Will,” see 12 N. C. Law Rev. 402.

Entire Will Is Not Revoked.—While after-born children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under this section, it does not amount to revocation of the entire will. *Fawcett v. Fawcett*, 191 N. C. 679, 132 S. E. 796 (1926).

Cited in Trust Co. v. Lenz, 196 N. C. 398, 145 S. E. 776 (1928); In re Wall’s Will, 216 N. C. 805, 5 S. E. (2d) 837 (1939).

Division VII. Fiduciaries.

	PAGE
Chap. 32. Fiduciaries	179
33. Guardian and Ward	183
34. Veterans' Guardianship Act	215
35. Persons with Mental Diseases and Incompetents	221
36. Trusts and Trustees	245
37. Uniform Principal and Income Act	260

Chapter 32.

Fiduciaries.

Sec.		Sec.	
32-1.	Short title.	32-7.	Check drawn by and payable to fiduciary.
32-2.	Definition of terms.	32-8.	Deposit in name of fiduciary as such.
32-3.	Application of payments made to fiduciaries.	32-9.	Deposit in name of principal.
32-4.	Registration of transfer of securities held by fiduciaries.	32-10.	Deposit in fiduciary's personal account.
32-5.	Transfer of negotiable instrument by fiduciary.	32-11.	Deposit in names of two or more trustees.
32-6.	Check drawn by fiduciary payable to third person.	32-12.	Cases not provided for in chapter.
		32-13.	Uniformity of interpretation.

§ 32-1. **Short title.**—This chapter may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C. S., s. 1864(d).)

Prior Law.—The cases cited in this note were decided prior to the enactment of the statute codified as this chapter. As to pledge or sale of trust assets as security for or in payment of fiduciary's own debt, see *Powell v. Jones*, 36 N. C. 337 (1841); *Lockhart v. Phillips*, 36 N. C. 342 (1841); *Exum v. Bowden*, 39 N. C. 281 (1846); *Gray v. Armistead*, 41 N. C. 74 (1849); *Bradshaw v. Simpson*, 41 N. C. 243 (1849); *Wilson v. Doster*, 42 N. C.

231 (1851); *Hendrick v. Gidney*, 114 N. C. 543, 19 S. E. 598 (1894). As to rights and liabilities where a party united with fiduciary in a breach of trust or circumstances put him on guard, see *Buning v. Ricks*, 22 N. C. 130 (1838); *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455 (1887). As to purchaser of legal title as trustee for cestui que trust, see *Maples v. Medlin*, 5 N. C. 220 (1809).

§ 32-2. **Definition of terms.**—1. In this chapter unless the context or subject matter otherwise requires:

“Bank” includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

“Fiduciary” includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

“Person” includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

“Principal” includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done “in good faith” within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not. (1923, c. 85, s. 1; C. S., s. 1864(e).)

Cross Reference.—As to what constitutes business of banking, see § 53-1.

§ 32-3. **Application of payments made to fiduciaries.**—A person who in good faith pays or transfers to a fiduciary any money or other property, which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 85, s. 2; C. S., s. 1864(f).)

Editor's Note.—It was stated in 1 N. C. Law Rev. 291, that this section accords with *Tyrrell v. Morris*, 21 N. C. 559

(1837); *Gray v. Armistead*, 41 N. C. 74 (1849), and *Kadis v. Weil*, 164 N. C. 84, 80 S. E. 229 (1913), unless a change results

from the elimination by the definition of "fiduciary" in § 32-2 of certain distinctions formerly recognized between some classes

of fiduciaries. See *Exum v. Bowden*, 39 N. C. 281 (1846).

§ 32-4. Registration of transfer of securities held by fiduciaries.—If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith. (1923, c. 85, s. 3; C. S., s. 1864(g).)

Editor's Note.—This section appears to change the rule of *Baker v. Railroad*, 173 N. C. 365, 92 S. E. 170 (1917), which required a corporation before registering a transfer of stock held in the name of a fiduciary as such, to inquire whether the fiduciary was committing a breach of trust in making the transfer. 1 N. C. Law Rev. 291.

Ground for actionable negligence in the transfer of stocks is greatly narrowed by this section. *Carolina Tel., etc., Co. v. Johnson*, 168 F. (2d) 489 (1948).

Corporation Not Negligent.—In action for negligence in registering transfer of wards' stock, which was registered in guardian's name, this section was a de-

fense where corporation had no "actual knowledge" either of the commission by the fiduciary of a breach of his obligation or of facts revealing bad faith in the transfer. *Carolina Tel., etc., Co. v. Johnson*, 168 F. (2d) 489 (1948).

Insistence by corporation upon a further decree was not a requisite of diligence where decree authorized guardian to partition stock and retain his wards' portion either in shares or money, and the corporation might with reason have believed the guardian was thereby entitled to reduce his wards' shares to cash. *Carolina Tel., etc., Co. v. Johnson*, 168 F. (2d) 489 (1948).

§ 32-5. Transfer of negotiable instrument by fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. (1923, c. 85, s. 4; C. S., s. 1864(h).)

Editor's Note.—North Carolina has followed the uniform application of the N. I. L. See *Setzer v. Deal*, 135 N. C. 428, 47 S. E. 466 (1904); *Smathers & Co. v. Toxa-*

way Hotel Co., 162 N. C. 346, 78 S. E. 224 (1913); *Smathers & Co. v. Toxaway Hotel Co.*, 167 N. C. 469, 83 S. E. 844 (1914). And see 1 N. C. Law Rev. 291.

§ 32-6. Check drawn by fiduciary payable to third person.—If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the

instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. (1923, c. 85, s. 5; C. S., s. 1864(i).)

Evidence Sufficient for Jury.—Admissions by defendant that it entered into contracts for the sale of certain lands to an individual and that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the funds of a corporation by the individual as president of the corporation, together with evidence that the individual had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation, was sufficient to

be submitted to the jury in an action by the receiver of the corporation under the provisions of this section. *LaVecchia v. North Carolina Joint Stock Land Bank*, 218 N. C. 35, 9 S. E. (2d) 489 (1940).

Judgment on Pleadings.—Allegations of defendant's acceptance of a corporate check in payment of individual obligation of the president does not entitle the plaintiff to judgment on the pleadings. *LaVecchia v. North Carolina Joint Stock Land Bank*, 216 N. C. 28, 3 S. E. (2d) 276 (1939).

§ 32-7. **Check drawn by and payable to fiduciary.**—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. (1923, c. 85, s. 6; C. S., s. 1864(j).)

§ 32-8. **Deposit in name of fiduciary as such.**—If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 7; C. S., s. 1864(k).)

Cross Reference.—As to deposits made in trust for infants, see § 53-59.

Editor's Note.—This and the two following sections are in accord with the tendency of the North Carolina decisions as

indicated in *Bank v. Clapp*, 76 N. C. 482 (1877); *Bank v. Insurance Co.*, 150 N. C. 770, 64 S. E. 902 (1909); *Miller v. Bank*, 176 N. C. 152, 96 S. E. 977 (1918). See 1 N. C. Law Rev. 291.

§ 32-9. **Deposit in name of principal.**—If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge

that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8; C. S., s. 1864(1).)

Editor's Note.—See note to § 32-8.

§ 32-10. **Deposit in fiduciary's personal account.**—If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9; C. S., s. 1864(m).)

Editor's Note.—See note to § 32-8.

§ 32-11. **Deposit in names of two or more trustees.**—When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. (1923, c. 85, s. 10; C. S., s. 1864(n).)

Editor's Note.—See 1 N. C. Law Rev. 292.

§ 32-12. **Cases not provided for in chapter.**—In any case not provided for in this chapter the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C. S., s. 1864(p).)

§ 32-13. **Uniformity of interpretation.**—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C. S., s. 1864(q).)

Chapter 33. Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

- Sec.
33-1. Jurisdiction in clerk of superior court.
33-1.1. Absence of natural guardian.
33-2. Appointment by parents; effect; powers and duties of guardian.
33-3. Mother's guardianship on death of father.
33-4. Appointment on divorce of parents.
33-5. Appointment when father living.
33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.
33-7. Proceedings on application for guardianship.
33-8. Letters of guardianship.
33-9. Removal by clerk.
33-10. Interlocutory orders on revocation.
33-11. Resignation; effect; accounting on resignation.

Article 2.

Guardian's Bond.

- 33-12. Bond to be given before receiving property.
33-13. Terms and conditions of bond; increased on sale of realty.
33-13.1. Clerk may reduce penalty of bond of guardian or trustee.
33-14. Bond to be recorded in clerk's office; action on.
33-15. Where several wards with estate in common, one bond sufficient.
33-16. Renewal of bond every three years; enforcing renewal.
33-17. Relief of endangered sureties.
33-18. Liability of clerk for taking insufficient bond.
33-19. Liability of clerk for other defaults.

Article 3.

Powers and Duties of Guardian.

- 33-20. Guardian to take charge of estate.
33-21. How rentals made.
33-22. When lands may be leased.
33-23. When guardians to cultivate lands of wards.
33-24. Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.

Sec.

- 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.
33-26. Plate and jewelry to be kept.
33-27. Personal representative of guardian to pay over to clerk.
33-28. Collection of claims; duty and liability.
33-29. Liability for lands sold for taxes.
33-30. Liability for costs.

Article 4.

Sales of Ward's Estate.

- 33-31. Special proceedings to sell; judge's approval required.
33-31.1. Procedure when real estate lies in county in which guardian does not reside.
33-32. Fund from sale has character of estate sold and subject to same trusts.
33-33. Sale of ward's estate to make assets.
33-34. To sell perishable goods on order of clerk.
33-35. When timber may be sold.

Article 4A.

Guardians' Deeds Validated When Seal Omitted.

- 33-35.1. Deeds by guardians omitting seal, prior to Jan. 1st, 1944, validated.

Article 5.

Returns and Accounting.

- 33-36. Return within three months.
33-37. Procedure to compel return.
33-38. Additional assets to be returned.
33-39. Annual accounts.
33-40. Procedure to compel accounting.
33-41. Final account.
33-42. Expenses and disbursements credited to guardian.
33-42.1. Guardian required to exhibit statements.
33-43. Commissions.

Article 6.

Public Guardians.

- 33-44. Appointment; term; oath.
33-45. Bond of public guardian; increasing bond.
33-46. Powers, duties, liabilities, compensation.

Sec.

33-47. When letters issue to public guardian.

Article 7.

Foreign Guardians.

33-48. Right to removal of ward's personality from State.

33-49. Contents of petition; parties defendant.

33-49.1. Transfer of guardianship.

Article 8.

Estates without Guardian.

33-50. Duty of grand jury as to orphans and guardians.

33-51. Solicitor to apply for receiver for orphans' estates.

33-52. Solicitor to prosecute bond of guardian removed without a successor.

33-53. Judge to appoint receiver; his rights and duties.

33-54. When receiver to pay over estate.

33-55. Duties of solicitor.

Article 9.

Guardians of Estates of Missing Persons.

33-56. Appointment.

Sec.

33-57. Jurisdiction.

33-58. Powers and duties; bond.

33-59. General laws applicable.

33-60. Other managerial powers conferred.

33-61. Discharge of guardian upon return of missing person.

33-62. Guardian not liable except for misconduct.

Article 10.

Conservators of Estates of Missing Persons.

33-63. Appointment of conservators for property of certain persons reported missing, etc.

33-64. Surety bond required; powers and duties.

33-65. Clerk may require provision for dependents.

33-66. Termination of conservatorship.

Article 11.

Guardians of Children of Service Men.

33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.

ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. **Jurisdiction in clerk of superior court.**—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell Training School: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. (1762, c. 69, ss. 5, 7; R. C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C. S., s. 2150; 1935, c. 467; 1945, c. 902.)

Cross Reference.—As to guardianship of insane persons, see § 35-2 et seq.

Editor's Note.—The 1935 amendment added a part of the proviso, and the 1945 amendment added the remainder.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 340.

The powers which a court of equity for-

merly exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by this section and § 33-6. *Duffy v. Williams*, 133 N. C. 195, 45 S. E. 548 (1903).

Place of Appointment.—Under this section the appointment of a guardian in a county other than the one in which the

ward's surviving parent resides or the ward's estate is situate is void. *Duke v. Johnston*, 211 N. C. 171, 189 S. E. 504 (1937).

Appointment by General Assembly.—An act of the General Assembly authorizing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. *Henderson v. Bowd*, 116 N. C. 795, 21 S. E. 692 (1895).

The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewable by the Supreme Court. *Battle v. Vick*, 15 N. C. 294 (1833).

In early cases it was held that the court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in its discretion, would best perform the duty. *Wynne v.*

Always, 5 N. C. 38 (1804); *Grant v. Whitaker*, 5 N. C. 231 (1809).

Person Related to Ward.—Courts are empowered to appoint as guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. *Mills v. McAllister*, 2 N. C. 303 (1796).

Custody of Child.—The jurisdiction of superior court clerks in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. *In re Lewis*, 88 N. C. 31 (1883).

Removal of Guardian.—A ward may not bring an action in the superior court by her next friend to remove her guardian appointed by the clerk under this section. *Moses v. Moses*, 204 N. C. 657, 169 S. E. 273 (1933).

§ 33-1.1. Absence of natural guardian.—Where there is no natural guardian of a minor or where a minor has been abandoned, and in either event the minor requires service from the department of public welfare, until the appointment of a guardian of the person for said minor under this chapter, the superintendent of public welfare of the county in which such minor resides shall be the guardian of the person of said minor: Provided, however, that nothing in this section shall be construed as changing or affecting the appointment or the duties or powers of any next friend of, or any guardian or trustee of the property or estate of, any minor, or any existing laws relative to the handling or disposition of the property of any minor. (1947, c. 413, s. 3.)

Editor's Note.—For brief comment on this section, see 25 N. C. Law Rev. 413.

§ 33-2. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and whether born at his death or in ventre sa mere for such time as the children may remain under twenty-one years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, or has willfully abandoned his wife, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (1762, c. 69; R. C., c. 54; 1868-9, c. 201; 1881, c. 64; Code, ss. 1562, 1563, 1564; Rev., ss. 1762, 1763, 1764; 1911, c. 120; C. S., s. 2151; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2.)

Cross References.—As to habeas corpus for custody of children, see §§ 17-39 and 17-40. As to adoption of children, see § 48-1 et seq.

Editor's Note.—The 1920 amendment inserted the words "or has willfully abandoned his wife" in the second sentence. The 1941 amendment added the

proviso to the section, and the 1945 amendment made changes in the first sentence.

The 1947 amendment struck out the words "by deed executed in his lifetime and with the written consent and privy examination of the mother, if she be living," formerly appearing after the word "may" near the beginning of the section. It also struck out the reference to "deed" formerly appearing in the fourth sentence and proviso.

For comment on the 1941 and 1947 amendments, see 19 N. C. Law Rev. 480; 25 N. C. Law Rev. 413.

Section Controls Appointment.—A father cannot appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except, pursuant to this section. *Peyton v. Smith*, 22 N. C. 325 (1839). See *Long v. Rhymes*, 6 N. C. 122 (1812).

And Applies Only to Testator's Children.—A testator cannot appoint a testamentary guardian except for his own children. *Camp v. Pittman*, 90 N. C. 615 (1884). This section does not authorize a grandfather to appoint a guardian for his grandchildren. *Williamson v. Jordan*, 45 N. C. 46 (1852).

Interpretation of Will.—Where it can clearly be collected from the will of a father that certain persons are thereby appointed to have the custody of the persons

and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. *Peyton v. Smith*, 22 N. C. 325 (1839).

Rights of Both Parents Are Recognized.—In this and other statutes, the legislature has recognized the human as well as the legal relation between parent and child, the paramount and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926).

Father Not Regarded as Wrongdoer When He Acts in Good Faith with Child's Money.—Since under this section the father is natural guardian for his minor children he should not be regarded as a trespasser or a wrongdoer when he acts in good faith with his child's money and makes purchases for its benefit. *Lifsey v. Bullock*, 11 F. Supp. 728 (1935).

Cited in *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012 (1895); *In re Warren*, 178 N. C. 43, 100 S. E. 76 (1919); *The Severance*, 152 F. (2d) 916 (1945).

§ 33-3. Mother's guardianship on death of father.—In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and over the appointment of guardians. (1883, c. 364; Code, s. 1565; Rev., s. 1765; C. S., s. 2152.)

Cited in *In re Warren*, 178 N. C. 43, 100 S. E. 76 (1919).

§ 33-4. Appointment on divorce of parents.—When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother. (1838, c. 16; R. C., c. 54, s. 4; 1868-9, c. 201, s. 9; Code, s. 1571; Rev., s. 1770; C. S., s. 2153.)

Cross Reference.—As to custody of children generally in case of divorce, see § 50-13.

§ 33-5. Appointment when father living.—The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all

respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor. (1806, c. 707; R. C., c. 54, ss. 4, 7; 1868-9, c. 201, s. 10; Code, s. 1572; Rev., s. 1771; C. S., s. 2154.)

Cross Reference.—As to appointment of jurisdiction of juvenile court is thereby guardian when welfare of child within promoted, see § 110-37.

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.—Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (1840, c. 31; R. C., c. 54, s. 3; 1868-9, c. 201, ss. 6, 7; Code, ss. 1567, 1568, 1569; Rev., ss. 1767, 1768, 1769; C. S., s. 2155.)

Cross References.—As to expenses and disbursements credited to guardian, see § 33-42. As to commissions, see § 33-43.

§ 33-7. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell Training School, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell Training School are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell Training School, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell Training School. (C. C. P., s. 474; Code, s. 1620; Rev., s. 1772; 1917, c. 41, s. 2; C. S., s. 2156.)

In General.—When a guardian is appointed he must assert his right to the custody of his ward by a civil action against the persons in charge of him, while they in turn, if so advised, can take appropriate steps to set aside the guardianship. In re Parker, 144 N. C. 170, 56 S. E. 878 (1907).

Habeas Corpus Not Proper.—Except as between parents, under § 17-39, the right of the custody of a child cannot be deter-

mined under the writ of habeas corpus, the object of that writ being to remove an illegal restraint. In re Parker, 144 N. C. 170, 56 S. E. 878 (1907).

Application Should Be in Writing.—The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the next friend or guardian ad litem be appointed upon due consideration of an

application in writing, and not upon a simple suggestion. *Morris v. Gentry*, 89 N. C. 248 (1883).

Effect of Failure of Notice.—Failure to notify the relative in custody of the child of proceedings to appoint a guardian is an irregularity, under this section, which does not render the appointment of the guardian void, though it is not conclusive upon such relative. *In re Parker*, 144 N. C. 170, 56 S. E. 878 (1907).

While the failure to notify the relatives

§ 33-8. **Letters of guardianship.**—The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office. (C. C. P., s. 475; Code, s. 1621; Rev., s. 1773; C. S., s. 2157.)

The appointment of a guardian can be shown only by the records in the office of the clerk of the superior court by whom the appointment was made, or by letters of appointment issued by the clerk as re-

quired by this section, and parol evidence tending to show appointment is incompetent. *Buncombe County v. Cain*, 210 N. C. 766, 188 S. E. 399 (1936).

§ 33-9. **Removal by clerk.**—The clerks of the superior court have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it is their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.
2. Where the guardian in any manner mismanages the estate.
3. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.
4. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.
5. Where the guardian or his sureties are likely to become insolvent or non-residents of the State. (1762, c. 69; R. C., c. 54, ss. 2, 13; C. C. P., ss. 470, 476; 1868-9, c. 201, s. 20; Code, s. 1583; Rev., s. 1774; C. S., s. 2158.)

Cross References.—As to disqualifications to act as administrator, see § 28-8. As to removal of an administrator, see § 28-32. As to criminal liability for embezzlement, see § 14-90. As to guardian removing from State without appointing process agent, see § 28-187.

Personal Use of Ward's Funds.—The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal. *Ury v. Brown*, 129 N. C. 270, 40 S. E. 4 (1901).

Funds in Jeopardy.—A testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement. *Sanderson v. Sanderson*, 79 N. C. 369 (1878).

Removal without Cause Is Error.—An

order by a superior court clerk in a cause pending before him for the removal of a testamentary guardian, where none of the statutory grounds are alleged or found as a fact by the clerk, is improperly made, and will be set aside upon proceedings properly instituted to that end. *Sanderson v. Sanderson*, 79 N. C. 369 (1878).

A ward may not bring action in superior court by next friend to remove guardian appointed by the clerk, and for the appointment of another guardian, the superior court in such instance being without jurisdiction. *Moses v. Moses*, 204 N. C. 657, 169 S. E. 273 (1933).

Under Former Law.—As to removal of guardian by county court, see *Bray v. Brumsey*, 5 N. C. 227 (1809); *Cooke v. Beale*, 33 N. C. 36 (1850).

§ 33-10. **Interlocutory orders on revocation.**—In all cases where the

letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation. (1868-9, c. 201, s. 44; Code, s. 1607; Rev., s. 1775; C. S., s. 2159.)

§ 33-11. **Resignation; effect; accounting on resignation.**—Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, or the clerk of the superior court may be appointed receiver of the estate of the ward, and if so appointed the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation. (1868-9, c. 201, s. 45; Code, s. 1608; Rev., s. 1776; C. S., s. 2160; 1921, c. 95.)

Cross References.—See §§ 36-9 to 36-18. As to final account by the resigning guardian, see § 33-41.

Editor's Note.—The 1921 amendment inserted in the second sentence the words "or the clerk of the superior court may be appointed receiver of the estate of the ward and if so appointed."

Liability Continues.—Where permission is given to a guardian by the judge of pro-

bate to file an ex parte final account and turn over his guardianship to another, he is not thereby discharged from liabilities connected with his trust and arising before such resignation. He is still bound to account with the ward, or the succeeding guardian, when so required. *Luton v. Wilcox*, 83 N. C. 21 (1880).

Cited in *Thornton v. Barbour*, 204 N. C. 583, 169 S. E. 153 (1933).

ARTICLE 2.

Guardian's Bond.

§ 33-12. **Bond to be given before receiving property.**—No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court. (C. C. P., s. 355; Code, s. 1573; Rev., s. 1777; C. S., s. 2161.)

Cross References.—As to giving bond in surety company, see § 109-17. As to giving mortgage in lieu of bond, see § 109-24 et seq.

Presumption of Giving of Bond.—When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. *Kello v. Maget*, 18 N. C. 414 (1835).

When Denial of Guardianship Not Permissible.—Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. *Latham v. Wilcox*, 99 N. C. 367, 6 S. E. 711 (1888).

The surety on a guardianship bond is estopped to deny the validity of the appointment of a guardian when the bond signed by the surety recites that the

guardian has been duly appointed. *Phipps v. Royal Indemnity Co.*, 201 N. C. 561, 161 S. E. 69 (1931).

Omission by the clerk to take the bond required on the appointment of a guardian does not destroy the efficacy of the appointment. *Howerton v. Sexton*, 104 N. C. 75, 10 S. E. 148 (1889).

Liability on Bond.—A guardian and his bondsmen are liable for all moneys due his wards which he has collected or ought to have collected. *Loftin v. Cobb*, 126 N. C. 58, 35 S. E. 230 (1900).

Where the administrator of a former guardian himself becomes guardian, he and his guardian bondsmen become liable for any balance due from the solvent estate of the former guardian. *Loftin v. Cobb*, 126 N. C. 58, 35 S. E. 230 (1900).

Cited in *Phipps v. Royal Indemnity Co.*, 201 N. C. 561, 161 S. E. 69 (1931).

§ 33-13. Terms and conditions of bond; increased on sale of realty.

—Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward: Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten per cent of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; R. C., c. 54, s. 5; 1868-9, c. 201, s. 11; 1874-5, c. 214; Code, s. 1574; Rev., ss. 323, 1778; C. S., s. 2162; 1925, c. 131; 1935, c. 385.)

Local Modification.—Craven: 1935, c. 147.

Cross References.—As to statute of limitations on bond, see §§ 1-50, 1-52. As to renewal of bond, see § 33-16. As to action on bond, see § 33-14 and notes. As to reduction of penalty of bond, see §§ 33-13.1, 36-4. As to liability of clerk for taking insufficient bond, see § 33-18.

Editor's Note.—The 1925 amendment inserted the proviso as to amount of bond where value of all personal property and rents and profits exceeds one hundred thousand dollars.

The 1935 amendment changed the penalty as specified in the second sentence and added the exception at the end of the section relating to bond executed by surety company.

This section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. *Cheshire v. Howard*, 207 N. C. 566, 178 S. E. 348 (1935).

And Acceptance without Guardian's Signature Is an Irregularity.—The acceptance and approval of the bond by the clerk of the superior court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the princi-

pal or as to his sureties. *Cheshire v. Howard*, 207 N. C. 566, 178 S. E. 348 (1935).

Not Strictly a Record.—A guardian's bond is not strictly a record of the court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. *Harrell v. Hare*, 70 N. C. 658 (1874).

Failure to Insert Penalty.—A guardian's bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize anyone to insert the amount. *Rollins v. Ebbs*, 137 N. C. 355, 49 S. E. 341 (1904).

Failure to Collect Money.—Where a guardian ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in place of the money, he and his sureties are liable. *Avent v. Womack*, 72 N. C. 397 (1875).

Bank Intermingling Trust Funds.—A bank, as guardian, in not investing the funds of its ward, but intermingling them with other funds of the bank, was faithless to the trust reposed in it; and, under the terms of this section, its bonds-

man must suffer the loss for such faithlessness. *Roebuck v. National Surety Co.*, 200 N. C. 196, 156 S. E. 531 (1931).

Responsible for Laches.—A guardian is responsible on his bond for any loss resulting from his laches in failing to sue. *Cross v. Craven*, 120 N. C. 331, 26 S. E. 940 (1897).

Limit of Liability for Realty.—The guardian's bond is not responsible in any way for the realty beyond the rents and profits. *Cross v. Craven*, 120 N. C. 331, 26 S. E. 940 (1897).

Liability on Note for Ward's Board.—The sureties on a guardian's bond are not

responsible for the nonpayment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward. *McKinnon v. McKinnon*, 81 N. C. 201 (1879).

Surety as a Party in Interest.—When a guardian fails to "faithfully execute the trust reposed in him as such," upon which his bond is conditioned, the surety thereon is subjected to liability, and as a party in interest is entitled to have the wrong remedied. *Maryland Cas. Co. v. Lawing*, 223 N. C. 8, 25 S. E. (2d) 183 (1943).

Cited in *Pierce v. Pierce*, 197 N. C. 348, 148 S. E. 438 (1929).

§ 33-13.1. Clerk may reduce penalty of bond of guardian or trustee.—The clerks of the superior court within their respective counties shall have full power and authority from time to time to order that the penalty of a bond of a guardian or trustee be reduced to a stated sum under the following circumstances:

When a guardian or trustee has disbursed either income or income and principal of the estate according to law, either for the purchase of real estate, or the support and maintenance of the ward or the ward and his dependents, or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian or trustee have been so diminished, the penalty of the bond of such guardian or trustee may be reduced in the discretion of the clerk to an amount not less than the amount which would be required if the guardian or trustee were first qualifying to administer such personal assets and annual income. (1947, c. 667.)

Cross Reference.—See § 36-4.

§ 33-14. Bond to be recorded in clerk's office; action on.—The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions. (R. C., c. 54, s. 5; 1868-9, c. 201, s. 12; Code, s. 1575; Rev., s. 1779; C. S., s. 2163.)

Jurisdiction of Action.—The clerk has no jurisdiction of a suit on a guardian's bond. Such suit must be brought in the superior court. *Rowland v. Thompson*, 65 N. C. 110 (1871).

Action in Name of State.—An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. *Carmichael v. Moore*, 88 N. C. 29 (1883); *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131 (1887); *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468 (1888).

Unnecessary Parties.—In an action against the surety on a guardian's bond, when the guardian has defaulted and his whereabouts is unknown, and the defendant is the sole surety, and claims that the guardian, who was assistant clerk of the superior court, had given to the clerk a bond for the faithful performance of his duties as assistant clerk, neither the clerk nor the bonding company on the assistant

clerk's bond is a necessary or proper party to said action. *Phipps v. Royal Indemnity Co.*, 201 N. C. 561, 161 S. E. 69 (1931).

Proper Relator.—When the share of an infant in an estate in the hands of his guardian is assigned, the assignee, and not the infant, is the proper relator in an action on the guardian's bond. *Petty v. Rousseau*, 94 N. C. 355 (1886).

A creditor of a guardian is not the proper relator in an action upon his bond. *McKinnon v. McKinnon*, 81 N. C. 201 (1879).

Condition Set Out in Complaint.—In an action on a guardian's bond; it is necessary that conditions of the bond which are alleged to have been broken should be set forth in the complaint. *McKinnon v. McKinnon*, 81 N. C. 201 (1879).

Evidence.—Evidence of a balance in the hands of a guardian as shown of his annual account was admissible against a

surety under the Laws of 1884. *Loftin v. Cobb*, 126 N. C. 58, 35 S. E. 230 (1900).

Same—Bond Must Be Proved.—A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. *Butler v. Durham*, 38 N. C. 589 (1845).

Defenses.—The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. *State v. Cordon*, 30 N. C. 179 (1847).

Same—Settlement.—A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. *Dean v. Ragsdale*, 80 N. C. 215 (1879).

Where in a suit on a guardian's bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt, this was a sufficient defense to the suit on

the bond. *State v. Cordon*, 30 N. C. 179 (1847).

Same—Statute of Limitations.—An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

Amount of Recovery.—In an action upon a guardian's bond the recovery against either the principal or the surety cannot exceed the penalty thereof, but should be for the penal sum of the bond, and to be discharged on payment of the damages sustained. *Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347 (1888).

Same—Measure of Damages.—The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age. *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14 (1888).

Cited in *Cheshire v. Howard*, 207 N. C. 566, 178 S. E. 348 (1935).

§ 33-15. **Where several wards with estate in common, one bond sufficient.**—When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (1822, c. 1161; R. C., c. 54, s. 8; 1868-9, c. 201, s. 13; Code, s. 1576; Rev., s. 1780; C. S., s. 2164.)

§ 33-16. **Renewal of bond every three years; enforcing renewal.**—Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor: Provided, that this section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (1762, c. 69, s. 15; R. C., c. 54, s. 10; 1868-9, c. 201, ss. 18, 19; Code, ss. 1581, 1582; Rev., ss. 324, 1781, 1782; C. S., s. 2165; 1943, c. 167.)

Editor's Note.—The 1943 amendment added the proviso.

An ordinary guardian has no fixed term of office. While the statute requires a renewal of the bond every three years there is no requirement for a new appointment. *Thornton v. Barbour*, 204 N. C. 583, 169 S. E. 153 (1933).

Liability for Failure to Enforce Renewal.—A clerk and his sureties are not liable upon his official bond for his failure to issue a citation requiring a guardian to renew his bond. *Jones v. Biggs*, 46 N. C. 364 (1854); *Sullivan v. Lowe*, 64 N. C. 500 (1870).

§ 33-17. **Relief of endangered sureties.**—Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting

forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fails to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (1762, c. 69, ss. 21, 22; R. C., c. 54, s. 35; 1868-9, c. 201, s. 43; Code, s. 1606; Rev., s. 1783; C. S., s. 2166.)

A surety is not discharged from liability by the guardian giving a new bond with other sureties. *Jones v. Blanton*, 41 N. C. 115 (1848).

New Bond Is Additional Security.—When, under this section, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. *Bell v. Jasper*, 37 N. C. 597 (1843).

And where a guardian gives several successive bonds, the sureties on each stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. *Jones v. Hays*, 38 N. C. 502 (1845); *Thornton v. Barbour*,

204 N. C. 583, 169 S. E. 153 (1933).

Where Counter-Security Given.—Where the sureties of a guardian obtained an order for counter-security, and at that time the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed; and the sureties on the first bond were liable for it, though the order for counter-security expressly released them. *Foye v. Bell*, 18 N. C. 475 (1836).

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, especially at a time when the principal is in default. This section provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated. *Thornton v. Barbour*, 204 N. C. 583, 169 S. E. 153 (1933).

§ 33-18. Liability of clerk for taking insufficient bond.—If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (1762, c. 69, ss. 5, 6; R. C., c. 54, s. 2; 1868-9, c. 201, s. 51; Code, s. 1614; Rev., s. 1784; C. S., s. 2167.)

A clerk and sureties on his official bond are liable for loss resulting from a failure to take a good guardian's bond, and the record of the appointment of the guardian is sufficient evidence of such appointment. *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14 (1888).

The giving of the bond required of a guardian is not essential to the validity of the appointment itself. The failure to take the bond, however, subjects the clerk

to the consequences of such omission. *Howerton v. Sexton*, 104 N. C. 75, 10 S. E. 148 (1889).

When Action Lies.—No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there have been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. *Jones v. Briggs*, 46 N. C. 364 (1854).

§ 33-19. Liability of clerk for other defaults.—If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in § 33-18. (1868-9, c. 201, s. 52; Code, s. 1615; Rev., s. 1785; C. S., s. 2168.)

ARTICLE 3.

Powers and Duties of Guardian.

§ 33-20. **Guardian to take charge of estate.**—Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor. (1762, c. 69, s. 3; R. C., c. 54, s. 21; 1868-9, c. 201, s. 25; Code, s. 1588; Rev., s. 1786; C. S., s. 2169.)

Cross References.—As to power of guardians to lend portions of estates of wards, see § 24-4. As to personal liability of guardian for stock held for ward, see §§ 53-40 and 55-65. As to voting as stockholder, see § 55-111. As to income taxes, see §§ 105-139, 105-153, 105-154. As to payment of taxes, see § 105-412. As to investment and deposit of funds generally, see § 36-1 et seq. As to authority to invest in federal farm loans, see § 53-60; in bonds guaranteed by United States, see § 53-44; in mortgages of federal housing administration, etc., see § 53-45.

A guardian in managing his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. *Luton v. Wilcox*, 83 N. C. 21 (1880).

The guardian can select the forum, under this section, as there is no statute to the contrary. *Lawson v. Langlely*, 211 N. C. 526, 191 S. E. 229 (1937).

Recovery of Realty.—A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of

realty. *Cross v. Craven*, 120 N. C. 331, 26 S. E. 940 (1897).

Payment of funds to guardian under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence, the deposit of the funds in a bank duly appointed guardian, and which later became insolvent, does not entitle the surety on the guardianship bond to a preference for the amount of the deposit. *In re Home Savings Bank*, 204 N. C. 454, 168 S. E. 688 (1933).

Miscellaneous Matters.—As to exchange of security for debt due ward, see *Christman v. Wright*, 38 N. C. 549 (1845). As to compromise of claim for personal injury to ward, see *Bunch v. Foreman Blades Lbr. Co.*, 174 N. C. 8, 93 S. E. 374 (1917). As to statute of limitations upon discovery of fraud, see *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375 (1940).

Cited in *The Severance*, 152 F. (2d) 916 (1915).

§ 33-21. **How rentals made.**—All rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days' notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. The proceeds [of all] rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security. (1793, c. 391; R. C., c. 54, s. 26; Code, s. 1590; 1891, c. 83; 1901, c. 97; Rev., s. 1788; C. S., s. 2171; 1949, c. 719, s. 2.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section applied to sales as well as to rentings. The amendment struck out the words "sales and" formerly appearing after the word "All" at the beginning of the section. It also directed the deletion of the words "of all sales of personal estate and" formerly following the word "proceeds" near the beginning of the last sentence. The words "of all" in the quoted deletion were apparently directed to be

stricken by inadvertence on the part of the legislature. Therefore, they have been retained in brackets to show that, while they are not part of the present section, they are thought to express the apparent intent of the legislature.

Effect of Violation.—Where a lease by the guardian of his ward's lands was not publicly made, as required by this section, nor approved by the clerk of the superior court, as required by § 33-22, the lessee may not hold the ward's estate liable

for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. *Coxe v. Whitmire Motor Sales Co.*, 190 N. C. 838, 130 S. E. 841 (1925).

Applied in *Pate v. Kennedy*, 104 N. C. 234, 10 S. E. 188 (1889); *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896); *Duffy v. Williams*, 133 N. C. 195, 45 S. E. 548 (1903).

§ 33-22. **When lands may be leased.**—The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land. (1762, c. 69, s. 13; 1794, c. 413, s. 2; R. C., c. 54, s. 25; Code, s. 1591; Rev., s. 1789; C. S., s. 2172.)

Section Not a Limitation on Power of Court.—This section is a restriction upon the power of guardians but not a limitation on the power of the court; and guardians may lease the real property of their infant wards for a period extending beyond the guardianship or the minority of the wards with the approval of a court of general equity jurisdiction. *Coxe v. Charles Stores Co.*, 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959 (1939).

the guardian of his ward's lands was not publicly made as required by § 33-21, nor approved by the clerk of the superior court as required by this section, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. *Coxe v. Whitmire Motor Sales Co.*, 190 N. C. 833, 130 S. E. 841 (1925).

Effect of Violation—Where a lease by

§ 33-23. **When guardians to cultivate lands of wards.**—Where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 57; C. S., s. 2173.)

Cross Reference.—As to compensation of commissioners in partition of real estate, see § 1-408.

§ 33-24. **Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.**—In addition to the powers given to guardians under the general laws of the State, all guardians may, upon presentation of satisfactory evidence, with approval of the clerk of superior court, which approval must be concurred in by the resident judge or other regular or special judge holding courts in the district, cause lands to be cultivated and make such contracts with reference thereto as said guardian may deem to be the best interest of his ward's estate, and under the direction of the clerk of superior court, with the approval of the resident judge or other regular or special judge holding courts in the district, continue to operate any business or business enterprise of his ward and make such contract, agreements, and settlements

with reference thereto as the clerk of superior court, with the approval of said resident judge or other regular or special judge holding courts in the district, may determine necessary or find to be to the best interest of the estate. (1935, c. 24.)

Cited in *First Citizens Bank, etc., Co. v. Parker*, 225 N. C. 480, 35 S. E. (2d) 489 (1945).

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.—On application of the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the repayment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over twenty-one years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156.)

§ 33-26. Plate and jewelry to be kept.—All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity. (1868-9, c. 201, s. 34; Code, s. 1597; 1895, c. 74; Rev., s. 1791; C. S., s. 2175.)

§ 33-27. Personal representative of guardian to pay over to clerk.—In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (1881, c. 301, s. 2; Code, s. 1622; Rev., s. 1794; C. S., s. 2176.)

Cross Reference.—As to a mortgage to guardian, see § 45-19.

Action between Administrators.—The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guard-

ian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. *Allison v. Robinson*, 78 N. C. 222 (1878).

§ 33-28. Collection of claims; duty and liability.—Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same. (1762, c. 69, s. 10; R. C., c. 54, s. 23; 1868-9, c. 201, s. 30; Code, s. 1593; Rev., s. 1795; C. S., s. 2177.)

Cross References.—As to compound interest on obligations due to guardians, see § 24-4. As to criminal liability of guardian for embezzlement of funds, see § 14-90.

A guardian is liable for what he ought

to receive, as well as for what he does receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. *Avent v. Womack*, 72 N. C. 397 (1875).

By Exercise of Diligence and Good Faith.—A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. *Armfield v. Brown*, 73 N. C. 81 (1875).

Where a guardian carelessly and without deliberation accepts for his wards from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. *Culp v. Stanford*, 112 N. C. 664, 16 S. E. 761 (1893), distinguishing *Luton v. Wilcox*, 83 N. C. 21 (1880).

But He Need Not Resort to Extraordinary Remedies.—Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. *White v. Robinson*, 64 N. C. 698 (1870).

Accepting Unsecured Note.—A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. *Covington v. Leak*, 65 N. C. 594 (1871).

§ 33-29. **Liability for lands sold for taxes.**—If any guardian suffer his ward's lands to lapse or become forfeited or to be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; Code, s. 1595; Rev., s. 1796; C. S., s. 2178.)

§ 33-30. **Liability for costs.**—All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default. (1868-9, c. 201, s. 48; Code, s. 1611; Rev., s. 1797; C. S., s. 2179.)

Cross Reference.—As to owelty to be paid by guardian, see § 46-12.

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. **Special proceedings to sell; judge's approval required.**—On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought

Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. *Alexander v. Alexander*, 120 N. C. 472, 27 S. E. 121 (1897).

Failure to Collect Note During Civil War.—A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the Civil War, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. *Love v. Logan*, 69 N. C. 70 (1873).

Failure to Sue before Insolvency of Debtor.—Where a guardian negligently fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. *Coggins v. Flythe*, 113 N. C. 102, 18 S. E. 96 (1893).

Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having an opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. *Williamson v. Williams*, 59 N. C. 62 (1860), distinguishing *Deberry v. Ivey*, 55 N. C. 370 (1856); *Davis v. Marcum*, 57 N. C. 189 (1858).

for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the superior court of the county in which any or all of such personal estate is situated; no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. The procedure for a sale pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (1827, c. 33; R. C., c. 54, ss. 32, 33; 1868-9, c. 201, s. 39; Code, s. 1602; Rev., s. 1798; 1917, c. 258, s. 1; C. S., s. 2180; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2.)

Cross References.—As to procedure when real estate lies in county in which guardian does not reside, see § 33-31.1. As to sale of estate of an idiot, inebriate, or lunatic, see §§ 35-10 and 35-11. As to release of land condemned under eminent domain, see § 40-22.

Editor's Note.—The 1923 amendment changed the fourth sentence from the end of the section. The former provision was that a guardian could not mortgage his ward's property for a term of years "exceeding the minority of the ward." This limitation was stricken out and the term made dependent upon the decree of the court.

The first 1945 amendment, as changed by the second 1945 amendment, added that part of the first sentence beginning with the words "all petitions filed" following the second semicolon and ending with the last semicolon. The second 1945 amendment also added the next to last sentence.

The 1949 amendment, effective Jan. 1, 1950, substituted the words "no mortgage" now following the last semicolon in the first sentence for the words "but no sale or mortgage." It also added the last sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 458.

For act validating proceedings instituted by guardian relating to estate of ward under provisions of this chapter, see Session Laws 1945, c. 426, s. 8.

Not Applicable to Settlement or Partition.—This section does not apply either to the settlement of estates or to partition. *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20 (1925).

Jurisdiction.—The superior courts have authority in all proper cases to direct a

sale of the property of infants, both real and personal, for their benefit and advantage. *Williams v. Harrington*, 33 N. C. 616 (1850); *Ex parte Dodd*, 62 N. C. 97 (1867); *Sutton v. Schonwald*, 86 N. C. 198 (1882); *Morris v. Gentry*, 89 N. C. 248 (1883); *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

As to sale of contingent interests, see *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402 (1917). As to procedure for sale of such interests, see § 41-11.

Same—Clerk.—By this section the clerk and court in term have concurrent jurisdiction in the manner of ordering a sale of infants' lands upon petition of their guardian. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Compliance with Statutory Requirements.—Although this section must be strictly complied with, where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. *Quick v. Federal Land Bank*, 208 N. C. 562, 181 S. E. 746 (1935).

Order of Sale Must Be Approved.—The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. *Morton v. Lumber Co.*, 178 N. C. 163, 100 S. E. 322 (1919).

Approval of Order by Emergency Judge.—An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency

judge is not holding court in the county. *Ipock v. North Carolina Joint Stock Land Bank*, 206 N. C. 791, 175 S. E. 127 (1934).

Approval of Order Nunc Pro Tunc.—

Where a guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge, and the judge later approved the order nunc pro tunc, the defect was cured so as to come within this section. *Powell v. Armour Fertilizer Works*, 205 N. C. 311, 170 S. E. 916 (1933); *Ipock v. North Carolina Joint Stock Land Bank*, 206 N. C. 791, 175 S. E. 127 (1934).

Proof Required.—This section contemplates that, in addition to the verified petition of the guardian, there shall be required other satisfactory proof of the truth of the matter alleged. In *re Propst*, 144 N. C. 562, 57 S. E. 342 (1907).

Sale May Be Private.—The sale by order of the court may be either public or private. Section 33-21 does not apply when the sale is by order of court. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

The court may sell the land of minors for better investment, when they are properly represented before the court. *Hutchinson v. Hutchinson*, 126 N. C. 671, 36 S. E. 149 (1900).

When Foreign Guardian May Sell.—Where a foreign guardian has complied with the provisions of §§ 33-48 and 33-49 which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of this section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. *Cilley v. Geitner*, 183 N. C. 528, 11 S. E. 866 (1922).

Confirmation of Sale.—While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. In *re Dickerson*, 111 N. C. 108, 15 S. E. 1025 (1892).

When Sale May Be Set Aside.—Where the court, without taking any means to ascertain the necessity for a sale, directed it to be made, and that it should be "first advertised at the courthouse and three other public places," and no bid be received less than \$125, and that the guardian should make conveyance, it was held that it was not error to set aside the sale and direct another. In *re Dickerson*, 111 N. C. 108, 15 S. E. 1025 (1892).

Guardian Cannot Purchase.—It is well settled that a guardian cannot purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. But this does not apply to a sale made by a master. *Patton v. Thompson*, 55 N. C. 285 (1855); *Lee v. Howell*, 69 N. C. 200 (1873). As to power of guardians to purchase at foreclosure of mortgages executed to them, see § 3-25.

When Guardian Liable.—Where a guardian obtains a decree for the sale of his ward's land, it must appear, in order to make him liable for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. *Harrison v. Bradley*, 40 N. C. 136 (1847).

Petition Signed by Person Not a Qualified Guardian Confers No Jurisdiction on Clerk.—A clerk of the superior court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no jurisdiction on the clerk. *Buncombe County v. Cain*, 210 N. C. 766, 188 S. E. 399 (1936).

And in Such Case the Purchaser at Sale Acquires No Title Adverse to Infant.—A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquires no right, title, interest, or estate in said property, adverse to the infant. *Buncombe County v. Cain*, 210 N. C. 766, 188 S. E. 399 (1936).

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund notes executed by the life tenant representing a part of the moneys expended by the life tenant in making permanent improvements upon the land, since the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. *Hall v. Hall*, 219 N. C. 805, 15 S. E. (2d) 273 (1941).

Mortgage Valid in Part.—Under the presumption that the provisions of this section were followed, mortgage executed

by guardian was held valid as to funds used for permanent improvements on land, but void as to funds used to purchase livestock. *Quick v. Federal Land Bank*, 208 N. C. 562, 181 S. E. 746 (1935).

Court May Authorize Lease Extending Beyond Period of Minority.—Since the superior courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdiction of courts of equity over the estates of infants, give courts of equity plenary jurisdiction to order and empower a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship or the minority of the wards, upon its findings that such would be to the best interest of the infant wards. *Coxe v. Charles Stores Co.*, 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959 (1939).

Title Not Affected by Reversal of Decree.—Where land of an infant was sold under a decree of the court upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the

proceeding of which the purchaser had no notice. *Sutton v. Schonwald*, 86 N. C. 198 (1882).

Title at Unauthorized Private Sale.—A guardian, having offered at public sale the land of his wards in accordance with an order of the court, and having failed to sell for want of a bid at a fair price, subsequently sold the land at private sale upon terms approved by the court. It was held that the purchaser at such private sale obtained a good title. *Rowland v. Thompson*, 73 N. C. 504 (1875).

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, under § 2-53, the sale was not void. *Ex parte Huffstetler*, 203 N. C. 796, 167 S. E. 65 (1933).

Applied in *In re Propst*, 144 N. C. 562, 57 S. E. 343 (1907). As to sale of contingent interests, in *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402 (1917).

Cited in *Ex parte Quick*, 206 N. C. 627, 175 S. E. 119 (1934).

§ 33-31.1. Procedure when real estate lies in county in which guardian does not reside.—In all cases where a guardian is appointed under the authority of chapter thirty-three and chapter thirty-five of the General Statutes of North Carolina, and such guardian applies to the court for an order to sell or mortgage all or some part of his ward's real estate, and such real estate is situated in a county other than the county in which the guardian is appointed and qualified, it shall be the duty of the guardian to first apply to the clerk of the court of the county in which he was appointed and qualified for an order showing that the sale or mortgage of his ward's real estate is necessary, or that the interest of his ward would be materially promoted thereby. The clerk of the superior court to whom such application is made shall hear and pass upon the same and enter his findings and order as to whether or not said sale or mortgage of the ward's real estate is necessary, or would materially promote the interest of the ward, and said order and findings shall be certified to the clerk of the superior court of the county in which the ward's land, or some part of same, is located and before whom any petition or application is filed for the sale of said land. Such findings and orders so certified shall be considered by the court or the clerk of the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale of said land. Before such findings and orders shall become effective the same shall be approved by the judge holding the courts of the district or by the resident judge. (1945, c. 426, s. 7; 1949, c. 724, ss. 1-3.)

Editor's Note.—The 1949 amendment the ward being materially promoted and inserted the references to the estate of added the last sentence.

§ 33-32. Fund from sale has character of estate sold and subject to same trusts.—Whenever, in consequence of any sale under § 33-31, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of

the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (1827, c. 33, s. 2; R. C., c. 54, s. 33; 1868-9, c. 201, s. 40; Code, s. 1603; Rev., s. 1799; C. S., s. 2181.)

In General.—Although it is the duty of the court, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet the husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted. *Harrison v. Bradley*, 40

N. C. 136 (1847).

Application.—Where a female infant's land was sold for the benefit of the infant and she married and died before becoming of age, it was held that the money retained the character of real property. *Wood v. Reeves*, 58 N. C. 271 (1859).

§ 33-33. Sale of ward's estate to make assets.—When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts, to the clerk of the superior court, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of the sale; the procedure shall be as provided by article 29A of chapter 1 of the General Statutes; all petitions filed under the authority of this section wherein an order is sought for the sale of a ward's real estate or both real and personal property shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale of the ward's personal estate, the petition shall be filed in the office of the clerk of superior court of the county in which all or any of said personal estate is situated. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1789, c. 311, s. 5; R. C., c. 54, s. 34; 1868-9, c. 201, ss. 41, 42; Code, ss. 1604, 1605; Rev., ss. 1800, 1801; C. S., s. 2182; 1945, c. 426, s. 2; c. 1084, s. 2; 1949, c. 719, s. 2.)

Cross Reference.—See § 33-31.1.

Editor's Note.—The first 1945 amendment struck out the words "wherein the guardianship was granted" formerly following the word "court" the first time it appears in the section. And the amendment, as changed by the second 1945 amendment, inserted that part of the first sentence appearing after the second semicolon.

The 1949 amendment, effective Jan. 1, 1950, inserted the words "the procedure shall be as provided by article 29A of chapter 1 of the General Statutes," appearing after the second semicolon. It also struck out the former last clause of the first sentence relating to the revision and confirmation of the order of sale.

Ascertaining Debts Due and Specifying

Property to Be Sold.—Under the former wording of the statute, giving the county court the power now possessed by the clerk of the superior court, it was held that the statute did not confer a general power to make orders of sale, but conferred a limited power to make orders to sell designated parts of the ward's estate to pay ascertained debts against such estate. *Leary v. Fletcher*, 23 N. C. 259 (1840).

The court should first ascertain that there are debts due from the ward, which render the sale of his property expedient, and should also select the part or parts of the property which can be disposed of with least injury to the ward. *Leary v. Fletcher*, 23 N. C. 259 (1840).

Same—Sufficiency of Order.—An order

authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was ascertained that there were debts due from the ward, and then specify what particular land is to be sold for their payment. *Spruill v. Davenport*, 48 N. C. 42 (1855).

Insufficient Specification of Land.—An order that the guardian sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale. *Leary v. Fletcher*, 23 N. C. 259 (1840); *Ducket v. Skinner*, 33 N. C. 431 (1850).

Sufficient Specification of Land.—An order “to sell the land of the ward named in the petition, adjoining the lands of A., B., and others, containing about 110 acres,” it not appearing that the ward had other land, was held a sufficient specification of the land under the statute. *Pendleton v. Trueblood*, 48 N. C. 96 (1855).

Sale Void Where Debts Not Shown.—A sale of a ward’s land on petition of the guardian to pay debts is void where it is not made to appear that the court passed

on and ascertained the fact that there were debts against the ward’s estate. *Coffield v. McLean*, 49 N. C. 15 (1856).

But the amount of the debts, or to whom due, need not be set forth in the order. *Spruill v. Davenport*, 48 N. C. 42 (1855); *Pendleton v. Trueblood*, 48 N. C. 96 (1855).

Proceeds Subject to Attachment.—Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. *Leroy v. Jacobosky*, 136 N. C. 443, 48 S. E. 796 (1904).

Priority in Payment of Debts.—When a guardian of an infant, under an order of court, sells his ward’s land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. *Merchant v. Sanderlin*, 25 N. C. 501 (1843).

Sale of Lunatic’s Property.—See § 35-10 et seq. And see *Howard v. Thompson*, 30 N. C. 367 (1848).

§ 33-34. To sell perishable goods on order of clerk.—Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. The procedure for the sale shall be as provided by article 29A of chapter 1 of the General Statutes. (1762, c. 69, s. 10; R. C., c. 54, s. 22; 1868-9, c. 201, s. 26; Code, s. 1589; Rev., s. 1787; C. S., s. 2170; 1949, c. 719, s. 2.)

Editor’s Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote the second sentence.

§ 33-35. When timber may be sold.—In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 33; Code, s. 1596; Rev., s. 1790; C. S., s. 2174.)

Sale without Authority.—Where a guardian sold timber on the land of his ward without an order of the court (now consent of superior court clerk), and took a note for the purchase money, the maker

of such note cannot set up the failure of the guardian to observe the statutory mandate. *Evans v. Williamson*, 79 N. C. 86 (1878).

ARTICLE 4A.

Guardians’ Deeds Validated When Seal Omitted.

§ 33-35.1. Deeds by guardians omitting seal, prior to Jan. 1st, 1944, validated.—All deeds executed prior to the first day of January, 1944, by any guardian, acting under authority obtained by him from the superior court as required by law, in which the guardian has omitted to affix his seal after his signature and/or has omitted to affix the seal after the signature of his ward

shall be good and valid, and shall pass the title to the land which the guardian was authorized to convey: Provided, however, this section shall not apply to any pending litigation. (1947, c. 531.)

ARTICLE 5.

Returns and Accounting.

§ 33-36. **Return within three months.**—Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months. (1762, c. 69, s. 9; R. C., c. 54, s. 11; 1868-9, c. 201, s. 14; Code, s. 1577; Rev., s. 1802; C. S., s. 2183.)

In the administration of the estate of a lunatic, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by this and following sections to account.

Read v. Turner, 200 N. C. 773, 158 S. E. 475 (1931).

Cited in Norman v. Walker, 101 N. C. 24, 7 S. E. 468 (1888).

§ 33-37. **Procedure to compel return.**—In cases of default to exhibit the return required by § 33-36, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return. (1762, c. 69, s. 15; R. C., c. 54, s. 12; 1868-9, c. 201, s. 15; Code, s. 1578; Rev., s. 1803; C. S., s. 2184.)

Cross Reference.—As to suits for accounting at term, see § 28-147.

§ 33-38. **Additional assets to be returned.**—Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in § 33-37. (1868-9, c. 201, s. 16; Code, s. 1579; Rev., s. 1804; C. S., s. 2185.)

§ 33-39. **Annual accounts.**—Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness. (1762, c. 69, ss. 9, 15; R. C., c. 54, ss. 11, 12; 1871-2, c. 46; Code, s. 1617; Rev., s. 1805; C. S., s. 2186.)

Cross References.—As to clerk's power to audit the account of guardian, see § 2-16. As to vouchers being evidence of disbursement, see § 28-119.

Definition of "Account."—An "account" is used in this section in the sense of a

statement in writing of debts and credits, or of receipts and payments. And when not only an account, but payment or settlement is intended, additional words are used to express that idea. State v. Dunn, 134 N. C. 663, 46 S. E. 949 (1904).

Ward Can Demand Annual Statement.

—A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate. *Moore v. Askew*, 85 N. C. 199 (1881).

What to Be Set Out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

The annual account of a guardian is competent evidence against him, and presumptive evidence against his sureties. *Loftin v. Cobb*, 126 N. C. 58, 35 S. E. 230 (1900).

Of Good Faith.—No higher evidence

can be offered of that good faith required of a guardian than perfect candor, full information, and minute, detailed accounts. *Moore v. Askew*, 85 N. C. 199 (1881).

And Is Prima Facie Correct When Accepted by the Court.—The ex parte settlement made by a guardian with the court having jurisdiction of such matters, is, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking such settlement to establish, by a preponderance of testimony, its incorrectness. *State v. Turner*, 104 N. C. 566, 10 S. E. 606 (1889).

§ 33-40. Procedure to compel accounting.—If any guardian omits to account, as directed in § 33-39, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office. And in all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceeding, including the costs of service of all notices or writs incidental to, or thereby acquiring, or the amount of the costs of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for said corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of said corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may also be fined and/or removed as such guardian for such failure or omission. (C. C. P., s. 479; Code, s. 1618; Rev., s. 1806; C. S., s. 2187; 1929, c. 9, s. 2; 1933, c. 317.)

Editor's Note.—See 11 N. C. Law Rev. 222.

The 1929 amendment inserted the third sentence, and the 1933 amendment added the provisions relating to compelling

corporate guardians to account.

Applied, as to removal for failure to account, in *Sanderson v. Sanderson*, 79 N. C. 369 (1878); In re *Dixon*, 156 N. C. 26, 72 S. E. 71 (1911).

§ 33-41. Final account.—A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court. (C. C. P., s. 481; Code, s. 1619; Rev., s. 1807; C. S., s. 2188.)

Cross References.—As to accounting for compound interest in final settlement, see § 24-4. As to necessity for payment of taxes before final accounting, see § 105-240. As to fees for auditing final account,

see § 2-35.

In General.—This section is not intended to bestow upon the guardian the ward's moneys and properties for six months after he becomes of age, nor to deprive

him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months, and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement, to complete the record in his office, for the section states that such return shall be "audited and recorded." *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

"Audit" Explained.—When the section directs that the clerk shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. *Rowland v. Thompson*, 64 N. C. 714 (1870).

Jurisdiction.—The clerk of the superior court has jurisdiction of settlements between guardian and ward, and, of course, between the guardian and the ward's personal representative. *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265 (1890); *McLean v. Breece*, 113 N. C. 390, 18 S. E. 694 (1893).

Action Barred Ten Years after Ward Comes of Age.—Ten years after the ward comes of age bars an action by him against his guardian for settlement. *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

When Action Barred as to Sureties.—An action for breach of the guardianship bond based upon this section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the

amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. *State v. Fountain*, 205 N. C. 217, 171 S. E. 85 (1933). See *Copley v. Scarlett*, 214 N. C. 31, 197 S. E. 623 (1938).

Judgment Is an Estoppel.—The clerk of the superior court, having jurisdiction of proceedings against a guardian for a settlement, a judgment rendered therein is an estoppel to an action in the superior court between the same parties and upon the same question, and cannot be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. *Donnelly v. Wilcox*, 113 N. C. 408, 18 S. E. 339 (1893).

Distributees May Have Accounting.—The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may have letters of administration taken out and call for an accounting. *Lowder v. Hathcock*, 150 N. C. 438, 64 S. E. 194 (1909).

Effect of Wrongful Settlement.—Where a guardian surrendered his office in March to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith, it was held that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. *Jennings v. Copeland*, 90 N. C. 572 (1884).

§ 33-42. Expenses and disbursements credited to guardian.—Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (1762, c. 69, ss. 18, 19; 1799, c. 536, s. 2; R. C., c. 54, s. 28; 1868-9, c. 201, s. 49; Code, s. 1612; Rev., s. 1808; C. S., s. 2189.)

Cross References.—As to payments allowed in accounting, see § 33-6. As to expense of bond being lawful expense, see § 109-23.

A guardian should be charged with what he receives and credited with what he pays out, when it does not appear that he collected anything prematurely or kept on hand any unreasonable sum. *Freeman v. Wilson*, 74 N. C. 368 (1876).

Paying Debts Due.—When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed

credit for disbursements of assets in his hands in such respects. *Adams v. Thomas*, 83 N. C. 521 (1880); *McLean v. Breece*, 113 N. C. 390, 18 S. E. 694 (1893).

Where, in the settlement of the guardian's account, the lunatic is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts without prejudice to the estate, the disbursement would be allowed. *McLean v. Breece*, 113 N. C. 390, 18 S. E. 694 (1893).

Payments to Mother for Board of Wards after Majority.—A guardian is not chargeable with moneys paid to the

mother of his wards for their board after their arrival at full age, no objection being urged against the propriety or justness of the claim, or of the price paid. *McNeill v. Hodges*, 83 N. C. 505 (1880).

Counsel Fees.—A guardian should be allowed reasonable attorney's fees paid in good faith. *Burke v. Turner*, 85 N. C. 500 (1881), citing *Whitford v. Foy*, 65 N. C. 265 (1871).

The employment of counsel for legal advice and assistance in connection with the administration of the wards' estate is a proper expense to be charged in the guardian's account, if in reasonable amount, and for the benefit of the wards. *Maryland Cas. Co. v. Lawing*, 225 N. C. 103, 33 S. E. (2d) 609 (1945).

But fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, cannot be allowed the latter in his settlement. *Johnston v. Haynes*, 68 N. C. 509 (1873).

And where the interests of the guardian and wards are antagonistic and the services rendered by the attorney are in the interest of the former rather than the latter the obligation to pay therefor is the individual liability of the guardian. *Maryland Cas. Co. v. Lawing*, 225 N. C. 103, 33 S. E. (2d) 609 (1945), citing *Lightner v. Boone*, 221 N. C. 78, 19 S. E. (2d) 144 (1942).

Exceeding Income of Estate.—In paying the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. *Caffey v. McMichael*, 64 N. C. 507 (1870); *Johnston v. Haynes*, 68 N. C. 514 (1873).

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and

education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity. *Tharington v. Tharington*, 99 N. C. 118, 5 S. E. 414 (1888).

Same—Clerk May Allow.—The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk. *Duffy v. Williams*, 133 N. C. 195, 45 S. E. 548 (1903).

Same—Setting Ward up in Business.—A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the court for leave, is not entitled to charge the ward with it. *Shaw v. Coble*, 63 N. C. 377 (1869).

Father as Guardian.—A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education. *Walker v. Crowder*, 37 N. C. 478 (1843).

A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. *Burke v. Turner*, 85 N. C. 500 (1881).

Stepfather as Guardian.—Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and other necessities furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. *Barnes v. Ward*, 45 N. C. 93 (1852).

§ 33-42.1. **Guardian required to exhibit statements.**—At the time the accounts required by this article or other provisions of law are filed, the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk of the superior court shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account. (1947, c. 596.)

§ 33-43. **Commissions.**—The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors. (1762, c. 69, ss. 18, 19; R. C., c. 54, s. 28; 1868-9, c. 201, s. 50; Code, s. 1613; Rev., s. 1809; C. S., s. 2190.)

Cross Reference.—As to commissions of executors and administrators, see § 28-170.

Commissions are only a compensation to the guardian for his time and trouble in managing his ward's estate. *Walton v. Erwin*, 36 N. C. 136 (1840).

And the time spent in the management of his ward's estate may be considered in

fixing his commissions, but cannot be separately charged. *Shutt v. Carlross*, 36 N. C. 232 (1840).

Failure to Keep Accounts.—A guardian is entitled to commissions, although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect. *McNeill v. Hodges*, 83 N. C. 505 (1880). But where he is grossly negligent, it is otherwise. *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14 (1888).

Payments to Guardian's Firm.—A guardian is entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member. *Williamson v. Williams*, 59 N. C. 62 (1860).

When Ward Boards with Guardian.—A guardian is not entitled to commissions on charges for board while the ward lived with the guardian's family. *Williamson v. Williams*, 59 N. C. 62 (1860).

Securities Delivered at Majority.—Commissions should be allowed a guardian on the amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. *Whitford v. Foy*, 65 N. C. 265 (1871).

Disbursement after Ward's Majority.—A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age. *McNeill v. Hodges*, 83 N. C. 505 (1880).

Bank as Administrator and Guardian of Distributee.—Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. *Rose v. Bank of Wadesboro*, 217 N. C. 600, 9 S. E. (2d) 2 (1940).

Using Ward's Money in Own Business.—A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward. *Carr v. Askew*, 94 N. C. 194 (1886), distinguishing *Burke v. Turner*, 85 N. C. 500 (1881). See *Fisher v. Brown*, 135 N. C. 198, 47 S. E. 398 (1904).

Same—Gross Negligence.—A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in not making his returns. *Burke v. Turner*, 85 N. C. 500 (1881).

Rate of Commissions.—Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. *Whitford v. Foy*, 65 N. C. 265 (1871).

Same—Two and One-Half Per Cent.—Two and one-half per cent was ample commission to a guardian receiving most of the ward's property, without litigation or difficulty, in the shape of notes payable to himself, which he retained six years collecting but little interest, when he voluntarily resigned and delivered the notes to his successor. *Walton v. Erwin*, 36 N. C. 136 (1840).

Same—Five Per Cent.—Five per cent was not an unreasonable allowance to a guardian as commissions on his receipts and disbursements, when these were numerous, and extended over a period of fourteen years. *Covington v. Leak*, 65 N. C. 594 (1871).

Same—Ten Per Cent.—A commission of ten per cent, the highest allowed by the statute, will be allowed to a guardian only in a case of the greatest merit, as where his duties have been troublesome and of long continuance. *Walton v. Erwin*, 36 N. C. 136 (1840).

Referee's Decision Adopted.—The amount of allowance of commissions to a guardian by a referee is usually adopted by the court, unless it is shown to be excessive. *Johnston v. Haynes*, 68 N. C. 514 (1873); *Whitford v. Foy*, 71 N. C. 527 (1874).

An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. *Whitford v. Foy*, 71 N. C. 527 (1874).

ARTICLE 6.

Public Guardians.

§ 33-44. **Appointment; term; oath.**—There may be in every county a public guardian, to be appointed by the clerk of the superior court for a term of eight years. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior

court. (1874-5, c. 221, ss. 1, 5; Code, ss. 1556, 1560; Rev., ss. 1758, 1759; C. S., s. 2191.)

§ 33-45. **Bond of public guardian; increasing bond.**—The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the State of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (1874-5, c. 221, ss. 2, 3; Code, ss. 1557, 1558; Rev., ss. 321, 322; C. S., s. 2192.)

§ 33-46. **Powers, duties, liabilities, compensation.**—The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1761; C. S., s. 2193.)

Cross Reference.—As to payment to minor, etc., insurance beneficiary, see public guardian of limited proceeds due § 2-52.

§ 33-47. **When letters issue to public guardian.**—The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1760; C. S., s. 2194.)

ARTICLE 7.

Foreign Guardians.

§ 33-48. **Right to removal of ward's personalty from State.**—Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, or in the event no guardian has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any infants, idiots, lunatics or insane persons when no guardian has been appointed for such person, may apply to have such estate removed to the residence of the infant, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings. (1820, c. 1044; 1842, c. 38; R. C., c. 54, s. 29; 1868-9, c. 201, ss. 35, 38;

1874-5, c. 168; Code, ss. 1598, 1601; Rev., s. 1816; 1913, c. 86, s. 1; C. S., s. 2195; 1937, c. 307.)

Cross Reference.—As to removal of trust funds of nonresidents from State, see § 36-6 et seq.

Editor's Note.—The 1937 amendment made provision for the event "when no guardian has been appointed." It also substituted "infant" for "ward" in a subsequent part of the section.

Local Guardian Not Necessary.—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with this section and § 33-49, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. *Cilley v. Geitner*, 183 N. C. 528, 111 S. E. 865 (1922).

When Guardian Must Be Resident.—Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under this section and § 33-49; and the law of this State governs the interpretation of the will when the testator died domiciled here. *Cilley v. Geitner*, 182 N. C. 714, 110 S. E. 61 (1921).

Proper Refusal to Order Removal.—

§ 33-49. Contents of petition; parties defendant.—The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian of any person or infant, and such banking institution is not required to execute a bond to qualify as guardian under the laws of the state wherein said guardian qualified and was appointed guardian of such infant, or infants, and no sureties are or were required by the state in which said banking institution qualified as guardian, and this fact affirmatively appears to the court, then the personal property and estate of such infant or other person, may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the ward is filed may order the transfer and removal of the property of the ward, and the payment and delivery of the same to the nonresident guardian of said ward without regard to whether a nonresident guardian has filed a bond with sureties; and the finding of the court that the said guardian is a banking institution and has duly qualified and been

Where it appeared that the property in this State of a ward residing in another state consisted of good bonds at interest in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. *Douglas v. Caldwell*, 59 N. C. 20 (1860).

Foreign Guardian as Next Friend.—A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

A guardian in another state of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of this section; and § 36-7, relating to property in the hands of a trustee residing in this State, is not applicable. *Fidelity Trust Co. v. Walton*, 198 N. C. 790, 153 S. E. 401 (1930).

The petition and proceeding prescribed by this section are jurisdictional, in order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state; and an order, by the judge of the superior court or clerk, for its transfer otherwise is void. *State v. Sawyer*, 223 N. C. 102, 25 S. E. (2d) 443 (1943).

appointed guardian of said ward under the laws of the state where said ward, or wards, is or are residents, shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (1820, c. 1044, s. 2; 1842, c. 38; R. C., c. 54, s. 30; 1868-9, c. 201, ss. 36, 37; Code, ss. 1599, 1600; Rev., ss. 1817, 1818; C. S., s. 2196; 1949, c. 253.)

Cross Reference.—As to who may be added the proviso at the end of the first defendants, see § 1-69. sentence. For brief account of amendment,

Editor's Note.—The 1949 amendment see 27 N. C. Law Rev. 458.

§ 33-49.1. Transfer of guardianship.—When any ward, mental defective, or mentally disordered person, for whom a guardian or trustee has been appointed, lives in a county in this State other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward, mental defective or mentally disordered person. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194.)

ARTICLE 8.

Estates without Guardian.

§ 33-50. Duty of grand jury as to orphans and guardians.—The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him. (1762, c. 69, s. 17; R. C., c. 54, s. 18; 1868-9, c. 201, s. 46; Code, s. 1609; Rev., s. 1810; C. S., s. 2197.)

§ 33-51. Solicitor to apply for receiver for orphans' estates.—Whenever the name of an orphan, having any estate and for whom no suitable person will become guardian, is presented by a grand jury, the clerk of the superior court must give notice thereof forthwith to the solicitor of the State for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed. (1846, c. 43; R. C., c. 54, s. 19; 1868-9, c. 201, s. 47; Code, s. 1610; Rev., s. 1811; C. S., s. 2198.)

§ 33-52. Solicitor to prosecute bond of guardian removed without a successor.—Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward. (1844, c. 41; R. C., c. 54, s. 14; 1868-9, c. 201, s. 21; Code, s. 1584; Rev., s. 1812; C. S., s. 2199.)

Infant Not Necessary Party.—The action required by this section to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward when the guardian has been removed, and the ward is not a

necessary, perhaps not a proper, party to it. *Becton v. Becton*, 56 N. C. 419 (1857); *Temple v. Williams*, 91 N. C. 82 (1884).

Allowance Pendente Lite.—During the pendency of an action under this section against a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in possession of the court, the superior court has no power to order the guardian and his sureties to pay a certain sum into court

for the ward's maintenance and support pendente lite, and a further sum for her attorney. *State v. Harrison*, 75 N. C. 432 (1876).

Same—Contempt.—If it is made to appear to the court, pending an action under this section, that a fund belonging to the ward is in possession of the guardian removed, the judge may, by process of contempt, compel its payment into court, where it will be subject to such orders and disposition as the necessities of the ward may require. *State v. Harrison*, 75 N. C. 432 (1876).

§ 33-53. **Judge to appoint receiver; his rights and duties.**—The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship. (1844, c. 41, s. 2; R. C., c. 54, s. 15; 1868-9, c. 201, s. 22; Code, s. 1585; Rev., s. 1813; C. S., s. 2200.)

Cross Reference.—As to receivers, see § 1-501 et seq.

Appointment of Clerk.—Under this section the court has authority to appoint a clerk of the superior court receiver of the infants' estate. *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918 (1893).

Same—Sufficiency of Order.—Where, in an order of court appointing "J. A. M. clerk of the superior court," receiver of the infants' estate, the word "as" was omitted before the words "clerk of the superior court." It was held that the intention of the court to appoint M. as receiver in his official capacity was sufficiently indicated. *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918 (1893).

The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N. C. 359, 25 S. E. 963 (1896).

The receiver does not have the powers of a guardian, but acts under the control of the court until another guardian is appointed. *Temple v. Williams*, 91 N. C. 82 (1884).

Liability of Receiver.—As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts

in entire good faith. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

Is Similar to Guardian's.—When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

Liability for Failure of Bank.—A receiver may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. *State v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

Liability on Official Bond of Clerk.—When the clerk of the superior court is

appointed receiver of a minor's estate under this section, he takes and holds the funds by virtue of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. *State v. Upchurch*, 110 N. C. 62, 14 S. E. 642 (1892). See *State v. Odom*, 86 N. C. 432 (1882).

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918 (1893).

Action against Receiver.—It is not necessary to obtain leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed

receiver under this section. *State v. Upchurch*, 110 N. C. 62, 14 S. E. 642 (1892).

Same—Burden of Proof.—The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918 (1893).

Settlement Not Conclusive.—A settlement made with a receiver appointed under this section, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct. Such presumption may be disproved. *Temple v. Williams*, 91 N. C. 82 (1884).

§ 33-54. **When receiver to pay over estate.**—When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver. (1844, c. 41, s. 4; R. C., c. 54, s. 17; 1868-9, c. 201, s. 24; Code, s. 1587; Rev., s. 1814; C. S., s. 2201.)

§ 33-55. **Duties of solicitor.**—The solicitor shall prosecute the action and take all necessary orders therein. (1884, c. 41, s. 3; R. C., c. 54, s. 16; 1868-9, c. 201, s. 23; Code, s. 1586; 1895, c. 14; Rev., s. 1815; C. S., s. 2202.)

ARTICLE 9.

Guardians of Estates of Missing Persons.

§ 33-56. **Appointment.**—When it shall be made to appear to the satisfaction of the clerk of the superior court, or a judge of the superior court having jurisdiction of the appointment of guardians, that any person has disappeared from the community of his residence, and his whereabouts remains unknown in such community for a period of three (3) months, and cannot, after diligent inquiry, be ascertained; and that such person has property in the State and property rights within its jurisdiction which may be affected by his absence, or may need protection and administration; and that such person has made no provision for the management of his affairs; such clerk of the superior court or judge of the superior court may appoint a guardian of the estate and property of such person as may, by law be done in the case of minors and persons non compos mentis, and with the like powers and duties with respect to such estate. (1933, c. 49, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 231, for discussion of this article.

Purpose of Article.—This article was enacted to provide for the preservation and protection of the estate of a person who has disappeared from the community of his residence and whose whereabouts has been unknown for three months or more and cannot, after diligent inquiry, be ascertained. *Carter v. Lilley*, 227 N. C. 435, 42 S. E. (2d) 610 (1947).

It relates solely to estates of living persons, and where in a proceeding thereunder the court finds that the missing person is dead under the presumption of death arising from seven years' absence, the administration of the estate of such missing person becomes a matter for the probate court and proceedings under the statute are coram non iudice. *Carter v. Lilley*, 227 N. C. 435, 42 S. E. (2d) 610 (1947).

§ 33-57. **Jurisdiction.**—The clerk of the superior court of the county of the last residence of such absent person shall have prior right to jurisdiction of such appointment, but the appointment may be made by the clerk of the superior

court of any county in the State where such person has property, after the expiration of six months from the time of such disappearance, if no prior appointment has been made. (1933, c. 49, s. 2.)

§ 33-58. **Powers and duties; bond.**—The guardian, so appointed, shall have all the powers and duties with respect to the property and estate of such absent person as are now, or may be hereafter, conferred by law upon guardians generally; and before entering into the discharge of the duties of his guardianship, he shall be required to enter into such bond as is now required by law in such cases, for the faithful performance of his trust and for the accounting of the property, moneys and assets of the estate coming into his hands as guardian. (1933, c. 49, s. 3.)

Cross Reference.—As to bond of guardians generally, see § 33-12 et seq.

§ 33-59. **General laws applicable.**—The public laws relating to guardianships, and particularly this chapter, as far as by their terms they may be applicable, and as far as they are not modified by this article, shall apply to guardians so appointed. (1933, c. 49, s. 3.)

§ 33-60. **Other managerial powers conferred.**—In addition to the powers given to guardians under the general laws of the State, such guardians may, by approval of the court, apply funds in his hands to the satisfaction of obligations of such absent person, renew notes and other obligations, pledge property for loans necessary in carrying on or liquidating the affairs of such absent person, cause lands to be cultivated, where such business was previously carried on, and make such contracts with reference thereto as he may deem to the best interest of the estate, and, under the direction of the court and with its approval, continue to operate any business or business enterprise of such person, and make such contracts, agreements and settlements in reference thereto as may be necessary, or to the best interests of the estate. (1933, c. 49, s. 4.)

§ 33-61. **Discharge of guardian upon return of missing person.**—Upon the return of such absent person, and within six months from the filing of the petition by such person to be restored to his property and to the management of his estate, the clerk of the superior court having jurisdiction of the said guardianship shall require a settlement of the estate by the guardian so appointed, and shall cause to be turned over to such person all of the said estate then in the hands of the said guardian, after the payment of such reasonable costs and commissions as may be authorized by law, and, upon the filing of a financial account by the said guardian, he shall be discharged. (1933, c. 49, s. 5.)

§ 33-62. **Guardian not liable except for misconduct.**—No action shall be maintained against such guardian, or the sureties on his bond, by reason of his appointment, taking over and managing the property of such absent person, or any of his acts with respect to the said estate, where it appears that they were done under authority of this article, but only for recovery because of the misconduct in office or bad faith of such guardian, or the waste of the assets of the estate through mismanagement, amounting to gross carelessness or in violation of the law. (1933, c. 49, s. 6.)

ARTICLE 10.

Conservators of Estates of Missing Persons.

§ 33-63. **Appointment of conservators for property of certain persons reported missing, etc.**—Whenever a person, hereinafter referred to as an absentee, has been reported missing, or interned in a neutral country or beleaguered, besieged or captured by an enemy, and he has an interest in any form of property in this State and has not provided an adequate power of attorney authorizing another to act in his behalf in regard to such property or interest, the

clerk of the superior court of the county of such absentee's legal domicile or of the county where such property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person who would have an interest in the property of the absentee were such absentee deceased, after notice to, or on receipt of proper waivers from the heirs and next of kin of the absentee as provided by law for the administration of an estate, and upon good cause being shown, may, after finding the facts to be as aforesaid, appoint any suitable person a conservator to take charge of the absentee's estate, under the supervision and subject to the further orders of the court. (1945, c. 469, s. 1.)

§ 33-64. **Surety bond required; powers and duties.**—The conservator shall post a surety bond in the same amount and under the same conditions as is required of guardians under the general guardianship laws of North Carolina, and shall possess the same powers and authority, and be subject to the same duties and requirements of guardians generally in this State. (1945, c. 469, s. 2.)

§ 33-65. **Clerk may require provision for dependents.**—The clerk of the superior court, if petitioned for that purpose by any interested person, may, if he finds it proper to do so, require the conservator to make ample and suitable provisions out of the estate in his hands for the support of the wife or husband and infant children of such absentee, as well as any other person dependent upon such absentee for support and maintenance. (1945, c. 469, s. 3.)

§ 33-66. **Termination of conservatorship.**—At any time upon petition signed by the absentee, or on petition of an attorney in fact acting under an adequate power of attorney granted by the absentee, the court shall direct the termination of the conservatorship and the transfer of all property held thereunder to the absentee or to the designated attorney in fact. Likewise, if at any time subsequent to the appointment of a conservator it shall appear that the absentee has died and an executor or administrator has been appointed for his estate, the court shall direct the termination of the conservatorship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator. (1945, c. 469, s. 4.)

ARTICLE 11.

Guardians of Children of Service Men.

§ 33-67. **Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.**—In all cases where a citizen of this State is serving in the armed forces of the United States and has made an allotment or allowance to his child, children or other minor dependents as provided by the war time allowances to Service Men's Dependents Act or any other act of Congress, and the mother of said child, children or other minor dependents or other person of lawful age designated in said allowance or allotment to receive such moneys and disburse them for the benefit of said minor dependents shall die or become mentally incompetent, and such person so serving in the armed forces of the United States shall be reported as missing in action or as a prisoner of war and shall be unable to designate another person to receive and disburse said allotment or allowance to said minor dependents; then and in such event the clerk of the superior court of the county of the legal residence of said service man or person serving in the armed forces of the United States, is hereby authorized and empowered to act as temporary guardian of such minor dependents for the purpose of receiving and disbursing such allotments and allowance funds for the benefit of such minor dependents. (1945, c. 735.)

Cross References.—As to Veterans' Guardianship Act, see chapter 34 of General Statutes. As to veterans generally, see chapter 165 of General Statutes.

Editor's Note.—The act from which this section was codified provides that it shall be retroactive in effect.

Chapter 34.

Veterans' Guardianship Act.

Sec.		Sec.	
34-1.	Title.	34-10.	Guardian's accounts to be filed; hearing on accounts.
34-2.	Definitions.	34-11.	Failure to file account cause for removal.
34-3.	Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.	34-12.	Compensation at 5 per cent; additional compensation; premiums on bonds.
34-4.	Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.	34-13.	Investment of funds.
34-5.	Petition for appointment of guardian.	34-14.	Application of ward's estate.
34-6.	Certificate of Director prima facie evidence of necessity for appointment.	34-14.1.	Payment of pension funds to dependent relatives.
34-7.	Same in regard to guardianship of mentally incompetent wards.	34-15.	Certified copy of record required by Bureau to be furnished without charge.
34-8.	Notice of filing of petition.	34-16.	Commitment to Veterans' Administration, etc., for care or treatment.
34-9.	Qualifications of guardian; surety bond.	34-17.	Discharge of guardian.
		34-18.	Construction of chapter.

§ 34-1. **Title.**—This chapter shall be known as “The Veterans' Guardianship Act.” (1929, c. 33, s. 1.)

§ 34-2. **Definitions.**—In this chapter:

The term “person” includes a partnership, corporation or an association.

The term “Bureau” means the United States Veterans' Bureau or its successor.

The terms “estate” and “income” shall include only moneys received by the guardian from the Bureau and all earnings, interests and profits derived therefrom.

The term “benefits” shall mean all moneys payable by the United States through the Bureau.

The term “Director” means the Director of the United States Veterans' Bureau or his successor.

The term “ward” means a beneficiary of the Bureau.

The term “guardian” as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment vided by § 95-4.

changed this section by striking out the following: The term “State Service Officer” means such appointee of the North Carolina Commissioner of Labor as provided by § 95-4.

The successor of the United States Veterans' Bureau is the Veterans' Administration, referred to in § 34-16.

§ 34-3. **Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.**—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (1929, c. 33, s. 3.)

§ 34-4. **Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.**—Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. If any case, upon presenta-

tion of a petition by an attorney of the Bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be guardian of more than five wards if they are all members of the same family. (1929, c. 33, s. 4.)

§ 34-5. Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

§ 34-6. Certificate of Director prima facie evidence of necessity for appointment.—Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity of such appointment. (1929, c. 33, s. 6.)

§ 34-7. Same in regard to guardianship of mentally incompetent wards.—Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

§ 34-8. Notice of filing of petition.—Upon the filing of a petition for the appointment of a guardian, under the provisions of this chapter, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 34-9. Qualifications of guardian; surety bond.—Before making an appointment under the provisions of this chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under

the guardianship laws of this State. The court shall have power from time to time to require the guardian to file an additional bond.

No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

Cross Reference.—As to bond required of general guardians, see § 33-12 et seq.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.—Every guardian, who shall receive on account of his ward any moneys from the Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the North Carolina Veterans Commission by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1; 1945, c. 723, s. 2.)

Editor's Note.—The 1933 amendment inserted the third from the last sentence and made other changes. See 11 N. C. Law Rev. 232.

next to the last sentence of this section the words "the North Carolina Veterans Commission" for the words "State Service Officer."

The 1945 amendment substituted in the

§ 34-11. Failure to file account cause for removal.—If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within thirty days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this Chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

§ 34-12. Compensation at 5 per cent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed five per cent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment substituted the words "North Carolina Veterans Commission" for the words "State Service Officer."

clerk entered an order allowing a guardian additional compensation for extraordinary services and the Veterans Administration failed to perfect its appeal from the clerk's order, and thereafter applied to the judge

Additional Compensation.—Where the

of the superior court for a writ of certiorari, the petition for certiorari was denied upon the court's finding of laches and de-

merit. In re Snelgrove, 208 N. C. 670, 182 S. E. 335 (1935).

§ 34-13. **Investment of funds.**—Every guardian shall invest the funds of the estate in any of the following securities:

(a) United States government bonds.

(b) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.

(c) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty per cent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed or trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2.)

Editor's Note.—Prior to the 1933 amendment this section merely provided that the guardian should invest the funds as allowed by law or approved by the court.

As to purchase of home for use of de-

pendent sister, see Patrick v. Branch Bkg., etc., Co., 216 N. C. 525, 5 S. E. (2d) 724 (1939).

Applied in First Citizens Bank, etc., Co. v. Parker, 225 N. C. 480, 35 S. E. (2d) 489 (1945).

§ 34-14. **Application of ward's estate.**—A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2.)

Cross Reference.—For subsequent statute affecting this section, see § 34-14.1.

Editor's Note.—The 1945 amendment

substituted the words "North Carolina Veterans Commission" for the words "State Service Officer."

§ 34-14.1. **Payment of pension funds to dependent relatives.**—It shall be lawful for guardians of insane or incompetent persons who receive pensions or other benefits from the government of the United States of America on account of military service to pay to dependent relatives such an amount as shall be approved by the clerk of the superior court having jurisdiction over said guardian, and when approved by a superior court judge.

The word "relative," as used herein, shall mean father, mother, brother, sister,

nephew, niece, uncle, aunt, or any other relative, who, prior to appointment of said guardian, received any part of their maintenance from said ward. (1945, c. 479, ss. 1, 2.)

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or the North Carolina Veterans Commission to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or the North Carolina Veterans Commission with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment "Veterans Commission" for the words substituted the words "the North Carolina "State Service Officer."

§ 34-16. Commitment to Veterans' Administration, etc., for care or treatment.—(1) Whenever, in any proceeding under the laws of this State for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans' Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans' Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans' Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this State; and nothing in this section shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this State shall be subject to the rules and regulations of the Veterans' Administration or other agency. The chief officer of any facility of the Veterans' Administration or institution operated by any other agency of the United States to which the person is so committed shall, with respect to such person, be vested with the same powers as superintendents of State hospitals for mental diseases within this State with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this State at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this section are so conditioned.

(2) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans' Administration, or other agency of the United States government for care or treatment shall have the same force and effect as to the committed person while in this State as in the jurisdiction in which is situated the court entering the judgment or making the order; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (1) of this section with respect to persons committed by the courts of this State. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the Veterans' Administration, or of any institution operated in

this State by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

(3) Upon receipt of a certificate of the Veterans' Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans' Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans' Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans' Administration or other agency of the United States pursuant to the original commitment. (1929, c. 33, s. 16; 1943, c. 424.)

Cross Reference.—As to rules and regulations for State hospitals and powers exercised by superintendents thereof, see chapter 35 of the General Statutes.

Editor's Note.—The 1943 amendment rewrote this section.

§ 34-17. **Discharge of guardian.**—When a minor ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this State shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. (1929, c. 33, s. 17.)

§ 34-18. **Construction of chapter.**—This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1.

Definitions.

- Sec.
35-1. Inebriates defined.
35-1.1. Definitions of mental disease, mental defective, etc.

Article 2.

Guardianship and Management of Estates of Incompetents.

- 35-2. Inquisition of lunacy; appointment of guardian.
35-2.1. Guardian appointed when issues answered by jury in any case.
35-3. Guardian appointed on certificate from hospital for insane.
35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.
35-4. Restoration to sanity or sobriety; effect; how determined; appeal.
35-4.1. Discharge of guardian by clerk on testimony of one or more practicing physicians.
35-4.2. Restoration of rights of mentally disordered persons where no guardian had been appointed.
35-5. Legal rights restored upon certificate of sanity by superintendent of hospital.
35-6. Estates without guardian managed by clerk.
35-7. Allowance to abandoned insane wife.
35-8. Renewal of obligations by guardians.
35-9. Guardian not liable.

Article 3.

Sales of Estates.

- 35-10. Clerk may order sale, renting or mortgage.
35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.
35-12. Sale of land of wife of lunatic upon petition.
35-13. Wife of insane person entitled to special proceeding for sale of his property.

Article 4.

Mortgage or Sale of Estates Held by the Entireties.

- 35-14. Where one spouse or both incompetent; special proceeding before clerk.

Sec.

- 35-15. General law applicable; approved by judge.
35-16. Proceeding valid in passing title.
35-17. Clerk may direct application of funds; purchasers and mortgages protected.
35-18. Prior sales and mortgages validated.

Article 5.

Surplus Income and Advancements.

- 35-19. Income of insane widowed mother used for children's support.
35-20. Advancement of surplus income to certain relatives.
35-21. Advancement to adult child or grandchild.
35-22. For what purpose and to whom advanced.
35-23. Distributees to be parties to proceeding for advancements.
35-24. Advancements to be equal; accounted for on death.
35-25. Advancements to those most in need.
35-26. Advancements to be secured against waste.
35-27. Appeal; removal to superior court.
35-28. Advancements only when insanity permanent.
35-29. Decrees suspended upon restoration of sanity.

Article 6.

Detention, Treatment, and Cure of Inebriates.

- 35-30. "Inebriate" defined.
35-31. Petition for examination; warrant for hearing; action without petition; evidence; confinement; time and notice of hearing.
35-32. Commitment for treatment; discharge.
35-33. Inquiry as to estate of inebriate; minors; costs; expenses.
35-34. Inebriate submitting himself for treatment.
35-35. Department for inebriates.
35-35.1. Commitment of inebriates for mental disorders.

Article 7.

Sterilization of Persons Mentally Defective.

- 35-36. State institutions authorized to sterilize mental defectives.

- Sec.
- 35-37. Operations on mental defectives not in institutions.
- 35-38. Restrictions on such operations.
- 35-39. Prosecutors designated; duties.
- 35-40. Eugenics Board created.
- 35-40.1. Eugenics Board authorized to accept gifts.
- 35-41. Quarterly meetings.
- 35-42. Secretary of Board and duties.
- 35-43. Proceedings before Board.
- 35-44. Copy of petition served on patient.
- 35-45. Consideration of matter by Board.
- 35-46. Board may deny or approve petition.
- 35-47. Orders may be sent parties by registered mail; consenting to operation.
- 35-48. Right of appeal to superior court.
- 35-49. Appeal costs.
- 35-50. Appeal to Supreme Court.
- 35-51. Civil or criminal liability of parties limited.
- 35-52. Necessary medical treatment unafflicted by article.
- 35-53. Permanent records of proceedings before Board.

- Sec.
- 35-54. Construction of terms.
- 35-55. Discharge of patient from institution.
- 35-56. Existing rights of surgeons unafflicted.
- 35-57. Temporary admission to State hospitals for sterilization.

Article 8.

Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

- 35-58. Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.
- 35-59. Use of restraining devices limited.
- 35-60. Civil liability for corrupt admissions.

Article 9.

Mental Health Council.

- 35-61. Creation of Council; membership; chairman.
- 35-62. Functions; meetings; annual report.
- 35-63. Members not State officers.

ARTICLE 1.

Definitions.

§ 35-1. **Inebriates defined.** — Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing. (1879, c. 329; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; Rev., s. 1892; C. S., s. 2284.)

Editor's Note.—Prior to Session Laws 1945, c. 952, s. 1, the title of this chapter was "Insane Persons and Incompetents".

Cited in In re Anderson, 132 N. C. 243, 43 S. E. 649 (1903).

§ 35-1.1. **Definitions of mental disease, mental defective, etc.**—The words "mental disease," "mental disorder" and "mental illness" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include "lunacy," "unsoundness of mind," and "insanity."

A "mental defective" shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable. The term shall be construed to include "feeble-minded," "idiot," and "imbecile." (1945, c. 952, s. 2.)

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. **Inquisition of lunacy; appointment of guardian.**—Any person, in behalf of one who is deemed a mental defective, inebriate, or mentally disordered, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed mental defective, inebriate or mentally disordered person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed mental defective, inebriate or mentally disordered person, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed mental defective, inebriate or mentally disordered person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed mental defective, inebriate, mentally disordered, or incompetent person may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed mental defective, inebriate, mentally disordered, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered or incompetent person by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of § 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses, the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s.

1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3.)

Local Modification.—Guilford: 1945, c. 102.

Cross References.—As to appointment, duties, etc., of guardian generally, see § 32-1 et seq. As to power of guardian of insane or minor wife to dissent from husband's will, see § 30-1. As to guardian's power to claim benefits under Workmen's Compensation Act, see § 97-49. As to bond required of guardian, see § 33-12 et seq. As to commitment of insane person to State hospital, see § 122-36 et seq. As to proceedings in case of insanity of a citizen of another state, see § 122-63; of an alien, see § 122-64. As to service of summons upon an insane person, see § 1-97.

Editor's Note.—The 1919 amendment gave the right of appeal to the parties, and the 1921 amendment added a provision regarding the commitment of inebriates. The 1929 amendment inserted the proviso in the last paragraph, and the 1933 amendment added the last two sentences abolishing advance fees of sheriffs and juries. The 1945 amendment substituted "mental defective" for "idiot" and "mentally disordered" and "mentally disordered person" for "lunatic."

Section Provides Procedure.—The effect of this section is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice therein provided being served upon the alleged incompetent, thereby dispensing with the necessity of issuing a summons. The notice to an incompetent to appear at a time and place named to present evidence and show cause, if any, why he should not be declared incompetent serves every function of a summons. In re Barker, 210 N. C. 617, 188 S. E. 205 (1936).

Presence of Party.—The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. *Betha v. McLennon*, 23 N. C. 523 (1841).

Erroneous Instruction.—In a proceeding for the appointment of a guardian for respondent on the ground that he was incompetent for "want of understanding to manage his own affairs," respondent was held entitled to a new trial for the reason that the court, although giving the respective contentions of the parties upon the issue, failed to define the legal meaning of the term or instruct the jury as to the

standard of mental capacity recognized by the law. In re Worsley, 212 N. C. 320, 193 S. E. 666 (1937).

Mental incapacity is only cause for appointment of a guardian under this section. This section does not make physical incapacity alone, however complete, grounds for such appointment. *Goodson v. Lehmon*, 224 N. C. 616, 31 S. E. (2d) 756 (1944).

A finding of the jury that a person is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, whatever the cause may be. And this is true even where the jury finds that the defendant is not a lunatic or idiot, or that he was not wholly deprived of reason. In re Denny, 150 N. C. 423, 64 S. E. 187 (1909). See In re Anderson, 132 N. C. 243, 43 S. E. 649 (1903).

And Ward Is Presumed to Lack Capacity after Guardian Appointed.—Where a person has been adjudged incompetent for want of understanding to manage his own affairs, under this section, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his own affairs, in so far as parties and privies to the proceeding are concerned; and, while not conclusive as to others, it is presumptive, and the presumption continues unless rebutted in a proper proceeding. *Sutton v. Sutton*, 222 N. C. 274, 22 S. E. (2d) 553 (1942).

Confirmation of Finding.—The report of the jury need not be formally "confirmed" by the clerk as the statute only requires it to be "filed and recorded." *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407 (1897).

Conclusiveness of Adjudication.—An inquisition of lunacy, finding a person a lunatic, is only prima facie evidence of the fact, and may be rebutted by proof. *Christmas v. Mitchell*, 38 N. C. 535 (1845).

Applied in *Dowell v. Jacks*, 58 N. C. 417 (1860); In re Anderson, 132 N. C. 243, 43 S. E. 649 (1903); In re Dewey, 206 N. C. 714, 175 S. E. 161 (1934).

Cited in In re Sylvant, 212 N. C. 343, 193 S. E. 422 (1937); In re Cook, 218 N. C. 384, 11 S. E. (2d) 142 (1940); *McNeill v. McNeill*, 223 N. C. 178, 25 S. E. (2d) 615 (1943); In re Jeffress, 223 N. C. 273, 25 S. E. (2d) 845 (1943).

§ 35-2.1. **Guardian appointed when issues answered by jury in any case.**—When a jury in the trial of any civil or criminal case shall find, in an-

swer to appropriate issues, that a person is insane or without sufficient mental capacity to conduct business, it shall have the same effect as an adjudication before the clerk of the superior court and the clerk may forthwith appoint a guardian or trustee for the person so adjudged insane or incompetent. (1945, c. 96.)

§ 35-3. Guardian appointed on certificate from hospital for insane.

—If any person is confined in any State, territorial or governmental asylum or hospital for the insane in this State, or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize to appoint a guardian for such idiot, lunatic or insane person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of nineteen hundred and twenty-four, as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatics, and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section on certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (1860-1, c. 22; Code, s. 1673; Rev., ss. 1891, 4609; 1907, c. 232; C. S., s. 2286; 1927, c. 160, s. 1; 1939, c. 330.)

Editor's Note.—The 1927 amendment added the latter part of the first paragraph relating to the appointment of guardians for World War veterans. The 1939 amendment added the second paragraph and inserted near the beginning of the first paragraph the words "or in any hospital licensed and supervised by the State of North Carolina."

Certificate Must Be from Superintendent of Hospital under Governmental Control.—The certificates of the superintendents of hospitals for the insane, which

are to be received as sufficient evidence for the clerk to appoint a guardian for an insane person, relate to the superintendents of such hospitals under governmental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians ad litem on their certificates is void. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921).

Cited in *Somers v. Board of Commissioners*, 123 N. C. 582, 31 S. E. 873 (1898).

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.—Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

(1) There is real property situate in the county of said clerk in which a nonresident of the State of North Carolina has an interest or estate;

(2) That said nonresident is insane or incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and

(3) That such incompetent or insane nonresident has no guardian in the State of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to

appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said insane person, or incompetent, in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said insane person, or incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive proof of the fact of incompetency or insanity and of the appointment of such guardian of the residence of the insane person or incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this State under this article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1949, c. 986.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 457.

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal.—When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, or before the clerk of the superior court of the county wherein such person is confined or held; provided, however, that in all cases where a guardian has been appointed the cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner (the petition may be filed by the person formerly adjudged to be insane, lunatic, inebriate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. The petitioner may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1879, c. 324, s. 4; Code, s. 1672; 1901, c. 191; 1903, c. 80; Rev., s. 1893; C. S., s. 2287; 1937, c. 311; 1941, c. 145; 1949, c. 124.)

Local Modification.—Guilford: 1945, c. 102.

Editor's Note.—The 1937 amendment inserted the words appearing in parenthesis.

The 1941 amendment provided for filing petition in county of confinement or where guardianship is pending. It also added the provision for the guardian to be made a party to the action before final determination. In re Jeffress, 223 N. C. 273, 25 S. E.

(2d) 845 (1943), it is said that the last mentioned provision was added in consequence of the decision in *In re Dry*, 216 N. C. 427, 5 S. E. (2d) 142 (1939). For comment on the amendment, see 19 N. C. Law Rev. 486.

The 1949 amendment added the last sentence giving the right of appeal.

Constitutionality of Section.—This section, requiring that only six freeholders

shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921).

Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665 (1897).

Appeal and Review.—Prior to the 1949 amendment no right of appeal was given by this section. In *re Sylvant*, 212 N. C. 343, 193 S. E. 422 (1937); In *re Dry*, 216 N. C. 427, 5 S. E. (2d) 142 (1939); In *re Jeffress*, 223 N. C. 273, 25 S. E. (2d) 845 (1943).

And prior to the amendment it was held

that the proper method of review was by application for certiorari. In *re Jeffress*, 223 N. C. 273, 25 S. E. (2d) 845 (1943). See In *re Sylvant*, 212 N. C. 343, 193 S. E. 422 (1937).

Where an incompetent party was found competent under this section prior to the 1949 amendment, it was held that the superior court had power to review the matter, on application of the trustee or guardian, and it would seem that the procedure provided in § 35-2 on appeal might appropriately be followed, although certiorari would ordinarily be proper. In *re Jeffress*, 223 N. C. 273, 25 S. E. (2d) 845 (1943).

§ 35-4.1. Discharge of guardian by clerk on testimony of one or more practicing physicians.—When any person for whom a guardian has been appointed by reason of his commitment to and confinement in a State hospital or private hospital for mental cases or State school for the feeble-minded shall have been discharged from that commitment by the hospital or school, he may petition, or in his behalf his natural or legal guardian or any interested responsible person may petition, the clerk of superior court of the county of his residence or the clerk of superior court of the county in which the guardian was appointed for the discharge of such guardian. The guardian shall be notified thereupon and made a party to such action, which shall be held in, or transferred to, if requested by the guardian, the county in which the guardian was appointed.

The clerk shall hold a hearing, which at the option of the petitioner may be without jury, and shall appoint one or more licensed physicians to examine the person in question and to make an affidavit as to his mental state and competency to conduct his business, make contracts and sell property. If the hearing is before a jury and the jury determines that such person is competent, or if the hearing is without a jury and the clerk determines that such person is competent on the basis of evidence presented by the interested parties and the medical affidavits, the clerk shall discharge the guardian, and the person shall be able to conduct his affairs and business, make contracts, and transfer property as if he never had been committed or declared incompetent. When any such determination by the jury or the clerk, in the absence of a jury, is adverse to the person in whose behalf such petition has been presented, such petitioner may appeal from the finding of said jury or clerk to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1947, c. 537, s. 22; 1949, c. 124.)

Editor's Note.—The 1949 amendment rewrote the second paragraph.

§ 35-4.2. Restoration of rights of mentally disordered persons where no guardian had been appointed.—When any person who shall have been committed to a State hospital or State school for the feeble-minded or to a private hospital for mental cases and for whom no guardian has been appointed shall have been discharged from that commitment, he may petition or in his behalf any interested person may petition the clerk of the superior court of the county in which such person has residence for the restoration of any rights of which he may have been deprived by his commitment.

The clerk shall then hold a hearing, which at the option of the petitioner may be without jury, and shall appoint one or more licensed physicians to examine the person in question, and to make an affidavit as to his mental state and competency

to conduct his business, make contracts, and sell property. On the basis of evidence presented by the person and the medical affidavit or affidavits the clerk shall determine the competency of the person and may if it is deemed proper issue an order restoring any rights of which the person may have been deprived by his commitment. (1947, c. 537, s. 23.)

§ 35-5. Legal rights restored upon certificate of sanity by superintendent of hospital.—Any person who has been declared of unsound mind and memory under § 35-3, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or notary public for the county in which the hospital wherein such person had been confined is located, and certified under the seal of said court to the clerk of the superior court of the county wherein said person had his legal residence immediately before being declared of unsound mind and memory. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights. (1909, c. 176; C. S., s. 2288.)

§ 35-6. Estates without guardian managed by clerk.—When any person is declared to be of nonsane mind or inebriate, and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (1846, c. 43, s. 1; R. C., c. 57, s. 6; Code, s. 1676; Rev., s. 1894; C. S., s. 2289.)

Cross References.—As to estates of orphans whose guardians have been removed, see § 35-52 et seq. As to defenses deemed pleaded by insane party, see § 1-16. As to the appointment of a guardian ad litem, see § 1-65.

How Receiver Appointed.—The appointment of a receiver for an insane person's estate should be made only on the

motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. *In re Hybart*, 119 N. C. 359, 25 S. E. 963 (1896).

Cited in Smith v. Smith, 106 N. C. 498, 11 S. E. 188 (1890).

§ 35-7. Allowance to abandoned insane wife.—When any insane wife is abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband. (1858-9, c. 52, s. 1; Code, s. 1686; Rev., s. 1895; C. S., s. 2290.)

Cross Reference.—As to alimony, see § 50-16.

§ 35-8. Renewal of obligations by guardians.—In all cases where a guardian has been appointed for a person who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drink or other causes, and said person is the maker or one of the makers, a surety or one of the sureties, an indorser or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated,

for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed by such guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1.)

§ 35-9. **Guardian not liable.**—The execution of any note, bond or other obligation for the payment of money mentioned in § 35-8 by the guardian of the inebriate, lunatic, or incompetent, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2.)

ARTICLE 3.

Sales of Estates.

§ 35-10. **Clerk may order sale, renting or mortgage.**—When it appears to any clerk of the superior court by report of the guardian of any mental defective, inebriate or mentally disordered person, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. The procedure for any sale made pursuant to this section shall be as provided by article 29A of chapter 1 of the General Statutes. Any order made under the authority of this section for the sale, mortgage or renting of real estate, or both real and personal property, shall be made by and all proceedings shall be had before the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order applied for is for the sale, mortgage or renting of personal property, then said order may be made and the proceedings may be had before the clerk of the superior court of the county in which all or any part of the personal property is situated; such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by a commissioner to be appointed by the clerk; or the clerk may direct the guardian to file his petition for such purpose. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1801, c. 589; R. C., c. 57, s. 4; Code, s. 1674; Rev., s. 1896; C. S., s. 2291; 1931, c. 184, s. 1; 1945, c. 426, s. 3; c. 952, s. 4; c. 1084, s. 3; 1949, c. 719, s. 2.)

Cross References.—See note to § 35-11. As to manner in which sales and rentals shall be made, see §§ 33-21 et seq., 33-31 and 33-31.1.

Editor's Note.—The 1931 amendment changed this and § 35-11 to permit the mortgaging, under order of the clerk of the superior court, of the personal or real estate of any idiot, inebriate, or lunatic in order that such incompetent may be

adequately supported, his debts paid, or his property disposed of if such disposal be to his best interests. Under the former law his property could only be sold or rented. 9 N. C. Law Rev. 392.

The first 1945 amendment inserted that part of the third sentence ending with the second semicolon, and substituted near the end of the sentence the words "a commissioner to be appointed by the clerk"

for the words "such person as the clerk may appoint on confirming the sale." The second 1945 amendment substituted, in the first sentence, "mental defective" for "idiot" and "mentally disordered person" for "lunatic." The third 1945 amendment added the last sentence.

The 1949 amendment, effective Jan. 1, 1950, inserted the second sentence.

For act validating proceedings instituted

by guardian relating to estate of ward under provisions of this chapter, see Session Laws 1945, c. 426, s. 8.

Judicial Character of Sales.—Sales of real property of a lunatic in proceedings before the clerk of the superior court acting as a probate court are judicial sales. *Rexford v. Brunswick-Balke-Collender Co.*, 181 F. 462 (1910).

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.—When it appears to the clerk, upon the petition of the guardian of any mental defective, inebriate or mentally disordered person, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the mental defective, inebriate or mentally disordered person would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such person with mental disorder or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. All petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of real estate, both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale sought in the petition is for the sale or mortgage of personal property, the petition shall be filed in the office of the clerk of the superior court of the county in which any or all of such personal property is situated. The procedure for any sale made pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (R. C., c. 57, s. 5; Code, s. 1675; Rev., s. 1897; C. S., s. 2292; 1931, c. 184, s. 2; 1945, c. 426, s. 4; c. 952, s. 5; c. 1084, s. 4; 1949, c. 719, s. 2.)

Cross References.—As to sale of estates of wards generally, see § 33-31 et seq. As to release of lands condemned under power of eminent domain, see § 40-22.

Editor's Note.—The first 1945 amendment, as changed by the third 1945 amendment, added the next to last sentence. The second 1945 amendment substituted, in the first sentence, "mental defective" for "idiot" and "mentally disordered person" for "lunatic." And it substituted "person with mental disorder" for "nonsane person" in the second sentence.

The 1949 amendment, effective Jan. 1, 1950, added the last sentence.

Prior Debts of Mentally Disordered Person.—As to debts of lunatic contracted

prior to inquisition of lunacy, see *Blake v. Respass*, 77 N. C. 193 (1877); *Adams v. Thomas*, 81 N. C. 296 (1879); *Rexford v. Brunswick-Balke-Collender Co.*, 181 F. 462 (1910).

As to sale of contingent interest of lunatic, see *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402 (1917).

Title of Purchaser.—As to purchaser at sale of lunatic's real property not being chargeable with errors or irregularities in the proceedings, see *Rexford v. Brunswick-Balke-Collender Co.*, 181 F. 462 (1910).

Judgment against Lunatic.—As to satisfaction of judgment against lunatic, see *Blake v. Respass*, 77 N. C. 193 (1877).

§ 35-12. Sale of land of wife of lunatic upon petition.—Where the wife of a lunatic owns real estate in her own right the sale of which will promote

her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic. The procedure for any sale made pursuant to this section shall be as provided by article 29A of chapter 1 of the General Statutes. (1881, c. 361; Code, s. 1687; Rev., s. 1808; C. S., s. 2293; 1949, c. 719, s. 2.)

Cross References.—See § 52-5. As to conveyance by husband of insane wife, see §§ 30-9 and 47-15.

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

Section Not Mandatory.—The remedies given by this section and § 52-5 are in the alternative, and optional by the wife as to which may be pursued. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919).

§ 35-13. **Wife of insane person entitled to special proceeding for sale of his property.**—Every woman whose husband is a lunatic or insane and is confined in an asylum in this State, and who was living with her husband at the time he was committed to such asylum, if she be in needy circumstances, shall have the right to bring a special proceeding before the clerk of the superior court to sell the property of her insane husband, or so much thereof as is deemed expedient, and have the proceeds applied to her support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the insane husband is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2; C. S., s. 2294.)

ARTICLE 4.

Mortgage or Sale of Estates Held by the Entireties.

§ 35-14. **Where one spouse or both incompetent; special proceeding before clerk.**—In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. All petitions filed under the authority of this section shall be filed in the office of the clerk of the superior court of the county where the real estate or any part of same is situated. (1935, c. 59, s. 1; 1945, c. 426, s. 5; c. 1084, s. 5.)

Editor's Note.—For analysis of article, see 13 N. C. Law Rev. 376. The 1945 amendments added the second sentence.

§ 35-15. **General law applicable; approved by judge.**—The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or

the judge holding the courts in the judicial district wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6.)

Cross Reference.—As to general law on inserted the words “or any part of same” special proceedings, see § 1-393 et seq. near the end of this section.

Editor's Note.—The 1945 amendment

§ 35-16. **Proceeding valid in passing title.**—Any mortgage, deed, or deed of trust executed under authority of this article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3.)

§ 35-17. **Clerk may direct application of funds; purchasers and mortgages protected.**—In all cases conducted under this article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4.)

§ 35-18. **Prior sales and mortgages validated.**—Any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to March 5, 1935, under circumstances contemplated in this article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5.)

ARTICLE 5.

Surplus Income and Advancements.

§ 35-19. **Income of insane widowed mother used for children's support.**—When a father dies leaving him surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in § 35-20 be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder. (1905, c. 546; Rev., s. 1899; C. S., s. 2295.)

§ 35-20. **Advancement of surplus income to certain relatives.**—When any nonsane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any nonsane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such

person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part. (R. C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C. S., s. 2296; Ex. Sess. 1924, c. 93.)

Cross Reference.—As to payment of pension funds to dependent relatives of incompetent veterans, see § 34-14.1.

Evidence.—The evidence tended to show that petitioner was the sister of an insane veteran, that prior to and after entering the army he assisted in her support, that he was unmarried and had no other dependents, that his guardian had on hand more than enough to amply provide for his support, and that petitioner was destitute and without means of support.

It was held that the clerk of the superior court, with the approval of the resident judge or presiding judge, had the power, upon proper findings from the evidence, to order guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support. *Patrick v. Branch Bkg., etc., Co.*, 216 N. C. 525, 5 S. E. (2d) 724 (1939).

Cited in *In re Jones*, 211 N. C. 704, 191 S. E. 511 (1937).

§ 35-21. Advancement to adult child or grandchild.—When such nonsane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1.)

§ 35-22. For what purpose and to whom advanced.—Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (R. C., c. 57, s. 10; Code, s. 1678; Rev., s. 1901; C. S., s. 2297.)

§ 35-23. Distributees to be parties to proceeding for advancements.—In every application for such advancements, the guardian of the nonsane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R. C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C. S., s. 2298.)

§ 35-24. Advancements to be equal; accounted for on death.—The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R. C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C. S., s. 2299.)

§ 35-25. Advancements to those most in need.—When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (R. C., c. 57, s. 13; Code, s. 1681; Rev., s. 1904; C. S., s. 2300; 1925, c. 136, s. 2.)

§ 35-26. **Advancements to be secured against waste.**—It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (R. C., c. 57, s. 14; Code, s. 1682; Rev., s. 1905; C. S., s. 2301.)

§ 35-27. **Appeal; removal to superior court.**—Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (R. C., c. 57, s. 15; Code, s. 1683; Rev., s. 1906; C. S., s. 2302.)

Cited in *In re Cook*, 218 N. C. 384, 11 S. E. (2d) 142 (1940).

§ 35-28. **Advancements only when insanity permanent.**—No such application shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (R. C., c. 57, s. 16; Code, s. 1684; Rev., s. 1907; C. S., s. 2303.)

§ 35-29. **Decrees suspended upon restoration of sanity.**—Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (R. C., c. 57, s. 17; Code, s. 1685; Rev., s. 1908; C. S., s. 2304.)

ARTICLE 6.

Detention, Treatment, and Cure of Inebriates.

§ 35-30. **“Inebriate” defined.**—For the purposes of this article, the word “inebriate” is defined to be a person habitually so addicted to alcoholic drinks or narcotic drugs as to be a proper subject for restraint, care, and treatment. (1921, c. 156, s. 2; C. S., s. 2304(a).)

§ 35-31. **Petition for examination; warrant for hearing; action without petition; evidence; confinement; time and notice of hearing.**—Upon petition of any two of the following persons, to-wit, the wife, husband, parent, child, committee of the estate of an inebriate, or next friends of such person, or, if there be no such persons, then of two citizens of the county wherein the alleged inebriate resides, the clerk of the superior court of the county in which the said alleged inebriate resides shall issue his warrant requiring the inebriate, on a day fixed, to be brought into court for a hearing. The petition shall not be considered unless it sets forth that the person named therein is an inebriate within the scope of this article, and unless it be accompanied by the affidavit or affidavits of at least two reputable physicians, stating that they have examined the alleged inebriate, and that he is a proper subject for restraint, care, and treatment, or the clerk may, on his own initiative, where he has information and reasonable grounds to believe that a particular person is an inebriate and is a fit subject for restraint, care, and treatment, cause such person to be brought before him and proceed to hear and try the question of whether or not he is an inebriate within the definition of § 35-30. If two reputable physicians shall certify before him that such person is an inebriate, he may commit such an inebriate as herein provided to the department of the State Hospital at Raleigh provided for the care and treatment of such inebriate.

If the petition or supplemental affidavit, filed pursuant to this section, states that the alleged inebriate’s condition is such as to endanger either himself or others, or if the sheriff or other person serving the warrant, or the clerk who issued the warrant, believes that the alleged inebriate’s condition is such as to endanger either himself or others, the clerk may order that such inebriate be confined in the county

jail, or in a place specifically designed for the care and confinement of such persons, until he is judicially declared to be or not to be an inebriate and, if found to be an inebriate, until he (or she) is accepted as a patient in the proper State institution or until he is otherwise discharged according to law.

The hearing before the clerk of the superior court shall be held at the courthouse at such time and upon such notice to the alleged inebriate, as the clerk may determine. (1921, c. 156, s. 3; C. S., s. 2304(b); 1941, c. 226; 1949, c. 980.)

Editor's Note.—The 1941 amendment rewrote the first sentence of the first paragraph so as to permit the petition to be filed by any two citizens in the absence

of those specified.

The 1949 amendment added the second and third paragraphs.

§ 35-32. Commitment for treatment; discharge.—If after such hearing the clerk is satisfied that the alleged inebriate is a proper subject for restraint, care, and treatment, he shall commit the inebriate to the department for inebriates at the State Hospital at Raleigh, where he shall be treated, subject to the same rules and regulations as provided for the treatment and cure of curable insane persons, and he shall be discharged therefrom under the same rules and regulations. (1921, c. 156, s. 4; C. S., s. 2304(c).)

§ 35-33. Inquiry as to estate of inebriate; minors; costs; expenses.—After the clerk shall determine that an inebriate is a fit subject to be committed to the department for inebriates as aforesaid, he shall go further and inquire as to whether said inebriate is indigent or not in such way that he has not in his own right sufficient estate or property to bear the cost and expense of his restraint, care, and treatment while in the institution. If he is so indigent, then he shall inquire further whether or not the petitioning wife or husband has sufficient estate to pay such costs. If the inebriate is a minor he shall determine whether his particular guardian or parent has sufficient estate of the inebriate or his own, if a parent, to pay such costs. In any of these instances, if sufficient estate or property is found to pay such costs, the clerk shall adjudge the payment from such estate, and in all cases, if the petitioning parent has property sufficient to pay, he shall be adjudged to pay the costs of the treatment of his minor child. But if in none of these cases sufficient property is found to pay such costs and expenses, the inebriate shall be declared indigent and the actual cost and expense of restraint, care, and treatment of indigent inebriates as herein defined shall be borne and paid by the county from which the inebriate is committed: Provided, that there shall not be included in such cost and expense any charge except for board and clothing. (1921, c. 156, s. 5; C. S., s. 2304(d).)

§ 35-34. Inebriate submitting himself for treatment.—Any inebriate within the definition of § 35-30 who wishes to submit himself for care and treatment in the department for inebriates at the State Hospital at Raleigh, may be received therein as a patient upon his presentation of himself personally at the institution and making arrangements with the superintendent for the actual cost of his detention and treatment. He shall signify his desire in writing, and promise therein to submit himself to the rules and regulations for the government of the institution. When this is done he shall be detained therein and given adequate care and attention. After he has been so detained for thirty days he may secure his release and discharge by ten days' notice in writing to the superintendent, or to any one of the assistant physicians in charge of such institution: Provided, said physician or physicians are satisfied that said inebriate has sufficiently recovered to return to his home and not become a menace or charge to society. (1921, c. 156, s. 6; C. S., s. 2304(e).)

§ 35-35. Department for inebriates.—It shall be the duty of trustees and superintendent of the State Hospital at Raleigh to prepare and set apart a department for such inebriates on or before the first day of May, one thousand

nine hundred and twenty-two: Provided that, if in the course of care and treatment of said inebriates it develops that they have criminal, mental or other symptoms indicating they cannot be properly taken care of in this department, the superintendent of the hospital is hereby authorized to transfer such patients to any other department under his care, that, in his opinion, the circumstances may justify. (1921, c. 156, s. 7; C. S., s. 2304(f); 1933, c. 341.)

Editor's Note.—The 1933 amendment added the proviso relating to inebriates in the State Hospital at Raleigh.

§ 35-35.1. Commitment of inebriates for mental disorders.—Whenever an inebriate under a commitment to the State Hospital at Raleigh is found to be suffering from a mental disorder he may be committed as a mentally disordered person by having two physicians not connected with the State Hospital at Raleigh examine him at the request of the superintendent of the State Hospital at Raleigh, without removing said inebriate and alleged mentally disordered person from the State Hospital. If these said two physicians find that the inebriate is mentally disordered, they shall sign the usual affidavit for commitment of an individual as mentally disordered and forward same to the clerk of the superior court of the county in which the inebriate is settled: whereupon the said clerk of court may declare the said person committed to the proper hospital as a mentally disordered person as provided in this chapter. Upon adjudication the superintendent shall notify the sheriff of the county in which the alleged mentally disordered person is settled, and it shall be said sheriff's duty to convey the mentally disordered person to the proper hospital. (1945, c. 952, s. 6.)

ARTICLE 7.

Sterilization of Persons Mentally Defective.

§ 35-36. State institutions authorized to sterilize mental defectives.—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased, feeble-minded or epileptic inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 254, for discussion of this article.

Former Law Unconstitutional.—The Act of 1929, ch. 34, relating to the same subject matter as the present article, was held unconstitutional, there being no pro-

vision giving a person ordered to be sterilized notice and hearing or affording him the right to appeal to the courts. *Brewer v. Valk*, 204 N. C. 186, 167 S. E. 638 (1933).

§ 35-37. Operations on mental defectives not in institutions.—It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased, feeble-minded or epileptic resident of the county, not an inmate of any public institution, upon the request and petition of the superintendent of public welfare or other similar public official performing in whole or in part the functions of such superintendent, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2.)

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Caro-

lina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody or charge of the feeble-minded, mentally defective or epileptic inmate, patient or noninstitutional individual. (1933, c. 224, s. 3.)

§ 35-39. **Prosecutors designated; duties.**—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county superintendent of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded, epileptic, or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor. It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.

2. When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

3. When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

4. When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

5. In all cases as provided for in § 35-55. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243.)

Cross Reference.—As to necessity of sterilization of one adjudged insane before issuance of marriage license, see § 51-12. inserted the third sentence of this section, and the 1937 amendment inserted the second sentence.

Editor's Note.—The 1935 amendment

§ 35-40. **Eugenics Board created.**—There is hereby created the Eugenics Board of North Carolina. All proceedings under this article shall be begun before the said Eugenics Board. This Board shall consist of five members and shall be composed of: (1) the Commissioner of Public Welfare of North Carolina, (2) the secretary of the State Board of Health of North Carolina, (3) the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina, not located in Raleigh, (4) the chief medical officer of the State Hospital at Raleigh, (5) the Attorney General of the State of North Carolina. Any one of these officials may for the purpose of a single hearing delegate his power to act as a member of said Board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said case. The said Board shall from time to time elect a chairman from its own member-

ship and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said Board designated above as the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina not located in Raleigh. (1933, c. 224, s. 5.)

§ 35-40.1. **Eugenics Board authorized to accept gifts.**—The Eugenics Board of North Carolina is hereby authorized and empowered to accept gifts from any source to be used by the Board for the furtherance of the purposes for which said Board was created. (1945, c. 784.)

§ 35-41. **Quarterly meetings.**—The Board of Eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services. (1933, c. 224, s. 6.)

§ 35-42. **Secretary of Board and duties.**—The Board shall appoint a secretary not a member of the Board who shall conduct the business of the Board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said Board in such matters as may be delegated to him by said Board. (1933, c. 224, s. 7.)

§ 35-43. **Proceedings before Board.**—Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petitioner shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in § 35-36 may be a member of the medical staff of said institution. The Eugenics Board may require that the petitioner submit additional social and medical history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said Board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in § 35-36 which shall be best suited to the interests of the said inmate or patient or to the public good. (1933, c. 224, s. 8; 1935, c. 463, s. 2.)

Editor's Note.—The 1935 amendment rewrote this section.

§ 35-44. **Copy of petition served on patient.**—(a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a term of superior court of the county in which the inmate, patient or individual resident resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this article, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in term or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least twenty days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the superintendent of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93.)

Editor's Note.—The 1947 amendment rewrote this section as changed by the 1935 amendment.

§ 35-45. Consideration of matter by Board.—The said Board at the time and place named in said notice, with such reasonable continuances from time to time and from place to place as the said Board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said Board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said Board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said Board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or

next of kin, or the solicitor, shall be made and preserved as part of the records of the case. (1933, c. 224, s. 10.)

§ 35-46. Board may deny or approve petition.—The said Board may deny the prayer of the said petition or if, in the judgment of the Board, the case falls within the intent and meaning of one or more of the circumstances mentioned in § 35-39, and an operation of asexualization or sterilization seems to said Board to be for the best interest of the mental, moral or physical improvement of the said patient, inmate or individual resident or for the public good, it shall be the duty of the Board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the Board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the Board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the Board to interfere in any manner with the right of the patient, inmate, or individual resident, or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense. (1933, c. 224, s. 11.)

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by the Board, such operation shall take place at such time as the said prosecutor petitioning shall designate. (1933, c. 224, s. 12.)

§ 35-48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of

the proceedings before the Eugenics Board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Board appealed from and may enter such order as it deems just and right and which it shall certify to the said Board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Board, then, if no notice of appeal to the Supreme Court is filed within ten days after such decision, said Board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant. (1933, c. 224, s. 13; 1935, c. 463, s. 4.)

Editor's Note.—The second paragraph in the second sentence of the fourth paragraph of this section was changed by the 1935 amendment. The amendment also inserted the words "unless appealed from."

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county. (1933, c. 224, s. 14; 1935, c. 463, s. 5.)

Editor's Note.—The 1935 amendment record before the Board was conclusive as omitted a former provision that the to facts.

§ 35-50. Appeal to Supreme Court.—Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the Supreme Court, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the Supreme Court shall operate as a stay of proceedings under any orders of the said Board and the superior court until the appeal be determined by the said Supreme Court. (1933, c. 224, s. 15.)

§ 35-51. Civil or criminal liability of parties limited.—Neither the said petitioner nor any other person legally participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation. (1933, c. 224, s. 16.)

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed in this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions. (1933, c. 224, s. 17.)

§ 35-53. Permanent records of proceedings before Board.—Records in all cases arising under this article shall be filed permanently with the secretary

of the said Eugenics Board. Such records shall not be open to public inspection except for such purposes as the court may from time to time approve. (1933, c. 224, s. 18.)

§ 35-54. **Construction of terms.**—Where the inmates, patients, or non-institutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean noninstitutional individual. (1933, c. 224, s. 19.)

§ 35-55. **Discharge of patient from institution.**—Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to the date of said parole or discharge. Upon the receipt of the signed approval of the Eugenics Board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient. (1933, c. 224, s. 20.)

§ 35-56. **Existing rights of surgeons unaffected.**—Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient. (1935, c. 463, s. 7.)

§ 35-57. **Temporary admission to State hospitals for sterilization.**—Any feeble-minded, epileptic, or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital. (1937, c. 221.)

ARTICLE 8.

Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§ 35-58. **Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.**—The superintendent, manager, or owner of any public or private hospital, sanatorium, or institution, upon the written request of two duly licensed physicians, not connected with any hospital, public or private, and the husband, wife, guardian, or in the case of an unmarried person having no guardian, by some one of the next of kin, may receive, care for and restrain in

such hospital, sanatorium, or institution, as a patient, for a period not exceeding twenty days, any insane person needing immediate care and treatment; or any person needing immediate care, restraint and treatment because such person has become addicted to the intemperate use of narcotics, hypnotic drugs or alcoholic drinks, to such an extent that he has lost the power of self control. Such request for the admission of such patient shall be in writing and filed at such hospital, sanatorium, or institution, at the time of the reception of such patient, or within twenty-four hours thereafter, and such written request shall be held and considered as a commitment of such patient or person to said hospital, sanatorium, or institution, for a period of not exceeding twenty days. The superintendent, manager, or owner of such hospital, sanatorium, or institution shall not detain or restrain any person received as above provided for more than twenty days and shall not be liable in damages to such person or his personal representative or guardian on account of such restraint: Provided, the same is exercised and administered in a humane manner, without violence or personal injury. (1933, c. 213, s. 1.)

Action for Abuse of Void Process.—Plaintiff alleged that she had been received in defendant's institution on the authority of a letter from one who claimed to have been appointed her guardian and that she was detained for a longer period than 20 days. It was also alleged that the entire proceeding "was totally null and void"

and later was so determined by the courts. It was held that plaintiff could not be permitted to maintain, as against demurrer, a cause of action for abuse of process upon allegation that the process was totally null and void. *McCartney v. Appalachian Hall, Inc.*, 230 N. C. 60, 51 S. E. (2d) 886 (1949).

§ 35-59. **Use of restraining devices limited.**—No restraint in the form of muffs or mitts with lock buckles or waist straps, wristlets, anklets, or camisoles, head-straps, protection sheets or simple sheets when used for restraint or other device interfering with freedom shall be imposed upon any patient in such hospital, sanatorium, or institution, unless applied in the presence of the superintendent, or of the physician, or of an assistant physician of such hospital, sanatorium, or institution. Such device shall be applied only in cases of extreme violence, active homicidal or suicidal intent, physical exhaustion, infectious disease, or following an operation, or accident which has caused serious bodily injury, or to prevent injury to such patient or others, except that in cases of emergency restraint may be imposed without the presence of the superintendent, physician or assistant physician; every such emergency case, after the imposition of such restraint, shall immediately be reported to the superintendent, or manager, physician, or assistant physician of such hospital, sanatorium or institution, who shall immediately investigate the case and approve or disapprove the restraint imposed. (1933, c. 213, s. 2.)

§ 35-60. **Civil liability for corrupt admissions.**—Nothing contained in this article shall be held or construed to relieve from liability in any suit or action, instituted in the courts of this State, any husband, wife, guardian, physician, or assistant physician, to such person or patient on account of collusion of such husband, wife, guardian, physician or assistant physician to unlawfully, wrongfully and corruptly commit any such person or patient to such hospital, sanatorium, or institution, under the provisions of this article. (1933, c. 213, s. 3.)

ARTICLE 9.

Mental Health Council.

§ 35-61. **Creation of Council; membership; chairman.**—There is hereby created a Mental Health Council to be composed of the following persons: The Superintendent of Mental Hygiene, the chairman of the North Carolina Hospitals Board of Control, the Commissioner of Public Welfare, the director of the division of psychiatric and psychological services of the State Board

of Public Welfare, the general business manager for institutions, the State public health officer, a representative of the North Carolina Clerks of Court Association, the Superintendent of the North Carolina State Board of Public Instruction, the Commissioner of Correctional Institutions, the psychiatric advisor on the advisory panel of medical specialists for the physical restoration program of the division of vocational rehabilitation of the North Carolina State Board of Public Instruction, a representative of the Medical Society of the State of North Carolina, a representative of the North Carolina Neuro-psychiatric Association, a representative of the North Carolina Mental Hygiene Society, a representative of the department of psychiatry of each of the four-year medical schools in the State.

The Mental Health Council shall choose its own chairman. (1945, c. 952, s. 61.)

§ 35-62. **Functions; meetings; annual report.**—The function of the Mental Health Council shall be to consider ways and means to promote mental health in North Carolina and to study needs for new legislation pertaining to mental health of the citizens of the State. The Council shall meet at least twice a year and shall file an annual report with the Governor. (1945, c. 952, s. 61.)

§ 35-63. **Members not State officers.**—The members of the Mental Health Council shall not be considered as State officers within the meaning of article XIV, section seven of the North Carolina Constitution. (1945, c. 952, s. 61.)

Chapter 36. Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

Sec.

- 36-1. Certain investments deemed cash.
- 36-2. Investment of trust funds in county, city, town, or school district bonds.
- 36-3. Investment in building and loan and federal savings and loan associations.
- 36-4. Investment in registered securities.
- 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.
- 36-5. Trust funds deposited at trustee's risk.
- 36-5.1. Employee trusts.

Article 2.

Removal of Trust Funds from State.

- 36-6. Proceeding to remove trust funds of nonresidents.
- 36-7. Removal ordered on notice; bond of nonresident trustee.
- 36-8. Order of removal discharges resident trustee.

Article 3.

Resignation of Trustee.

- 36-9. Clerk's power to accept resignations.
- 36-10. Petition; contents and verification.
- 36-11. Parties; hearing; successor appointed.
- 36-12. Resignation allowed; costs; judge's approval.
- 36-13. Appeal; stay effected by appeal.
- 36-14. On appeal judge determines facts.
- 36-15. Final accounting before resignation.
- 36-16. Resignation effective on settlement with successor.
- 36-17. Court to appoint successor; bond required.
- 36-18. Rights and duties devolve on successor.

Article 4.

Charitable Trusts.

- 36-19. Trustees to file accounts.

Sec.

- 36-20. Action for account; court to enforce trust.
- 36-21. Not void for indefiniteness; title in trustee; vacancies.
- 36-22. Trusts created in other states valid.
- 36-23. Application of § 36-22.
- 36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

Article 5.

Uniform Trusts Act.

- 36-24. Definitions.
- 36-25. Bank account to pay special debts.
- 36-26. Loan of trust funds.
- 36-27. Funds held by bank for investment or distribution.
- 36-28. Trustee buying from or selling to self.
- 36-29. Trustee selling from one trust to another trust.
- 36-30. Corporate trustee buying its own stock.
- 36-31. Voting stock.
- 36-32. Banks holding stock or bonds in name of nominee.
- 36-33. Powers attached to office.
- 36-34. Powers exercisable by majority.
- 36-35. Contracts of trustee.
- 36-36. Exoneration or reimbursement for torts.
- 36-37. Tort liability of trust estate.
- 36-38. Withdrawals from mingled trust funds.
- 36-39. Unenforceable oral trust created by deed.
- 36-40. Power of settlor.
- 36-41. Power of beneficiary.
- 36-42. Power of the court.
- 36-43. Liabilities for violations of article.
- 36-44. Uniformity of interpretation.
- 36-45. Short title.
- 36-46. Time of taking effect.

Article 6.

Uniform Common Trust Fund Act.

- 36-47. Establishment of common trust funds.
- 36-48. Court accountings.
- 36-49. Supervision by State Banking Commission.
- 36-50. Uniformity of interpretation.
- 36-51. Short title.
- 36-52. Time of taking effect.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36-1. **Certain investments deemed cash.**—Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by federal land banks, or in bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the State of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; Rev., s. 1792; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., s. 4018.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Cross References.—As to authority to invest in federal farm loan bonds, see § 53-60. As to further provisions as to investment by guardians and interest thereon, see § 24-4. As to authority of fiduciaries to buy real estate foreclosed under mortgages

executed by them, see § 33-25. As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

Cited in Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51 (1936).

§ 36-2. **Investment of trust funds in county, city, town, or school district bonds.**—Guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, are authorized to invest funds in their hands as such fiduciaries in bonds issued by any county, city, town or school district, of the State of North Carolina subsequent to January first, one thousand nine hundred and fifteen, provided that the net debt of such county, city, town or school district does not exceed ten (10%) per cent of the assessed valuation of the property therein subject to taxation for the payment of such bonds, in the same manner, to the same extent and with the same legal consequence as fiduciaries are now authorized to invest such funds in bonds of the State of North Carolina under the provisions of § 36-1. (Ex. Sess. 1921, c. 63; C. S., s. 4018(a); 1931, c. 257.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

made this section applicable to city, town and school district bonds.

Editor's Note.—The 1931 amendment

§ 36-3. **Investment in building and loan and federal savings and loan associations.**—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this State: Provided, that no such funds may be so invested unless and until authorized by the Insurance Commissioner. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations. (1933, c. 549, s. 1; 1937, c. 14.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Editor's Note.—The 1937 amendment added the second proviso.

§ 36-4. **Investment in registered securities.**—Any guardian or trustee having in hand surplus funds belonging to a minor ward, incompetent person, or

persons non compos mentis, may, if he so elects, invest the same in registered securities within the classes designated by §§ 36-1 and 36-2, the registration of said securities as to principal only to be in the name of said minor ward, incompetent person, or persons non compos mentis.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward, incompetent person, or persons non compos mentis, is being administered, said clerk of the superior court shall give said guardian or trustee a receipt for the same and said clerk of the superior court shall thereafter hold said securities for said ward, incompetent person, or persons non compos mentis, subject only to final disposition thereof to be approved by the resident judge or presiding judge of the superior court: Provided, however, all income accruing therefrom shall be paid to said guardian or trustee in the same manner and for the same purposes as any other income of said estate derived from other sources.

Whenever any guardian or trustee shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian or trustee for the amount actually expended for such securities, and his bond as such guardian or trustee shall thereupon be reduced in an amount equal in proportion to the total amount of the bond as the funds expended for the securities are to the total amount of the estate covered by such bond. (1935, c. 449; 1943, c. 96; 1945, c. 713.)

Local Modification.—Craven: 1935, c. 449, actually invested in said securities.”

Editor's Note.—Prior to the 1943 amendment the latter part of the third paragraph read as follows: “in an amount equal to twice the amount of the funds

The 1945 amendment made this section applicable to trustees and incompetent persons.

As to effect of section, see 13 N. C. Law Rev. 386.

§ 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.—(1) Executors, administrators c. t. a., trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others may, upon petition filed with the clerk of the superior court of the county in which said fiduciary has qualified, be authorized by an order of such clerk of the superior court and approved by either the resident judge or a judge of the superior court at term time, to invest such funds or assets, or part thereof, in single premium life, endowment or annuity contracts; any such fiduciaries may be authorized by order of the clerk of the superior court, upon approval by the judge as above provided, to invest the earnings, or part thereof, of such trust funds or assets, without encroaching upon the principal, in any annual premium life, endowment or annuity contracts of legal reserve life insurance companies duly licensed and qualified to transact business within the State: Provided, that where any such annual premium contract has been purchased as herein authorized any such fiduciary may, upon authorization of the clerk of the superior court and approval of the judge as above specified, encroach upon and use the principal of such trust funds or assets in order to pay subsequent premiums and thereby prevent a lapsation or forfeiture of any such insurance contract purchased pursuant to the provisions of this section.

(2) Such contracts may be issued on the life, or lives, of a ward, or wards, and beneficiary, or beneficiaries of a trust fund, or upon the life of any person in whose life the said ward or beneficiary has an insurable interest, and shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person or persons whose funds are invested therein. Such contracts may not be purchased from any such company for which such executor, administrator c. t. a., guardian or trustee is acting as agent, or receives any commission, or part of any commission, directly or indirectly paid by such company to its agent soliciting and/or selling such contract.

(3) Notwithstanding anything contained in this section no insurance contracts

as specified in subsection (1) may be purchased by any executor, administrator c. t. a., trustee, or guardian if the trust agreement or other instrument, if any, under which such fiduciary has qualified and is acting provides otherwise. (1943, c. 473, ss. 1-3.)

§ **36-5. Trust funds deposited at trustee's risk.**—No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds. (1889, c. 470; Rev., s. 1793; C. S., s. 4019.)

Cross Reference.—As to deposit of trust funds, see §§ 32-8 to 32-11.

§ **36-5.1. Employee trusts.**—Pension, profit sharing, stock bonus, annuity or other employee trusts established by employers for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities or restraints on the power of alienation of title to property; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purposes for which they are established. (1945, c. 8.)

ARTICLE 2.

Removal of Trust Funds from State.

§ **36-6. Proceeding to remove trust funds of nonresidents.**—When any personal estate in this State is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this State, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the State in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district. (1911, c. 161, s. 1; C. S., s. 4020.)

Cross Reference.—As to guardian's right to remove ward's personalty from State, see § 33-48. **Cited in** *Fidelity Trust Co. v. Walton*, 198 N. C. 790, 153 S. E. 401 (1930).

§ **36-7. Removal ordered on notice; bond of nonresident trustee.**—No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the State will not prejudice the right of any person interested or to become interested therein. (1911, c. 161, s. 2; C. S., s. 4021.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ **36-8. Order of removal discharges resident trustee.**—When any guardian or committee, trustee or other person in this State, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S., s. 4022.)

ARTICLE 3.

Resignation of Trustee.

§ 36-9. **Clerk's power to accept resignations.**—The clerks of the superior courts of this State have power and jurisdiction to accept the resignation of executors, administrators, guardians, trustees, and other fiduciaries and to appoint their successors in the manner provided by this article. (1911, c. 39, s. 1; C. S., s. 4023.)

Cross Reference.—As to resignation of guardian, see § 33-11.

Appointment by Clerk.—Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appointed under the provisions of this section. *Ladies Benevolent Society v. Orrell*, 195 N. C. 405, 142 S. E. 493 (1928).

Where the trustee appointed by will to administer an active trust dies, the clerk of the superior court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and this section authorizes the clerk to appoint

a successor trustee only when the former trustee resigns. *Cheshire v. First Presbyterian Church*, 221 N. C. 205, 19 S. E. (2d) 855 (1942).

Section Not Extended to Give Jurisdiction.—The equitable jurisdiction of the superior courts does not extend to the clerks of court unless expressly given by statute, and this and following sections giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. *In re Smith*, 200 N. C. 272, 156 S. E. 494 (1931).

Cited in *Cheshire v. Presbyterian Church*, 222 N. C. 280, 22 S. E. (2d) 566 (1942).

§ 36-10. **Petition; contents and verification.**—When any executor, administrator, guardian, trustee, or other fiduciary desires to resign his trust, he shall file his petition in the office of the clerk of the superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualification of the applicant as such fiduciary, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the cestuis que trustent and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the fiduciary and due the estate, together with a full statement of the reasons why the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2; C. S., s. 4024.)

§ 36-11. **Parties; hearing; successor appointed.**—Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the cestuis que trustent as defendants, and shall issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The cestuis que trustent, creditors, or any other person interested in the trust estate, have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the cestuis que trustent demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the cestuis que trustent, the clerk may, in the exercise of his discretion, allow the applicant to resign;

and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article. (1911, c. 39, s. 3; C. S., s. 4025.)

§ 36-12. **Resignation allowed; costs; judge's approval.**—In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective. (1911, c. 39, s. 3; C. S., s. 4026.)

§ 36-13. **Appeal; stay effected by appeal.**—Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S., s. 4027.)

§ 36-14. **On appeal judge determines facts.**—Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the Supreme Court. (1911, c. 39, s. 5; C. S., s. 4028.)

§ 36-15. **Final accounting before resignation.**—No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S., s. 4029.)

Cross References.—As to vouchers being presumptive evidence, see § 28-119. As to fee for auditing final accounts, see § 2-35.

§ 36-16. **Resignation effective on settlement with successor.**—In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate. (1911, c. 39, s. 6; C. S., s. 4030.)

§ 36-17. **Court to appoint successor; bond required.**—If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7; C. S., s. 4031.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-18. **Rights and duties devolve on successor.**—Upon the ac-

ceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by the court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee. (1911, c. 39, s. 8; C. S., s. 4032.)

ARTICLE 4.

Charitable Trusts.

§ 36-19. **Trustees to file accounts.**—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts. (43 Eliz., c. 4; 1832, c. 14, s. 1; R. C., c. 18, s. 1; Code, s. 2342; Rev., s. 3922; C. S., s. 4033.)

Cited in Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547 (1932); *Woodcock v. Wachovia Bank, etc., Co.*, 214 N. C. 224, 199 S. E. 20 (1938).

§ 36-20. **Action for account; court to enforce trust.**—If § 36-19 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the Attorney General or solicitor who represents the State in the superior court for that county; and it shall be his duty to bring an action in the name of the State against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The Attorney General or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust. (1832, c. 14, ss. 2, 3; R. C., c. 18, ss. 2, 3; Code, ss. 2343, 2344; Rev., s. 3923; C. S., s. 4034.)

The trustees of a charitable trust who violate its provisions are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. *Humphrey v. Board of Trustees*, 203 N. C. 201, 165 S. E. 547 (1932).

§ 36-21. **Not void for indefiniteness; title in trustee; vacancies.**—No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the superior court of the proper county shall appoint

a trustee or trustees, pursuant to § 36-9, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

Cross Reference.—For subsequent statute covering same subject matter, see § 36-23.1.

Editor's Note.—See 16 N. C. Law Rev. 22.

The rule against perpetuities does not apply to charitable trusts. *Penick v. Bank of Wadesboro*, 218 N. C. 686, 12 S. E. (2d) 253 (1940); *American Trust Co. v. Williamson*, 228 N. C. 458, 46 S. E. (2d) 104 (1948).

Charitable trusts are not subject to the rule against perpetuities, this section being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities. *Williams v. Williams*, 215 N. C. 739, 3 S. E. (2d) 334 (1939).

Appointment of Trustee upon Occurrence of Vacancy.—Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application. *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939).

Trusts Held Valid.—A devise to “the authorities in control of Deaf, Dumb and Blind Asylum of the State of North Carolina for the use and benefit of the indigent children therein, born blind, of the Caucasian race,” constitutes a valid charitable trust. *Hass v. Hass*, 195 N. C. 734, 143 S. E. 541 (1928).

A devise of all the income and profits of lands in trust for a charitable organization of a certain church “to be used by the stewards of the church in defraying the expenses of the institution” is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes. *Ladies Benevolent Society v. Orrel*, 195 N. C. 405, 142 S. E. 493 (1928).

Devise establishing trust for the ad-

vancement of a religious denomination held not void for indefiniteness. *Williams v. Williams*, 215 N. C. 739, 3 S. E. (2d) 334 (1939).

A gift to the trustees of a named church, in trust for the home and foreign missions and benevolent causes of that church, was held valid under this section and good as against the contention that no cause was named capable of enforcing a lawful claim, as each benevolent cause supported by that church had an interest in the devise. *King v. Richardson*, 46 F. Supp. 510 (1942).

Trust Held Invalid.—Bequest of a certain sum to be held in trust, and paid out in twenty years “to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville,” held void for uncertainty. *Woodcock v. Wachovia Bank, etc., Co.*, 214 N. C. 224, 199 S. E. 20 (1938).

Devise Giving Trustees Power to Convey.—A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated, gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale. *Hall v. Wardwell*, 228 N. C. 562, 46 S. E. (2d) 556 (1948).

Details of Administration May Be Left to Trustee.—A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. *Whitsett v. Clapp*, 200 N. C. 647, 158 S. E. 183 (1931).

Cited in *Johnson v. Wagner*, 219 N. C. 235, 13 S. E. (2d) 419 (1941).

§ 36-22. Trusts created in other states valid. — Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries

named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

§ **36-23. Application of § 36-22.**—Section 36-22 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)

§ **36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.**—1. Declaration of Policy.—It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to effect the policy herein declared.

2. No Gift, Transfer, etc., Invalid for Indefiniteness.—No gift, transfer, grant, bequest, or devise of property or income, or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of effecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: to prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

3. Enforcement.—Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the Attorney General of the State of North Carolina in any court of the State having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the General Assembly.

4. Construction with Other Acts.—This section is in addition to any prior act or acts of the General Assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and

preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4.)

Cross Reference.—For former statute section, see 25 N. C. Law Rev. 476. As to relating to same subject matter, see § the doctrine of cy pres in North Carolina, 36-21. see 27 N. C. Law Rev. 591.

Editor's Note.—For discussion of this

ARTICLE 5.

Uniform Trusts Act.

§ 36-24. **Definitions.**—As used in this article unless the context or subject matter otherwise requires:

1. "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.

2. "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee.

3. "Relative" means a spouse, ancestor, descendant, brother or sister.

4. "Affiliate" means any person directly or indirectly controlling or controlled by another person, as hereinabove defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.

5. "Trust" means an express trust only. (1939, c. 197, s. 1.)

Editor's Note.—For comment on this article, see 17 N. C. Law Rev. 396.

§ 36-25. **Bank account to pay special debts.**—1. Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

2. If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2.)

§ 36-26. **Loan of trust funds.**—Except as provided in § 36-27, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate. (1939, c. 197, s. 3.)

§ 36-27. **Funds held by bank for investment or distribution.**—Funds received or held by a bank as fiduciary awaiting investment or distribution shall be promptly invested, distributed or deposited to the credit of the trust department as a demand deposit in the commercial department of the bank or another bank: Provided, that the bank or the commercial department shall first deliver to the trust department, as collateral security, securities eligible for the investment of the sinking funds of the State of North Carolina equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per cent (125%) of the funds so deposited; and such collateral security shall be held by the trust department in trust and for the special benefit of the estate or fund for which the

deposit was made, or, in case the deposit consists of uninvested or undistributed funds belonging to several estates or trust funds, then in trust for the special benefit of said estates or funds in proportion to their respective interest in such deposits. The said securities shall at all times be kept separate and apart from the other assets of the trust department and proper records shall be kept by the proper officer in connection therewith. If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. "Investment" and/or "invested" shall not be construed to include savings accounts or certificates or deposits in any bank. (1939, c. 197, s. 4.)

§ 36-28. Trustee buying from or selling to self.—No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5.)

§ 36-29. Trustee selling from one trust to another trust.—No trustee shall as trustee of one trust sell property to itself as trustee of another trust: Provided, assets of trust held by any bank or trust company under the supervision of the State Banking Commission may be sold or transferred from one trust to another trust if such transfer is expressly authorized by the instrument creating the trust to which the transfer is made, or if such transfer is approved by the board of directors by unanimous vote at a regular meeting, such action being recorded in the minutes. (1939, c. 197, s. 6; 1945, c. 127, s. 3; c. 743, s. 3.)

Editor's Note.—The first 1945 amendment added the proviso. The second 1945 amendment substituted the words "to which the transfer is made" for the words "from which the transfer is made."

§ 36-30. Corporate trustee buying its own stock.—No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate. (1939, c. 197, s. 7.)

§ 36-31. Voting stock.—A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it. (1939, c. 197, s. 8.)

Cross References.—As to trustee's power to vote stock, see § 55-111. As to liability as stockholder, see § 60-17.

§ 36-32. Banks holding stock or bonds in name of nominee.—A bank holding stock or bonds as fiduciary may hold it in the name of a nominee, without mention of the trust in the stock or bonds certificate or stock or bonds registration book. Provided, that (1) the trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the stock or bonds by the fiduciary and the facts regarding its holdings; (2) the nominee shall not have possession of the stock or bonds certificate or access thereto except under the immediate supervision of the fiduciary. The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such stock or bonds so held. (1939, c. 197, s. 9; 1945, c. 292.)

Editor's Note.—The 1945 amendment inserted the words "or bonds" after the word "stock" wherever it appeared in this section.

§ 36-33. Powers attached to office.—Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10.)

§ 36-34. **Powers exercisable by majority.**—1. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

2. Nothing in this section shall excuse a cotrustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust. (1939, c. 197, s. 11.)

Cross Reference.—As to right of trustee where only a naked trust is created, see § 41-3.

§ 36-35. **Contracts of trustee.**—1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12.)

Cross References.—As to endorsement of negotiable instrument by trustee, see § 25-50. As to costs when trustee party to action, see § 6-31.

§ 36-36. **Exoneration or reimbursement for torts.**—1. A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust or, (2) although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

2. If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the

extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

3. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13.)

§ 36-37. **Tort liability of trust estate.**—1. Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustees shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in § 36-36.

5. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14.)

§ 36-38. **Withdrawals from mingled trust funds.**—Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15.)

§ 36-39. **Unenforceable oral trust created by deed.**—1. When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his suc-

cessor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

2. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable. (1939, c. 197, s. 16.)

§ 36-40. **Power of settlor.**—The settlor of any trust affected by this article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by §§ 36-26, 36-27 and 36-28. (1939, c. 197, s. 17.)

§ 36-41. **Power of beneficiary.**—Any beneficiary of a trust affected by this article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this article, except as to the duties, restrictions, and liabilities imposed by §§ 36-26, 36-27 and 36-28. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this article. (1939, c. 197, s. 18.)

§ 36-42. **Power of the court.**—A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this article. (1939, c. 197, s. 19.)

§ 36-43. **Liabilities for violations of article.**—If a trustee violates any of the provisions of this article, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20.)

§ 36-44. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 197, s. 21.)

§ 36-45. **Short title.**—This article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22.)

§ 36-46. **Time of taking effect.**—This article shall take effect the first day of July, one thousand nine hundred and thirty-nine and shall apply in the construction of and operation under (a) all agreements containing trust provisions entered into subsequent to March fifteenth, one thousand nine hundred and forty-one; (b) all wills made by testators who shall die subsequent to March fifteenth, one thousand nine hundred and forty-one; and (c) all other wills and

trust agreements and trust relations in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 25; 1941, c. 269.)

Editor's Note.—The 1941 amendment construction.”
 struck out a part of the original section For comment on this amendment, see
 and substituted therefor that part of this 19 N. C. Law Rev. 544.
 section beginning with the words “in the

ARTICLE 6.

Uniform Common Trust Fund Act.

§ 36-47. **Establishment of common trust funds.**—Any bank or trust company qualified to act as fiduciary in this State may establish one or more common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and another or others, as co-fiduciaries; and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust fund or funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship or by an amendment thereof, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciary or co-fiduciaries to such investment. (1939, c. 200, s. 1.)

Editor's Note.—For comment on this article, see 17 N. C. Law Rev. 394.

§ 36-48. **Court accountings.**—Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trusts fund to render accounts of their several trusts. (1939, c. 200, s. 2.)

§ 36-49. **Supervision by State Banking Commission.**—All common trust funds established under the provisions of this article shall be subject to the rules and regulations of the State Banking Commission. (1939, c. 200, s. 3.)

§ 36-50. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4.)

§ 36-51. **Short title.**—This article may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5.)

§ 36-52. **Time of taking effect.**—This article shall be in full force and effect on and after July first, one thousand nine hundred thirty-nine and shall apply to fiduciary relationships then in existence or thereafter established. (1939, c. 200, s. 8.)

Chapter 37.

Uniform Principal and Income Act.

Sec.	Sec.
37-1. Definition of terms.	37-8. Principal comprising animals.
37-2. Application of the chapter; powers of settlor.	37-9. Disposition of natural resources.
37-3. Income and principal; disposition.	37-10. Principal subject to depletion.
37-4. Apportionment of income.	37-11. Unproductive estate.
37-5. Corporate dividends and share rights.	37-12. Expenses; trust estates.
37-6. Premium and discount bonds.	37-13. Expenses; nontrust estates.
37-7. Principal used in business.	37-14. Uniformity of interpretation.
	37-15. Short title.

§ 37-1. **Definition of terms.**—"Principal" as used in this chapter means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto empowered that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person;

"Income" as used in this chapter means the return derived from principal;

"Tenant" as used in this chapter means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution;

"Remainderman" as used in this chapter means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law;

"Trustee" as used in this chapter includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee. (1937, c. 190, s. 1.)

§ 37-2. **Application of the chapter; powers of settlor.**—This chapter shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with, or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this chapter, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this chapter. (1937, c. 190, s. 2.)

§ 37-3. **Income and principal; disposition.**—(1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this chapter.

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, or property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where

such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this chapter. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established, while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law. (1937, c. 190, s. 3.)

§ 37-4. Apportionment of income.—Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal. (1937, c. 190, s. 4.)

Cross Reference.—As to apportionment in the case of renting real estate, see § 42-5 et seq.

§ 37-5. Corporate dividends and share rights.—(1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(2) All rights to subscribe to the shares of other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(3) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other

amounts paid upon corporate shares on disbursements of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(4) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend. (1937, c. 190, s. 5.)

§ 37-6. Premium and discount bonds.—Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal. (1937, c. 190, s. 6.)

§ 37-7. Principal used in business.—(1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period, the expenses during and the inventory value of the property at the beginning of such period.

(3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal. (1937, c. 190, s. 7.)

§ 37-8. Principal comprising animals.—Where any part of the principal consists of animals employed in business, the provisions of § 37-7 shall apply; and in other cases where the animals are held as a part of the principal, partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income. (1937, c. 190, s. 8.)

§ 37-9. Disposition of natural resources.—Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and

carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit. (1937, c. 190, s. 9.)

§ 37-10. **Principal subject to depletion.**—Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of five per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal. (1937, c. 190, s. 10.)

§ 37-11. **Unproductive estate.**—(1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year, and until disposed of as hereinafter stated, has not produced an average net income of at least one per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property, less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(3) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, otherwise one year after it became unproductive.

(4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.

(5) In the case of successive tenants the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income. (1937, c. 190, s. 11.)

§ 37-12. **Expenses; trust estates.**—(1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and re-

mainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in § 37-11, shall be paid out of principal, subject to the provisions of subsection (2) of § 37-11.

(2) All other expenses, including trustee's commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and cost of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of subsection (2) of § 37-3 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(3) Expenses paid out of income according to subsection (1) which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(4) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as part of principal are paid out of principal, as provided in subsection (2), the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement. (1937, c. 190, s. 12.)

§ 37-13. Expenses; nontrust estates.—(1) The provisions of § 37-12, so far as applicable and excepting those dealing with costs of, or special taxes, or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created, subject, however, to any legal agreement of the parties or any specific direction of the taxing or other statutes; but where either tenant or remainderman has incurred an expense for the benefit of his own estate, and without the consent or agreement of the other, he shall pay such expense in full.

(2) Subject to the exceptions stated in subsection (1) the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant, except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the "American Experience Tables of Mortality," and no other evidence of duration or expectancy shall be considered. (1937, c. 190, s. 13.)

§ 37-14. Uniformity of interpretation.—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1937, c. 190, s. 14.)

§ 37-15. Short title.—This chapter may be cited as the Uniform Principal and Income Act. (1937, c. 190, s. 15.)

Division VIII. Real and Personal Property.

	PAGE
Chap. 38. Boundaries	267
39. Conveyances	271
40. Eminent Domain	304
41. Estates	334
42. Landlord and Tenant	368
43. Land Registration	398
44. Liens	419
45. Mortgages and Deeds of Trust	466
46. Partition	507
47. Probate and Registration	523

Chapter 38.

Boundaries.

Sec.

- 38-1. Special proceeding to establish.
38-2. Occupation sufficient ownership.

Sec.

- 38-3. Procedure.
38-4. Surveys in disputed boundaries.

§ 38-1. **Special proceeding to establish.**—The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. (1893, c. 22; Rev., s. 325; C. S., s. 361.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Purpose of Processioning.—The primary object of this section and the following sections of this chapter is to facilitate the speedy determination of disputed boundaries between adjoining landowners who do not contest each other's title to their respective tracts. *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473 (1903).

Title to the land is not in issue unless so made by the pleadings, *Cole v. Seawell*, 152 N. C. 349, 67 S. E. 753 (1910); but when title is placed in issue by the defendant's denial of the plaintiff's ownership, then, by § 1-399, the pending special proceedings are converted into a civil action to quiet title, and the court will try all the issues in controversy connected therewith. *Woody v. Fountain*, 143 N. C. 67, 55 S. E. 425 (1906). See *Roberts v. Sawyer*, 229 N. C. 279, 49 S. E. (2d) 468 (1948).

Consent of Both Owners Not Required.—Until the passage of this section the consent of both adjoining landowners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors as a matter of right is entitled to have the land processioned, without the other's consent, and, where there has been an appeal, to have all the controverted matters settled by the jury under the guidance of the court, *Green v. Williams*, 144 N. C. 60, 58 S. E. 549 (1907).

Dispute as to Boundary Necessary.—To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. *Wood v. Hughes*, 195 N. C. 185, 141 S. E. 569 (1928).

Call in Deed Is Binding.—Plaintiffs in a processioning proceeding, under this chapter, are bound by the call in their deed for a named corner whether it be marked or unmarked. *Cornelison v. Ham-*

mond, 224 N. C. 757, 32 S. E. (2d) 326 (1944).

Effect of Agreement between Parties.—Where, in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. *Lowder v. Smith*, 201 N. C. 642, 161 S. E. 223 (1931).

Right to Have Issue Answered by Jury.—In a processioning proceeding under this chapter, where the only issue is the true boundary line, plaintiffs, as a matter of right, are entitled to have that issue answered by jury so that controversy may be ended by judicial decree, as the statute is expressly designed to provide a means of settlement by an orderly proceeding in court. *Cornelison v. Hammond*, 225 N. C. 535, 35 S. E. (2d) 633 (1945).

Injunctive Relief.—To warrant the granting of an injunction in cases of special proceedings, the relief sought must be subsidiary to the relief asked in the special proceedings, *Hunt v. Sneed*, 64 N. C. 176 (1870); and since this section gives no substantive relief—settles no rights, or titles to property—, but only locates the dividing lines between the parties, the plaintiff was denied an injunction to restrain the defendant from commissions of trespasses when such order was asked for in the special proceedings instituted to determine the boundary line between the adjoining estates. *Wilson v. Alleghany Co.*, 124 N. C. 7, 32 S. E. 326 (1899). See *Jackson v. Jernigan*, 216 N. C. 401, 5 S. E. (2d) 143 (1939).

Equitable Relief of Mutual Mistake.—As the procedure for the application of this section is that prescribed in § 38-3, subsection 4, it is competent for the defendant under §§ 1-70 and 1-399 to plead the equitable relief of mutual mistake, having the cause transferred to the civil

issue docket, and having the common grantor of the plaintiff and defendant made a party defendant. *Smith v. Johnson*, 209 N. C. 729, 184 S. E. 486 (1936).

§ 38-2. **Occupation sufficient ownership.**—The occupation of land constitutes sufficient ownership for the purposes of this chapter. (1893, c. 22; 1903, c. 21; Rev., s. 326; C. S., s. 362.)

Sufficiency of Ownership—When Title Not in Dispute.—The courts have construed the term “occupation,” as used in this section, to mean possession, and uniformly hold that one (a) in possession of the land, and/or (b) whose title thereto is not disputed, so that no issue is raised save only that of the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. *Williams v. Hughes*, 124 N. C. 3, 32 S. E. 325 (1899); *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473 (1903).

Where it was admitted that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to

Applied in *Tice v. Winchester*, 225 N. C. 673, 36 S. E. (2d) 257 (1945).

Cited in *Kelly v. King*, 225 N. C. 709, 36 S. E. (2d) 220 (1945).

the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true boundary line, was not error. *Clark v. Dill*, 208 N. C. 421, 181 S. E. 281 (1935).

Same—When Title Is in Dispute.—Where, however, the defendant puts the title to the land in issue, and the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. *Woody v. Fountain*, 143 N. C. 67, 55 S. E. 425 (1906). See *Williams v. Hughes*, 124 N. C. 3, 32 S. E. 325 (1899).

§ 38-3. **Procedure.**—1. **Petition; Summons; Hearing.**—The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Cross References.—See note to § 38-1. As to special proceedings generally, see § 1-393 et seq.

Compliance with the Procedural Steps Mandatory.—This section must be strictly followed in all material respects and any flagrant or negligent departure therefrom will be fatal to the proceedings. *Forney v. Williamson*, 98 N. C. 329, 4 S. E. 483 (1887). But the court will look to the substance and not to the form of the pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff's petition it will be treated as an answer, since it contains all that is required by the section. *Scott v. Kellum*, 117 N. C. 664, 23 S. E. 180 (1895).

Effect of Misjoinder of Parties.—A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land will be dismissed upon demurrer for misjoinder of parties and causes of action that involve

the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. *Rogers v. Rogers*, 192 N. C. 50, 133 S. E. 184 (1926).

A defense bond is not required in a special proceeding to establish boundaries. *Roberts v. Sawyer*, 229 N. C. 279, 49 S. E. (2d) 468 (1948).

When Transfer to Regular Term Required.—The jurisdiction of the clerk in these special proceedings is limited in its scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved, but must transfer the whole proceedings to the regular term of the court. *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473 (1903); *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62 (1904); *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302 (1911).

Proceeding Assimilated to Action to Quiet Title.—If title becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title under § 41-10. *Roberts v. Sawyer*, 229 N. C. 279, 49 S. E. (2d) 468 (1948). See *Woody v. Fountain*, 143 N. C. 66, 55 S. E. 425 (1906).

Where in a special proceeding under this chapter to establish a boundary line, the defendant denies by answer the petitioner's title and pleads twenty years' adverse possession under § 1-40 as a defense, the proceeding is assimilated to an action to quiet title under § 41-10 and the clerk, as directed by § 1-399, 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 as originally instituted. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Transfer of Cause and Injunctive Relief.—When defendant in a processioning proceeding puts title in issue, the cause should be transferred to the civil issue docket for trial, but when he does not do so the proceeding does not involve title or right to possession, but solely the location of the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. *Jackson v. Jackson*, 216 N. C. 401, 5 S. E. (2d) 143 (1939). See *Wilson v. Alleghany Co.*, 124 N. C. 7, 32 S. E. 326 (1899).

Issues Raised and Waiver of Jury Trial.—Where a special proceeding to establish a boundary line is assimilated to an action to quiet title by the defendant's answer, the issues raised by the pleadings are (1) whether petitioners own the land described in his petition, and (2) the location of the land so described. In such case if defendant does not tender issues pertinent to the issues above stated he waives his right to a trial by jury. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Exceptions Not Giving Right to Jury Trial.—Where compulsory reference is ordered in a special proceeding to establish a boundary line, upon defendant's denial of petitioners' title and plea of title by twenty years' adverse possession, defendant's exception to the order of reference and exceptions to findings of fact made by the referee do not entitle him to a jury trial when he tenders issues which relate only to questions of fact based upon his

exceptions, and fails to tender issues of fact which arise upon the pleadings and to relate such issues to his exceptions and to the findings by their respective numbers. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Burden of Proof.—Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden is on the plaintiff to establish such line, *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273 (1905); *Woody v. Fountain*, 143 N. C. 67, 55 S. E. 425 (1906); and this burden does not shift to the defendant merely because, in addition to denying the line to be as claimed by the plaintiff, he alleges another to be the dividing line. *Garris v. Harrington*, 167 N. C. 86, 83 S. E. 253 (1914).

The plaintiff is the actor and has the burden of establishing the true location of the dividing line. *McCansless v. Ballard*, 222 N. C. 701, 24 S. E. (2d) 525 (1943).

Evidence Generally.—The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. *Power Co. v. Savage*, 170 N. C. 625, 87 S. E. 629 (1916). See *Woodard v. Harrell*, 191 N. C. 194, 132 S. E. 12 (1926), containing dicta to the effect that parol evidence of location of boundary line may be properly admitted, if the parties were merely locating the true boundary line, but not to show a verbal agreement to change the true dividing line.

Surveyor's Report as Evidence.—The surveyor, when acting under this section, is not in any sense a referee, and his report to the court should not contain conclusions of law, but should only set forth a detailed account of the facts of the case, and when it does this it is entitled to great evidential weight, although it is not conclusive as to the results contained therein. *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349 (1894). See *Green v. Williams*, 144 N. C. 60, 56 S. E. 549 (1907).

What Report of Processioners Must Contain.—A report of a processioner is radically defective when it does not state, with precision, the claims of the respective parties, so as to show what lines were disputed or how far they were disputed, and no undue laxity in the proceedings in this respect will be tolerated by the court. *Hoyle v. Wilson*, 29 N. C. 466 (1847). So also where one of the parties objects to the processioner's proceeding, the processioner must, in his return to the court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, etc. *Carpenter v. Whitworth*, 25 N. C. 204 (1842).

Judgment of Clerk as Res Judicata.—

Where Title to Land Not in Issue.—

Where the only fact in issue is the establishment and location of the boundary line, then the judgment of the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. *Whitaker v. Garren*, 167 N. C. 658, 83 S. E. 759 (1914). But his judgment may not estop the parties from asserting in a separate action title in the land. *Nash v.*

Shute, 182 N. C. 528, 109 S. E. 353 (1921).

Same—Where Title in Issue.—Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court, a judgment therein estops the parties both as to the title and the location of the line. *Whitaker v. Garren*, 167 N. C. 658, 83 S. E. 759 (1914). See *Nash v. Shute*, 182 N. C. 528, 109 S. E. 353 (1921).

2. **Appeal to Term.**—Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo.

Parties on Appeal.—Under the provision contained in this section for appeal by either party to the regular term of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. *Batts v. Pridgen*, 147 N. C. 133, 60 S. E. 897 (1908).

a processioning proceeding under this chapter when the cause is heard on appeal, unless pleadings are complicated by other allegations the only issue is as to the true location of the dividing line. *Cornelison v. Hammond*, 225 N. C. 535, 35 S. E. (2d) 633 (1945).

Issue Is Location of Dividing Line.—In

3. **Survey after Judgment.**—When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

4. **Procedure as in Special Proceedings.**—The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (1893, c. 22; 1903, c. 21; Rev., s. 326; C. S., s. 363.)

§ 38-4. Surveys in disputed boundaries.—When in any suit pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit. (1779, c. 157; 1786, c. 252; R. C., c. 31, s. 119; Code, s. 939; Rev., s. 1504; C. S., s. 364.)

This section vests in the court a sound discretion within the limits defined. *Vance v. Pritchard*, 218 N. C. 273, 10 S. E. (2d) 725 (1940).

Clerk Has No Power to Make Allowance for Costs.—The word "court," as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order

allowing compensation to the surveyor, the clerk has no power to make the allowance; but on appeal from the clerk's refusal, such order will be made by the judge of the superior court. *LaRoque v. Kennedy*, 156 N. C. 360, 72 S. E. 454 (1911); *Cannon v. Briggs*, 174 N. C. 740, 94 S. E. 519 (1917).

Cited in *Roberts v. Sawyer*, 229 N. C. 279, 49 S. E. (2d) 468 (1948).

CHAPTER 39. CONVEYANCES

Chapter 39. Conveyances.

Article 1.

Construction and Sufficiency.

- Sec.
39-1. Fee presumed, though word "heirs" omitted.
39-2. Vagueness of description not to invalidate.
39-3. Conveyances to slaves.
39-4. Conveyances by infant trustees.
39-5. Official deed, when official selling or empowered to sell is not in office.
39-6. Revocation of deeds of future interests made to persons not in esse.
39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.

Article 2.

Conveyances by Husband and Wife.

- 39-7. Instruments affecting married woman's title; husband to execute.
39-8. Acknowledgment at different times and places; before different officers; order immaterial.
39-9. Absence of wife's acknowledgment does not affect deed as to husband.
39-10. Officers authorized to take privy examination.
39-11. Certain conveyances not affected by fraud if acknowledgment or privy examination regular.
39-12. Power of attorney of married woman.
39-13. Wife need not join in purchase-money mortgage.
39-13.1. Validation of certain deeds, etc., executed by married women without private examination.
39-14. [Repealed.]

Article 3.

Fraudulent Conveyances.

- 39-15. Conveyance with intent to defraud creditors void.
39-16. Conveyance with intent to defraud purchasers void.
39-17. Voluntary conveyance evidence of fraud as to existing creditors.
39-18. Marriage settlements void as to existing creditors.
39-19. Purchasers for value and without notice protected.
39-20. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.

Sec.

- 39-21. Bona fide purchaser of fraudulently conveyed property treated as creditor.
39-22. Persons aiding debtor to remove to defraud creditors liable for debts.
39-23. Sales in bulk presumed fraudulent.

Article 4.

Voluntary Organizations and Associations.

- 39-24. Authority to acquire and hold real estate.
39-25. Title vested; conveyance; probate.
39-26. Effect as to conveyances by trustees.
39-27. Prior deeds validated.

Article 5.

Sale of Building Lots in North Carolina.

- 39-28. Application for permit to sell.
39-29. Contents of application.
39-30. Investigation by clerk; bond.
39-31. Application, certificate, bond and order filed as permanent record.
39-32. Penalty for violation.

Article 5A.

Control Corners in Real Estate Developments.

- 39-32.1. Requirement of permanent markers as "control corners."
39-32.2. Control corners fixed at time of recording plat or prior to sale.
39-32.3. Recordation of plat showing control corners.
39-32.4. Description of land by reference to control corner; use of control corner to fix distances and boundaries prima facie evidence of correct method.

Article 6.

Power of Appointment.

- 39-33. Method of release or limitation of power.
39-34. Method prescribed in § 39-33 not exclusive.
39-35. Requisites of release or limitation as against creditors and purchasers for value.
39-36. Necessity for actual notice of release or limitation to bind fiduciary.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. **Fee presumed, though word "heirs" omitted.**—When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. (1879, c. 148; Code, s. 1280; Rev., s. 946; C. S., s. 991.)

Cross Reference.—As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see § 8-21.

Editor's Note.—This section changes the common-law rule that in order to convey a fee simple the word "heirs" should appear either in the premises or the habendum of the deed. *Carolina Real Estate Co. v. Bland*, 152 N. C. 225, 67 S. E. 483 (1910). Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estates had already been made. See *Hollowell v. Manly*, 179 N. C. 262, 102 S. E. 386 (1920); *Whichard v. Whitehurst*, 181 N. C. 79, 106 S. E. 463 (1921), relating to a conveyance in trust. And a series of cases established the proposition that the word "heirs," when used as indicative of the estate to be granted, no matter where the word appeared in the instrument, would be transposed and inserted so as to cause the instrument to operate as a fee simple. See *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889 (1905). But perhaps the most radical departure from the early rule is found in the case of *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308 (1889), where it was decided that if it appeared that the word "heirs" was omitted from the instrument because of ignorance, inadvertence or mistake, the word would be supplied so as to pass title in fee in accordance with the intention of the grantor.

Deeds Executed Prior to Effective Force of Section.—Although a deed to lands executed and delivered prior to the effective force of this section would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" was sufficient to pass a fee simple title to the lands conveyed therein.

Tucker v. Smith, 199 N. C. 502, 154 S. E. 826 (1930).

Section Provides Same Rule for Deeds as for Devises.—This section provides the same rule of construction of deeds as is contained in § 31-38 for construction of devises. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308 (1889).

Decisions construing § 31-38, pertaining to the construction of wills, are pertinent in construing this section, since the statutes are similar in wording and effect. *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948).

Fee Simple Presumed Unless Contrary Intention Appears.—All conveyances of land executed since the passage of this section are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79 (1908).

By this section a deed, though not using the word "heirs," is a conveyance in fee, unless the contrary intention appears. *Holloway v. Green*, 167 N. C. 91, 83 S. E. 243 (1914).

Presumption Held Rebutted.—The presumption of fee raised by this section was rebutted by the fact that the deed intended to convey only a life estate, which was manifest from the many restraining expressions contained therein. *Boomer v. Grantham*, 203 N. C. 230, 165 S. E. 698 (1932).

Deed to Husband and Wife and Heirs of Wife.—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of this section, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. *Sprinkle v. Spainhour*, 149 N. C. 223, 62 S. E. 910 (1908).

This section does not change a common-law conveyance of inheritance to a conveyance of less effectiveness, i. e., to one conveying only a life estate. *Whitley*

v. Aronson, 219 N. C. 121, 12 S. E. (2d) 906 (1941).

Deed Conveying Life Estate Notwithstanding Use of Word "Heirs."—The granting clause of a deed was to one of the grantor's sons, his heirs and assigns, and following the description, "this deed is conveyed to the said grantee to him his lifetime and then to his boy children," with habendum to the said son "and his heirs and not to assign only to his brothers their only use and behoof for ever" with warranty to the said son "and his heirs and assigns." It was held that the portion of the habendum restraining assignment except to the brothers of the grantee was equally consistent with an assignment of a life estate and with an assignment of the fee, and to hold that the grant to the "son and his heirs" conveyed the fee simple would require that other portions of the instrument expressive of the intent of the grantor be disregarded; thus in accordance with the intention of the grantor as gathered from the entire instrument the deed conveyed a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. *Jefferson v. Jefferson*, 219 N. C. 333, 13 S. E. (2d) 745 (1941).

Section as Curing Repugnance.—The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns," and the habendum, "to herself, the said M. G. during her lifetime, and at her death said land is to be equally divided between" her children. It was held that since under this section, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there was no repugnance in this deed between the granting clause and habendum. The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children. *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79 (1908).

Rejection of Repugnant Clause Where Granting Clause and Habendum Convey Fee.—Where the granting clause and the habendum convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee-simple title will be rejected

as repugnant to the estate and interest conveyed. *Artis v. Artis*, 228 N. C. 754, 47 S. E. (2d) 228 (1948); *Pilley v. Smith*, 230 N. C. 62, 51 S. E. (2d) 923 (1949).

Effect of Restraint upon Alienation.—Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. *Holloway v. Green*, 167 N. C. 91, 83 S. E. 243 (1914).

Deed Held Not to Impose Condition Subsequent.—A habendum in a deed to incorporators and trustees of a college, "To have and to hold the aforesaid lands and premises to the party of the second part and their successors in office forever, for the only proper use and behalf of said Claremont Female College as foresaid," did not have the effect of appropriating the specific property to school purposes under condition subsequent, but was held to express only the purpose of the grantor in making the deed, and as to third persons the power of the trustees or other corporate authority to convey the property was not impaired. *Claremont College v. Riddle*, 165 N. C. 211, 81 S. E. 283 (1914).

Deed Held to Create Defeasible Fee.—The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a defeasible fee-simple estate to his granddaughter, which was to become absolute upon the birth of a child to her. *Sharpe v. Brown*, 177 N. C. 294, 98 S. E. 825 (1919).

Section Applied to Reservation of Easement.—In *Ruffin v. Seaboard Air Line Railway*, 151 N. C. 330, 66 S. E. 317 (1909), this section was applied in holding that a reservation of an easement was a reservation in fee, as no contravening intent appeared from the conveyance.

Retention of Mineral Rights.—Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. *Central Bank, etc., Co. v. Wyatt*, 189 N. C. 107, 126 S. E. 93 (1925).

Applied in New York Life Ins. Co. v. Lassiter, 209 N. C. 156, 183 S. E. 616 (1936); *Jackson v. Powell*, 225 N. C. 599, 35 S. E. (2d) 892 (1945).

Cited in *Krites v. Plott*, 222 N. C. 679, 24 S. E. (2d) 531 (1943).

§ 39-2. **Vagueness of description not to invalidate.**—No deed or other writing purporting to convey land or an interest in land shall be declared void for

vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing. (1891, c. 465, s. 2; Rev., s. 948; C. S., s. 992.)

Cross Reference.—As to vagueness of description in paper-writing offered as evidence, see § 8-39.

Editor's Note.—In *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891 (1890), it was held that a deed describing land "as adjoining lands of A, B, and others and containing 25 acres, more or less," etc., was too vague and indefinite to be aided by parol proof. A similar holding appears in *Wilson v. Johnson*, 105 N. C. 211, 10 S. E. 895 (1890). These two cases were received by the bar and the State with manifest disapproval, and were the cause of much concern as to the validity of titles. Hence, the legislature in 1891 enacted the salutary provisions of this section. The section does not operate retrospectively. See *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539 (1893); *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152 (1896).

Section Applies Only Where There Is a Description.—In *Harris v. Woodard*, 130 N. C. 580, 41 S. E. 790 (1902), it was said that the statute applies only where there is a description which can be aided, but not when there is no description. *Bryson v. McCoy*, 194 N. C. 91, 138 S. E. 420 (1927).

A deed which fails to describe any land is as void now as it was prior to the passage of this section. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 776 (1905).

Description Too Vague and Indefinite.—A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, this section not applying to such cases. *Katz v. Daughtrey*, 198 N. C. 393, 151 S. E. 879 (1930).

Description Capable of Being Reduced to Certainty.—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the in-

strument refers. *Patton v. Sluder*, 167 N. C. 500, 83 S. E. 818 (1914).

Descriptions Held Sufficient.—A description in a mortgage of a life estate in lands as being in a certain county and township, containing twenty acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it, is sufficient to admit parol evidence to fit the locus in quo to the description in the instrument, and is not void for vagueness of description under this section. *Bissette v. Strickland*, 191 N. C. 260, 131 S. E. 655 (1926).

A description of land in a deed, which designates all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient under this section to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630 (1920).

When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract," or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C, or (3) the land is designated by such a term as the home place of D, or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, the description is not void for vagueness and it may be aided by parol evidence. *Peel v. Calais*, 224 N. C. 421, 31 S. E. (2d) 440 (1944).

Sufficiency of Description in Will.—Where a will leaves to the widow of the testator for life, "at least 75 acres of land ***** to include the dwelling house and to be located as she may want it to be, and as near four-square as is consistent," it is sufficient under this section to be located by parol evidence. *Heirs at Law of Freeman v. Ramsey*, 189 N. C. 790, 128 S. E. 404 (1925).

§ 39-3. Conveyances to slaves.—When it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same was conveyed by deed or parol, and the bargainee or donee has been placed in actual possession of the same, such gift or conveyance shall have the force and effect of transferring the legal title to the lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: Provided, further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided, also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute. (1869-70, c. 77; Code, s. 1278; Rev., s. 949; C. S., s. 993.)

Section Affects Remedy Only.—The statute affects the remedy only and does not interfere with vested rights. *Buie v. Carver*, 75 N. C. 559 (1876).

Former Laws Do Not Defeat Its Purpose.—Whenever it judicially appears that a slave purchased and paid for any property, real or personal, and that conveyance thereof was made to him, or to any one for his use, such purchaser, or those lawfully representing him, is entitled to such property, anything in the former laws of this State forbidding slaves to acquire and hold property, to the contrary notwithstanding. *Caldwell v. Watson*, 74 N. C. 296 (1876).

Grantor Must Have Had Title.—This

section does not apply to a case where one having himself no title made a parol conveyance of land to a slave, and put the slave in possession more than ten years before the passage of the act; for the section extends only to cases where the alleged donor or vendor had title himself. *Buie v. Carver*, 75 N. C. 559 (1876).

Section Held Not Applicable to Will.—Where a man made a will in 1860 and died in 1861, leaving certain property to his wife during her life and then to his slaves, naming them, and the widow died in 1899, the slaves could not take under the will. *Jervis v. Lewellyn*, 130 N. C. 616, 41 S. E. 873 (1902).

§ 39-4. Conveyances by infant trustees.—When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age. (1821, c. 1116, ss. 1, 2; R. C., c. 37, s. 27; Code, s. 1265; Rev., s. 1036; C. S., s. 994.)

Editor's Note.—The general rule is that the contracts of an infant are voidable at the option of the infant, and when avoided, the contract is null and void ab initio. *Pippen v. Mutual Ben. Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822 (1902). To this general rule, there is one exception as old as the rule itself: "An infant may bind himself for necessities." *Jordan v. Coffield*, 70 N. C. 110 (1874); *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574 (1880). It would seem that this section added a second exception to the general rule in this State. It expressly creates a class of contracts which an infant is authorized to make, and which are as binding "as if made by a person of full age." See 3 N. C. Law Rev. 110.

Section Indicates Proceeding in Equity.—The language of this section that "the court may decree" is indicative of a proceeding in equity. *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941).

Remedy Is Exclusive.—The remedy prescribed by this section, relating to the foreclosure of a deed of trust, must be, under our form of civil procedure, an action in the nature of an equitable proceeding to foreclose a mortgage. No other remedy is given by statute. Hence, it is exclusive and must be resorted to, and in the manner prescribed. *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941).

Trustors are necessary parties to an action by a purchaser at a foreclosure sale to obtain authority for an infant trustee

to execute the deed. *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941). *Joint-Stock Land Bank*, 208 N. C. 41, 178 S. E. 863 (1935).

Cited in *Coker v. Virginia-Carolina*

§ 39-5. Official deed, when official selling or empowered to sell is not in office.—When a sheriff, coroner, constable or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the State before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (R. C., c. 37, s. 30; Code, s. 1267; 1891, c. 242; Rev., ss. 950, 951; C. S., s. 995.)

Cross References.—As to authority of sheriff to execute deed to land sold under execution, see § 1-309. As to sheriff's deed for trust estate, see § 1-316. As to sheriff's deed on sale of equity of redemption, see § 1-317.

Section Does Not Extend to Clerks.—This section does not extend to clerks, and they cannot exercise the power herein conferred after going out of office. *Shew v. Call*, 119 N. C. 450, 26 S. E. 33 (1896).

A tax deed executed by an "ex-sheriff" may be authorized under this section. *Manufacturing Co. v. Rosey*, 144 N. C. 370, 57 S. E. 2 (1907); *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966 (1913).

Deed Executed by Successor in Office.—A deed made by a succeeding sheriff or coroner operates by virtue of this section to pass the title to what was sold. *Isler v. Andrews*, 66 N. C. 553 (1872); *Edwards v. Tipton*, 77 N. C. 222 (1877).

Successor May Demand Evidence of Sale and Payment.—Before a successor in office can be required to make a conveyance sought under this section he is entitled to demand clear and conclusive evi-

dence that a sale was made by his predecessor, and also that the purchase price was paid. *Harris v. Irwin*, 29 N. C. 432 (1847); *Isler v. Andrews*, 66 N. C. 553 (1872).

Deeds as Evidence.—A sheriff's deed made pursuant to this section after he has gone out of office is still subject to the rule that such deeds are prima facie evidence of sale and execution. But the recitals in a deed made by a successor of the sheriff are only hearsay, as they constitute his opinion based on information and not his own knowledge. *Curlee v. Smith*, 91 N. C. 172 (1884). See *McPherson v. Hussey*, 17 N. C. 323 (1833); *Edwards v. Tipton*, 77 N. C. 222 (1877).

Power to Correct Deeds.—A sheriff's deed is under control of the court, and the court can compel a sheriff to correct his deed; if the sheriff who executes the deed dies, the court can compel his successor to correct the deed, pursuant to this section, hence, the court may on motion during the trial of a suit correct such a deed. *Millsaps v. McCormick*, 71 N. C. 531 (1874).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.—The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner: Provided, that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective: Provided,

further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective. (1893, c. 498; Rev., s. 1045; C. S., s. 996; 1929, c. 305; 1941, c. 264; 1943, c. 437.)

Cross References.—As to registration of deeds, see § 47-17 et seq. As to validation of certain deeds of revocation not in conformity with this section, see § 39-6.1.

Editor's Note.—The 1929 amendment added the last sentence to this section down to the second proviso. Formerly the section applied only to voluntary conveyances; as amended, it includes the creation of voluntary trusts in real or personal property, not only for the benefit of the grantor, maker, or trustor, and of persons not in esse, but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to trusts heretofore created as well as to such as may be created hereafter. *Stanback v. Citizen's Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

The 1941 amendment inserted before the first proviso the words beginning with "and the grantor." The amendment became effective March 15, 1941, and did not affect pending litigation.

The 1943 amendment added the last three provisos at the end of the section.

For article on this section, see 20 N. C. Law Rev. 278. For comment on the 1941 amendment, see 19 N. C. Law Rev. 507. For comment on the 1943 amendment, see 21 N. C. Law Rev. 359.

The constitutionality of this section was upheld in *Stanback v. Citizen's Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929). Mere expectancies of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the legislature of the power to enact this section authorizing revocation of a voluntary grant. *MacMillan v. Branch Banking, etc., Co.*, 221 N. C. 352, 20 S. E. (2d) 276 (1942).

The 1929 amendment to this section is constitutional as applied to trusts created before the effective date of the amendment. *Stanback v. Citizen's Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929), distinguishing *Roe v. Journegan*, 175 N. C. 261, 95 S. E. 495 (1918), and *Roe v.*

Journigan, 181 N. C. 180, 106 S. E. 680 (1921).

Though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of a trust given by this section is not within the constitutional inhibition. *Stanback v. Citizen's Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

Section before 1929 Amendment Not Retroactive.—This section as it stood before the 1929 amendment did not apply to deeds executed prior to its enactment. *Roe v. Journegan*, 175 N. C. 261, 95 S. E. 495 (1918); *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 680 (1921). See *Stanback v. Citizen's Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

1943 Amendment Is Constitutional.—Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not in esse be regarded as a vested right, the 1943 amendment to this section, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional. *Pinkham v. Unborn Children of Pinkham*, 227 N. C. 72, 40 S. E. (2d) 690 (1946).

Power of Revocation Is Not a Vested Right.—The right to revoke a voluntary conveyance of future interests in lands limited to persons not in esse is a personal power and privilege created by this section and not a vested right within constitutional protection. *Pinkham v. Unborn Children of Pinkham*, 227 N. C. 72, 40 S. E. (2d) 690 (1946).

Purpose of 1943 Amendment.—The 1943 amendment was no doubt enacted to resolve a doubtful situation which had arisen

through uncertainty as to the effect of this section on the revocability of trusts, and the incidence of federal taxation on trusts already set up, or hereafter to be created. It was intended to bring North Carolina into line with other states where the irrevocability of trusts could be assured to the grantor or settlor when made. *Pinkham v. Unborn Children of Pinkham*, 227 N. C. 72, 40 S. E. (2d) 690 (1946).

Revocation within Six Months of Effective Date.—This section was applied, as to revocation within six months after the effective date of the 1943 amendment, in *Kirkland v. Deck*, 228 N. C. 439, 45 S. E. (2d) 538 (1947).

Equity Jurisdiction over Trusts Is Not Involved.—In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not in esse, the equitable jurisdiction of the court over trust estates is not involved. *Pinkham v. Unborn Children of Pinkham*, 227 N. C. 72, 40 S. E. (2d) 690 (1946).

Power of Revocation Rests Solely in Grantor.—The power to revoke future interests conveyed by voluntary deeds to persons not in esse under the provisions of this section, rests solely in the grantor conveying such interests, and where deeds are executed by owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power. *Pinkham v. Unborn Children of Pinkham*, 227 N. C. 72, 40 S. E. (2d) 690 (1946).

A waiver of the right of revocation by the trustor of a voluntary trust when made without consideration, does not preclude the trustor from exercising his right to revoke under this section. *MacMillan v. Branch Banking, etc., Co.*, 221 N. C. 352, 20 S. E. (2d) 276 (1942).

Voluntary Trusts.—A trust estate in personality created by the donor in consideration of one dollar and natural love and affection is a voluntary trust revocable by the donor under this section. *Stanback v. Citizens Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

Deed in Marriage Settlement.—Where a woman received property without restriction from her father's estate and executed a deed in marriage settlement in trust without consideration, the deed was

a voluntary trust in contemplation of this section. *MacRae v. Commerce Union Trust Co.*, 199 N. C. 714, 155 S. E. 614 (1930).

Future Contingent Interests.—Where a voluntary trust was created for the life of the donor's nephew or until he reached the age of fifty years, and at the termination to the nephew's issue or in the absence of issue to his next of kin, those who would take in remainder would take upon a contingency, the vesting of which depended upon the uncertain happening of a future event, and the trust might be revoked by the donor. *Stanback v. Citizens Nat Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

When Child "in Being."—Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. It was held that the child was in esse at the time of the attempted revocation and therefore the revocation was ineffectual. For the purpose of capacity to take under a deed, and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary, that a child is in esse 280 days prior to its birth. *Mackie v. Mackie*, 230 N. C. 152, 52 S. E. (2d) 352 (1949).

When Interests Become Vested.—Where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children their interests do not ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. *MacRae v. Commerce Union Trust Co.*, 199 N. C. 714, 155 S. E. 614 (1930).

Revocation with Consent of Only Beneficiary of Remainder in Esse.—Plaintiff executed a voluntary trust in personality with direction that the income therefrom be paid to her for life and upon her death the trust estate be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate should be paid to a named beneficiary if living and if he were not then living then to plaintiff's heirs generally. Plaintiff had no children, and executed an instrument in writing revoking the trust upon

the payment of a specified sum to the only beneficiary of the remainder in esse, who consented to the revocation of the trust upon the payment to him of the amount agreed. It was held that under the provisions of this section plaintiff was entitled to the revocation of the trust. *MacMillan v. Branch Banking, etc., Co.*, 221 N. C. 352, 20 S. E. (2d) 276 (1942).

Law Governing Power of Revocation of Trust Settlement.—Where the daughter of a British subject took property absolutely from the trustees under his will upon her

marriage, and married in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies, the *lex loci contractu* governing the marriage settlement was that of North Carolina and the settlement was controlled by the provisions of our statutes as to its revocation. *MacRae v. Commerce Union Trust Co.*, 199 N. C. 714, 155 S. E. 614 (1930).

Applied in *Cutter v. American Trust Co.*, 213 N. C. 686, 197 S. E. 542 (1938).

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.—All deeds or instruments heretofore executed, revoking any conveyance of future interest made to persons not in esse, are hereby validated insofar as any such deed of revocation may be in conflict with the provisions of General Statutes § 39-6.

All such deeds of revocation heretofore executed are hereby validated and no such deed of revocation shall be held to be invalid by reason of not having been executed within the six-month period prescribed in the third proviso of General Statutes § 39-6. (1947, c. 62.)

Editor's Note.—The act from which this section was codified became effective on February 11, 1947, and provided that its

provisions should not affect pending litigation.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married woman's title; husband to execute.—Every conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due proof or acknowledgment thereof must be made as to the wife, and such acknowledgment or proof as to the execution by the husband and such acknowledgment or proof as to the execution by the wife shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby. (C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15; Code, s. 1256; 1899, c. 235, s. 9; Rev., s. 952; C. S., s. 997; 1945, c. 73, s. 4.)

I. General Consideration.

II. Execution by Both Husband and Wife.

A. In General.

B. Husband's Acknowledgment and Proof of Execution.

C. Acknowledgment and Privy Examination of Wife.

III. Effect of Feme Covert's Deed.

Cross References.

See Const., Art. X, § 6. As to form of acknowledgment of conveyances and con-

tracts between husband and wife, see § 47-39. As to acknowledgment at different times and places and before different officers, and order of acknowledgment, see § 39-8. As to husband's acknowledgment and wife's acknowledgment before the same officer, see § 47-40. For repeal of laws requiring private examination of married women, see § 47-116. For validation of certain instruments executed without private examination of married woman, see § 39-13.1. As to assent by minor husband to conveyances of real property, see § 30-10.

As to married women generally, see § 52-1 et seq. As to dower, see § 30-4 et seq.

I. GENERAL CONSIDERATION.

Editor's Note.—This section must be considered in connection with article X, section 6 of the Constitution of North Carolina, and chapter 52 of the General Statutes. The Constitution secures to a feme covert her property, real and personal, acquired before or after marriage, as her sole and separate estate and property. However, it requires the written consent of the husband before she can make a valid conveyance thereof. The very year of the adoption of the Constitution the legislature passed an act requiring that for the validity of a conveyance or other instrument, affecting the "estate, right or title of any married woman in lands, tenements or hereditaments," her privy examination must be taken by the proper officer. Code of Civil Procedure, § 429, subsec. 6, re-enacted, with some slight modifications, by Laws 1868-9, c. 277, § 15. This enactment continued, in substance, through the various codes and laws on the subject, appearing in Revisal 1905 as § 952. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404 (1910). The section was brought forward in a substantial manner as this section.

The 1945 amendment to this section omitted provisions relating to the private examination of the wife. The same 1945 act added § 47-116, which repeals all laws requiring private examination of married women, and § 39-13.1, which declares that no deed, etc., executed since November 7, 1944, shall be held invalid because of failure to take the private examination of a married woman. As will be readily apparent, all of the cases in the following note involve instruments executed before the 1945 act, and many of them deal with the necessity for, and the manner of taking, private examination of a married woman.

See 12 N. C. Law Rev. 68, for comment on this section.

Constitutionality.—This section is constitutional. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404 (1910); Jackson v. Beard, 162 N. C. 105, 78 S. E. 6 (1913); Graves v. Johnson, 172 N. C. 176, 90 S. E. 113 (1916).

It is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Southerland v. Hunter, 93 N. C. 310 (1885).

This section is distinct from § 30-8. Coker v. Virginia-Carolina Joint-Stock

Land Bank, 208 N. C. 41, 178 S. E. 863 (1935).

Strict Compliance Necessary.—Unless the formalities of this section are complied with, the deed is absolutely void. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6 (1913).

The section admits no distinction between legal and equitable interests, and embraces every "estate, right or title," which a married woman may possess in land, and such is the construction put upon it by the court. Clayton v. Rose, 87 N. C. 106 (1882).

Creation of Trust.—A woman under coverture cannot create a trust in land by parol or in any other manner except by embodying it in a written instrument executed in accordance with this section. Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476 (1911).

A power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity. Hollingsworth v. Harman, 83 N. C. 153 (1880).

Liability of Married Woman for Breach of Contract.—Since the enactment of the Martin Act (§ 52-2), it is held that contracts wrongfully broken by married women will subject them to liability for damages, even though they cannot be compelled to convey unless they have been privily examined according to forms of law. In other words they may be liable for damages, although specific performance cannot be required. Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820 (1914); Royal v. Southerland, 168 N. C. 405, 84 S. E. 708 (1915); Warren v. Dail, 170 N. C. 406, 87 S. E. 126 (1915).

Cited in Owens v. Blackwood Lbr. Co., 212 N. C. 133, 193 S. E. 219 (1937).

II. EXECUTION BY BOTH HUSBAND AND WIFE.

A. In General.

It is necessary that a wife's deed be signed by the husband and acknowledged by both husband and wife. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103 (1934).

Veto Power of Husband.—While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. Stallings v. Walker, 176 N. C. 321, 97 S. E. 25 (1918).

Husband and Wife Must Execute Same Instrument.—This section clearly contemplates that the same instrument of writing shall be executed by both husband and wife. Green v. Bennett, 120 N. C. 394, 27

S. E. 142 (1897); *Slocomb v. Ray*, 123 N. C. 571, 31 S. E. 829 (1898).

Reason for Joinder of Husband.—The purpose of this section in making the requirements as to the deeds of a feme covert is stated by Chief Justice Smith in *Ferguson v. Kinsland*, 93 N. C. 337 (1885), as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And Connor, J., in *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410 (1905), says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the legislature declared that with certain exceptions she could not contract without the written consent of her husband." *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913).

Husband May Execute First.—The deed is nonetheless effectual to pass the title of the wife because the husband executes it before she does. *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889).

Binding Dower Interest by Mortgage.—To bind the dower interest by mortgage the husband and wife must join in the execution of the deed; separate conveyances will not comply with the requirement of this section. *Slocomb v. Ray*, 123 N. C. 571, 31 S. E. 829 (1898).

Effect of Husband's Minority.—The part of this section requiring execution by the husband when his wife's lands are conveyed is contractual in its nature; hence when the husband is a minor the conveyance is subject to the usual rules applying to infant's contracts, and he may avoid or ratify it upon reaching his majority. *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913). But see § 30-10, which now allows a minor husband to give his assent to conveyances of realty as though he were of age.

B. Husband's Acknowledgment and Proof of Execution.

Acknowledgment or Proof of Execution Necessary to Pass Title.—The law has been changed to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (see § 39-8), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle that the General Assembly has power to prescribe the form in which

the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpaired, and was fully recognized in *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915); *Graves v. Johnson*, 172 N. C. 176, 90 S. E. 113 (1916).

The case of *Southerland v. Hunter*, 93 N. C. 310 (1885), which has been approved on this point in *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889), and in *Slocomb v. Ray*, 123 N. C. 571, 31 S. E. 829 (1898), construes § 1256 of the Code (1883), Revisal, § 952, Consolidated Statutes, § 992, which is this section; and it is there held that a deed signed by the husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken. The fact that the General Assembly saw fit to change the statute requiring proof as to the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of *McGlennery v. Miller*, 90 N. C. 215 (1884), and *Ferguson v. Kinsland*, 93 N. C. 337 (1885), and left the statute unchanged as to the requirements that the deed must be proved as to the husband to pass the title or interest of the wife, after the decision in *Southerland v. Hunter*, furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained. *Graves v. Johnson*, 172 N. C. 176, 90 S. E. 113 (1916).

Time of Acknowledgment.—While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the section that the act of acknowledgment by both should be contemporaneous. *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889). See § 39-8 and notes.

Acknowledgment after Wife's Death.—A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by this section requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, in which thereafter the husband writes in his name as a grantor, and after her death acknowledges its execution before the clerk, is invalid to pass title. *Hensley v. Blankinship*, 174 N. C. 759, 94 S. E. 519 (1917).

Consent Proved and Recorded after Wife's Death.—No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until

after the death of the wife. *Green v. Bennett*, 120 N. C. 394, 27 S. E. 142 (1897).

C. Acknowledgment and Privy Examination of Wife.

Origin of Privy Examination.—A provision for the privy examination is found for the first time in 18 Edw. I. It was first enacted in this State in 1715. *Paul v. Carpenter*, 70 N. C. 502 (1874).

Privy Examination Abolished.—This section no longer requires privy examination of the wife. For repeal of all laws requiring privy examination, see § 47-116. As heretofore mentioned, the cases cited in this note were decided when privy examination was still required.

Deed Void without Privy Examination.—A deed of a feme covert, until she is privily examined by the proper authorities, is mere blank paper, so utterly void that even if it contains a stipulation in her own behalf, she cannot have the benefit thereof. *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902). See *Askew v. Daniel*, 40 N. C. 321 (1848), approved in *Scott v. Battle*, 85 N. C. 185, 39 Am. Rep. 694 (1881), which in effect overrules *Daniel v. Crumpler*, 75 N. C. 184 (1876). See also *Adderholt v. Lowman*, 179 N. C. 547, 103 S. E. 1 (1920); *Boyett v. First Nat. Bank*, 204 N. C. 639, 169 S. E. 231 (1933).

Deed Executed in Another State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this State, without privy examination of the wife, as formerly required by this section, was void. *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

When Only Interest Is Dower.—Where the only interest of a married woman in land was her dower, her failure to sign the deed and to be privily examined did not preclude the grantee from recovering possession during her husband's life. Upon the husband's death, however, her right of dower would arise. *Deans v. Pate*, 114 N. C. 194, 19 S. E. 146 (1894).

Time of Privy Examination.—Formerly proof of acknowledgment of execution by one or both (husband and wife) must precede the examination in reference to the volition and freedom of the wife. *Southerland v. Hunter*, 93 N. C. 310 (1885); *Barrett v. Barrett*, 120 N. C. 127,

26 S. E. 691 (1897). But the decision in these cases was changed by § 39-8. See also § 47-67, which was held in the *Barrett* case not to apply so as to impair or divest the rights of intervening third persons.

Acknowledgment and Examination Cannot Be Taken over Telephone.—This section contemplates that the acknowledgment and privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by §§ 47-38, and 47-39, as to acknowledgments of grantors and married women; and acknowledgment and private examination taken of the wife over a telephone does not meet the statutory requirements, and renders the conveyance invalid as to her. *Southern State Bank v. Sumner*, 187 N. C. 762, 122 S. E. 848 (1924).

III. EFFECT OF FEME COVERT'S DEED.

How Lands of Feme Covert Bound.—In *Green v. Branton*, 16 N. C. 500 (1830), the court says that a feme covert can be bound as to her land in only two ways: first, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court. *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

Delivery of Deed Not Presumed.—The delivery of a deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife. *Tarlton v. Griggs*, 131 N. C. 216, 42 S. E. 591 (1902).

When Deed Is Inoperative.—In *Scott v. Battle*, 85 N. C. 185 (1881), it is held that a feme covert's deed, not executed in the prescribed mode, is wholly inoperative. *Clayton v. Rose*, 87 N. C. 106 (1882).

A purchase-money deed given by a feme covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife, is void because not complying with this section and art. X, sec. 6 of the Constitution. *Hardy v. Abdullah*, 192 N. C. 45, 133 S. E. 195 (1926).

A married woman is not estopped by a deed not executed in the mode prescribed by the statute. *Towles v. Fisher*, 77 N. C. 437 (1877); *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

§ 39-8. **Acknowledgment at different times and places; before different officers; order immaterial.**—In all cases of deeds, or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and due proof or acknowledgment of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in

this State or only one in this State and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after due proof as to or acknowledgment of the wife. (1895, c. 136; 1899, c. 235, s. 9; Rev., s. 953; C. S., s. 998; 1945, c. 73, s. 5.)

Editor's Note.—Prior to the enactment of this section a deed made by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her privy examination taken. This order was regarded as material, and of the substance of the execution of such a deed. Unless this order of acknowledgment and probate was observed, the deed was ineffectual to pass any title or interest whatsoever. *McGlennery v. Miller*, 90 N. C. 215 (1884). And see *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691 (1897).

Obviously such stringent and technical requirements could hardly be said to be in line with the spirit of a statute whose leading purpose was to facilitate alienation by married women, or, as said in *Barfield v. Combs*, 15 N. C. 514 (1834), to protect, not to hamper, married women. It is hard to see where any additional protection was afforded married women, while the evils and inconveniences resulting therefrom are only too apparent. This section offers a solution to the difficulty by removing the technicalities, while in nowise decreasing

the protection provided for married women. *Burgess v. Wilson*, 13 N. C. 306 (1830); *Pierce v. Wanett*, 32 N. C. 446 (1849); *Malloy v. Bruden*, 88 N. C. 305 (1883); *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691 (1897); *Graves v. Johnson*, 172 N. C. 176, 90 S. E. 113 (1916).

The 1945 amendment omitted provisions relating to the private examination of the wife. For repeal of laws requiring private examination of married women, see § 47-116.

Acknowledgment of Husband Still Required.—The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. *Graves v. Johnson*, 172 N. C. 176, 90 S. E. 113 (1916).

Need Not Be at Same Time or before Same Officer.—It is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer. *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889).

§ 39-9. Absence of wife's acknowledgment does not affect deed as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, but no such instrument shall be the act or deed of the wife unless proven or acknowledged by her according to law. (1899, c. 235, s. 8; 1901, c. 637; Rev., s. 954; C. S., s. 999; 1945, c. 73, s. 6.)

Cross Reference.—For provision that clerk of superior court pass on certificate of acknowledgment and order registration, see § 47-14.

Editor's Note.—The 1945 amendment omitted provisions relating to the private examination of the wife. For repeal of laws requiring private examination of married women, see § 47-116.

When Assent of Wife Required.—An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, subject only to her right of dower, except in the following cases: (1) Where the land in question has been allotted to him as a homestead, either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but

there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted; (3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437 (1889).

By the eighth section of the tenth article of the Constitution, a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. *Wittkowsky v. Gidney*, 124 N. C. 437, 32 S. E. 731 (1899).

When Probate Does Not Authorize

Registration.—Where the probate of a deed recites the acknowledgment and privy examination of the wife of the grantor

only, it is insufficient and does not authorize registration. *Hatcher v. Hatcher*, 127 N. C. 200, 37 S. E. 207 (1900).

§ 39-10. **Officers authorized to take privy examination.**—The officials authorized by law to take proofs and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination. (1899, c. 235, s. 6; Rev., s. 955; C. S., s. 1000.)

Cross Reference.—As to officials authorized by law to take acknowledgments, see §§ 2-16, paragraph 13, 10-4, 47-1, 47-2, 47-3.

Editor's Note.—All laws requiring private examination of married women were repealed by Acts of 1945, c. 73, s. 21, codified as § 47-116.

When Husband and Wife Out of State.—When the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of any city or town. *Paul v. Carpenter*, 70 N. C. 502 (1874).

Acknowledgment before Military Officer.—An acknowledgment and private examination taken by the provost marshal of the city of New Bern while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect as foreign judgments. *Paul v. Carpenter*, 70 N. C. 502 (1874).

When Officer Employee of Grantee.—The privy examination of a married woman

as to her execution of a deed is not invalid because taken by a notary public who was a clerk in the office of the grantee, but had no interest in the transaction. *Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835 (1898).

When Officer Related to Parties.—Probate and private examinations taken before an officer are not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715 (1899).

Omission of Seal by Justice of the Peace.—The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, which is otherwise regular. *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889).

Corrections after Expiration of Office.—A justice of the peace cannot correct his certificate made to a deed after his term of office has expired, such authority not having been given by statute. *Cook v. Pittman*, 144 N. C. 530, 57 S. E. 219 (1907).

§ 39-11. **Certain conveyances not affected by fraud if acknowledgment or privy examination regular.**—No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the acknowledgment or private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (1889, c. 389; 1899, c. 235, s. 10; Rev., s. 956; C. S., s. 1001; 1945, c. 73, s. 7.)

Cross Reference.—As to sufficiency of probate and registration without livery, see § 47-17 and annotations.

Editor's Note.—The 1945 amendment inserted the words "acknowledgment or" before the words "private examination" in the first sentence.

For repeal of laws requiring private examination of married women, see § 47-116.

See 12 N. C. Law Rev. 71.

When Privy Examination Was Not Taken.—In an action to invalidate a deed to lands because, in fact, the privy examination of the feme covert, the owner and plaintiff, had not been taken, though it was expressed to have been taken, as required in the certificate of the justice of the peace, the plaintiff may by clear, cogent, and convincing proof show that her examina-

tion had not been taken at all, and when, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice. *Davis v. Davis*, 146 N. C. 163, 59 S. E. 659 (1907).

Same—Irregularity.—Where the privy examination of a wife was not taken, or was taken in a manner insufficient to fulfill the requirements of the law, though the grantee had no knowledge thereof, the matter is open to judicial investigation. *Benedict v. Jones*, 129 N. C. 470, 40 S. E. 221 (1901). But see *Brite v. Penny*, 157 N. C. 110, 72 S. E. 964 (1911).

Presence and Undue Influence of Husband.—The presence and undue influence of the husband at the ceremony of the privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. *Brite v. Penny*, 157 N. C. 110, 72 S. E. 964 (1911), citing *Butner v. Blevins*, 125 N. C. 585, 34 S. E. 629 (1899); *Davis v. Davis*, 146 N. C. 163, 59 S. E. 659 (1907).

Fraud of Probate Officer.—Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not have it set aside upon allegation of fraud of a probate officer in taking her separate examination, when she admits that the examination was taken in substantial compliance with the requirement of the statute, and she signed the conveyance, and there is no evidence that the

mortgagee participated in the fraud. *Whitaker v. Sikes Co.*, 187 N. C. 613, 122 S. E. 468 (1924).

In *Whitaker v. Sikes Co.*, 187 N. C. 613, 615, 122 S. E. 468 (1924), the court said: "Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof, or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside."

Note Procured by Duress.—Upon the principle embodied in this section, a note given by a husband and wife, where the husband procured the wife's execution by duress, is voidable only, and is good in the hands of a bona fide holder. *L. A. Randolph Co. v. Lewis*, 196 N. C. 51, 144 S. E. 545 (1928).

Guilt of Grantee Must Be Alleged.—A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailing unless supported by an allegation that the grantee had notice of or participated in the same. *Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835 (1898).

Innocent Purchaser from Guilty Grantee Protected.—This section protects the title of an innocent purchaser for value from a grantee who did have notice of such fraud, duress or undue influence. *Butner v. Blevins*, 125 N. C. 585, 34 S. E. 629 (1899).

Applied, as to married woman's attack upon certificate of acknowledgment and privy examination, in *Lee v. Rhodes*, 230 N. C. 190, 52 S. E. (2d) 674 (1949).

§ 39-12. **Power of attorney of married woman.**—All conveyances which may be made by any person under a power of attorney from any feme covert, freely executed by her with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney. (1798, c. 510; R. C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C. S., s. 1002.)

Cross Reference.—As to registration of power of attorney, § 47-28.

§ 39-13. **Wife need not join in purchase-money mortgage.**—The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust. (1868-9, c. 204; Code, s. 1272; Rev., s. 958; 1907, c. 12; C. S., s. 1003.)

Cross References.—As to dower generally, see § 30-4 et seq. As to property in which widow is entitled to dower, see § 30-5. As to deed of husband alone, purchase-money mortgages as exception, see

§ 30-6.

Dower Right Subject to Defeat.—The dower right of a feme covert may be defeated by a mortgage of the husband alone, when for part of the purchase money.

Corporation Comm. v. Dunn, 174 N. C. 679, 94 S. E. 481 (1917).

Deeds of Trust Substituted for Purchase-Money Deed.—Where two deeds of trust are executed and substituted for the original purchase-money deed of trust,

which is canceled, the wife of the grantee acquires no dower right in land, the original debt for the purchase money not having been extinguished. *Case v. Fitzsimons*, 209 N. C. 783, 184 S. E. 818 (1936).

§ 39-13.1. **Validation of certain deeds, etc., executed by married women without private examination.**—No deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, one thousand nine hundred and forty-four, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument. (1945, c. 73, s. 21½.)

§ 39-14: Repealed by Session Laws 1943, c. 543.

Editor's Note.—Chapter 65 of the Public Laws of 1923, now codified as § 30-9, was a re-enactment of this section. How-

ever, that act contained no specific repeal of this section. The 1943 act accomplished the repeal in specific terms.

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. **Conveyance with intent to defraud creditors void.**—For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding: and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; R. C., c. 50, s. 1; Code, s. 1545; 1893, c. 78; Rev., s. 960; C. S., s. 1005.)

I. General Consideration.

II. What Conveyances Fraudulent.

A. In General.

B. Intent.

C. Badges of Fraud.

III. Rights and Liabilities of Parties and Purchasers.

IV. Rights and Remedies of Creditors.

Cross References.

As to registration of conveyances, con-

tracts to convey, and leases of land, see § 47-18. As to preferences in deeds of trust or deeds of assignment for benefit of creditors, see § 23-1 et seq. As to arrest and bail in action for fraud on creditors, see § 1-410, paragraph 5. As to attachment in action for fraud, see § 1-440.

I. GENERAL CONSIDERATION.

Editor's Note.—This section is a substantial re-enactment of the statute 13

Eliz., c. 5, sec. 2. *Bank v. Adrian*, 116 N. C. 537, 21 S. E. 792 (1895). Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9 (1895). At an early period in the judicial history of this State, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. *Logan v. Simmons*, 18 N. C. 13 (1834); *Lee v. Flannagan*, 29 N. C. 471 (1847); *Hardy & Bro. v. Skinner*, 31 N. C. 191 (1848); *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890). The statute of 13 Eliz., is declaratory of the common law so far as regards existing creditors; in this sense the statute is sometimes spoken of as being in affirmance of the common law. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. *Long v. Wright*, 48 N. C. 290 (1856).

Section Applies to State.—The statute dealing with fraudulent conveyances applies to the State as well as to individuals, and the State cannot rely on its prerogative. *Hoke v. Henderson*, 14 N. C. 12 (1831).

It applies to voluntary conveyances of personalty, as well as realty, as against creditors. *Garrison v. Brice*, 48 N. C. 85 (1855).

It Prevents Passing of Any Estate.—This section makes fraudulent conveyances absolutely void, and in that way prevents the passing of any estate whatever, as against creditors of the grantor. *Flynn v. Williams*, 29 N. C. 32 (1846).

It Applies Only to Conveyances Made by Debtor.—The section operating, as it does, to wholly avoid the conveyances coming within its purview, it can be applied only to conveyances made by the debtor himself. *Gowing v. Rich*, 23 N. C. 553 (1841).

Mortgagor Considered Owner.—In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an encumbrancer. *Wall v. White*, 14 N. C. 105 (1831).

Cited in *Askew v. Interstate Hotel Co.*, 195 N. C. 456, 142 S. E. 590 (1928); *Vollers Co. v. Todd*, 212 N. C. 677, 194 S. E. 84 (1937).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated.—In *Aman v. Walker*, 165 N. C. 224, 81 S. E. 162 (1914), it was held that the principles to be deduced from the authorities as to fraudulent conveyances, are: (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor does not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. See § 39-17 and note.

Effect of Consideration.—Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122 (1887).

Preferences.—Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under operation of the statute against fraudulent conveyances. *Hafner v. Irwin*, 23 N. C. 490 (1841).

But an agreement by which a conveyance, made for the purpose of preferring a creditor, is to be kept secret until the

debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent towards other creditors, as intended to hinder, delay, or defeat them. *Hafner v. Irwin*, 23 N. C. 490 (1841).

As to recovery of preferences by trustee under assignment for benefit of creditors, see § 23-3.

Conveyance to Trustee for Use of Creditors.—A conveyance to a trustee for the use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide. *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122 (1887). See *Royster v. Stallings*, 124 N. C. 55, 32 S. E. 384 (1899).

Conveyance to Defeat Claim for Tort.—A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection thereof in the recovery of his damages, is fraudulent and void as to such party, and the former owner of the mill, notwithstanding such conveyance, continues liable for the damage. *Purcell v. McCallum*, 18 N. C. 221 (1835).

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under this section, as to his creditors. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890).

Secret Trusts.—In *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891), it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, under this section such a deed would be void as to all persons whose claims "are, shall or might be" defrauded thereby. See *Morgan v. McLelland*, 14 N. C. 82 (1831).

Absolute Transfers Intended as Security.—A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. *Gregory v. Perkins*, 15 N. C. 50 (1833).

A deed absolute on its face, which is mere security for a debt, is void as against creditors of the grantor. *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884 (1898).

A deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior credi-

tors. *Halcombe v. Ray*, 23 N. C. 340 (1840).

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same. *Powell & Co v. Inman*, 53 N. C. 436 (1862).

Feigned and Covinous Judgment.—A feigned and covinous judgment is made utterly void as against the person who is in anywise hindered, delayed, or defrauded of his debts. *Powell v. Howell*, 63 N. C. 283 (1869).

Assignment of Life Insurance Policy.—A life insurance policy issued to one for the benefit of himself is an integral part of his estate, and a voluntary assignment thereof to his children, made when he is insolvent, is fraudulent and void. *Burton v. Farinholt*, 86 N. C. 261 (1882).

When Insolvent Debtor Improves Wife's Estate.—An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Michael v. Moore*, 157 N. C. 462, 73 S. E. 104 (1911).

Money of Debtor Deposited in Wife's Name.—Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under this section, which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. *Moore v. Greenville Banking, etc., Co.*, 173 N. C. 180, 91 S. E. 793 (1917).

B. Intent.

Intent as Essential Element.—The intent is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be bona fide due, and itself tinged with no vicious ingredient. *Moore v. Hinnant*, 89 N. C. 455 (1883).

This section was meant to prevent deeds, etc., fraudulent in their concoction,

and not merely such as in their effect might delay or hinder other creditors. *Moore v. Hinnant*, 89 N. C. 455 (1883).

Intent as Objective Element.—The intention of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covinous, the intent is necessarily so. *Stone v. Marshall*, 52 N. C. 300 (1859).

Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. *Cheatham v. Hawkins*, 80 N. C. 161 (1879).

Sufficiency of Intent.—It is not necessary that there should have been an intent to hinder, delay, and defraud. An intent either to hinder and delay, or an intent to defraud, is sufficient. *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59 (1891).

Deed of Trust Executed with Intent to Delay.—A deed of trust executed by a corporation, or an individual, for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from the which enough might be realized to pay all the debts, is fraudulent and void as against creditors. *London v. Parsley*, 52 N. C. 313 (1859).

Fraud a Compound Question of Law and Fact.—In *Crow v. Holland*, 12 N. C. 481 (1828), it was said: "Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question of law for the court to decide."

Intention Ascertained from "Badges of Fraud".—It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose—to be to defraud his creditors, we need not look further. This will avoid the assignment. But if he has not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made—to what are called the "badges of fraud". *Royster v. Stallings*, 124 N. C. 55, 32 S. E. 384 (1899).

C. Badges of Fraud.

Badges of Fraud Defined.—It frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what

are designated as "badges of fraud". These badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not accessible to his adversary. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890).

The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. *Royster v. Stallings*, 124 N. C. 55, 32 S. E. 384 (1899).

Retention of Possession Not Fraudulent Per Se.—Possession retained by the vendor of chattels does not, per se, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none is stated in the bill of sale. *Howell v. Elliott*, 12 N. C. 76 (1826).

Permitting Mortgagor to Remain in Possession of and Sell Stock of Merchandise.—Where mortgagees expressly agree to permit mortgagor to remain in possession of the stock of merchandise and sell the same in the usual course of trade, but do not require him to account for the proceeds of same, until he is adjudged bankrupt, the mortgage is presumptively fraudulent in law, and the burden is upon the mortgagor to rebut that presumption by proof that there were no preexisting debts at the time the mortgage was executed, or that the mortgagor had assets sufficient and available to pay the existing debts exclusive of the property embraced in the mortgage. In *re Joseph*, 43 F. (2d) 252 (1930). See *Morris Plan Bank v. Cook*, 55 F. (2d) 176 (1932).

Reservation of Exemptions.—The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. *Barber v. Buffaloe*, 111 N. C. 206, 16 S. E. 386 (1892).

Secrecy.—It is a mark of fraud if the transaction is secret; and it is secret if it is done in the presence only of near relatives, who are such persons as may be relied on not to disclose what they know to the neighborhood, or if it is done at such distance from the neighborhood that it is unlikely that the affair will become known to them. *Vick v. Kegs*, 3 N. C. 126 (1800).

That the only parties present at a conveyance of all the vendor's land in satisfaction of old debts were the vendor and vendee, who were brothers-in-law, and the subscribing witness, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, i. e., is a badge of fraud. *Peebles v. Horton*, 64 N. C. 374 (1870).

Employing an attorney who resides at some distance, and in another county, to draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud. *Barber v. Buffalo*, 111 N. C. 206, 16 S. E. 386 (1892).

Authorizing Private Sale.—It is no ground for a court to pronounce a deed of trust fraudulent per se, as against other creditors, that the property conveyed was to be sold at a private sale. *Burgin v. Burgin*, 23 N. C. 453 (1841). See *Barber v. Buffalo*, 111 N. C. 206, 16 S. E. 386 (1892).

Evidence of Fraud in Assignment for Creditors.—In *Barber v. Buffalo*, 122 N. C. 128, 29 S. E. 336 (1898), it was held that there was sufficient evidence of fraud in an assignment for the benefit of creditors to take the case to the jury. There the party preferred, a relative of the assignor, went 16 miles on Sunday night with the attorney who drew the deed of assignment, bought in the property, with the debt secured, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. *Royster v. Stallings*, 124 N. C. 55, 32 S. E. 384 (1899).

Effect of Testimony as to Bona Fides of Transaction.—The rule laid down in *Reiger v. Davis*, 67 N. C. 185 (1872), was that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is regarded as fraudulent, but when these relatives are made witnesses in the cause, and depose to the fairness and bona fides of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Cross Reference.—See §§ 39-19, 39-21.
Conveyance Is Valid between the

Parties.—The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from this section, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. *Lane v. Becton*, 225 N. C. 457, 35 S. E. (2d) 334 (1945).

Valid against Maker.—A conveyance made with an intent to defraud creditors is nevertheless valid against the maker and all others except creditors and those who purchase under a sale made for their benefit. *Saunders v. Lee*, 101 N. C. 3, 7 S. E. 590 (1888).

When Parties in Pari Delicto.—In *York v. Merritt*, 77 N. C. 213 (1877), the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against either party. *Bank v. Adrian*, 116 N. C. 537, 21 S. E. 792 (1895).

Bona Fide Purchaser from Fraudulent Grantor.—A bona fide purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. *Plummer v. Worley*, 35 N. C. 423 (1852). See § 39-21.

Purchaser with Notice of Former Fraudulent Conveyance.—Since the passage of the Act of 1840 a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor. *Hiatt v. Wade*, 30 N. C. 340 (1848); *Triplett v. Witherspoon*, 70 N. C. 589 (1874).

Bona Fide Purchaser from Fraudulent Grantee.—A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the fraudulent grantor. *Saunders v. Lee*, 101 N. C. 3, 7 S. E. 590 (1888). And in *Young v. Lathrop*, 67 N. C. 63, (1872), Chief Justice Pearson said: "Whatever may be said about fairness or unfairness towards creditors, the legislative will gives preference to a bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin."

Constructive Notice.—A purchaser from a trustee, under a conveyance containing upon its face evidence of a fraudulent pur-

pose to defeat creditors, takes with notice of such evidence. *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122 (1887).

Burden of Proof.—The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903).

Where a conveyance from an insolvent husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59 (1891).

IV. RIGHTS AND REMEDIES OF CREDITORS.

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under this section. *Bryant v. Bryant*, 212 N. C. 6, 192 S. E. 864 (1937).

Prior and Subsequent Creditors.—See first paragraph under analysis line II, A, of this note.

Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to subsequent creditors seeking satisfaction out

of the property conveyed, merely evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors, where debts cannot be otherwise satisfied, it constitutes fraud in law to be declared by the court. *O'Daniel v. Crawford*, 15 N. C. 197 (1833).

A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor; as against subsequent creditors, whether the conveyance is fraudulent or not depends upon the bona fides of the transaction, and the question is one of intent, to be passed on by the jury. *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862 (1891). See § 39-17 and note.

Surety on Bond.—The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that a conveyance with intent to defraud creditors is void as to existing obligations. *Graeber v. Sides*, 151 N. C. 596, 66 S. E. 600 (1909).

Void in Part Void in Toto.—If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void. *Hafner v. Irwin*, 23 N. C. 490 (1841).

When Trustee in Bankruptcy May Have Conveyance Set Aside.—A trustee in bankruptcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, if any creditor of the bankrupt would be entitled to do so. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903).

§ 39-16. Conveyance with intent to defraud purchasers void.—Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same. (27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2; R. C., c. 50, s. 2; Code, s. 1546; Rev., s. 961; C. S., s. 1006.)

Cross Reference.—As to registration, see the Connor Act, §§ 47-17, 47-18, 47-19, and 47-20.

Editor's Note.—The statute 27 Elizabeth, from which this section is derived, enacts that conveyances of land, made with intent to defraud purchasers, shall only, as against purchasers for good consideration, be void. Under the act it was, of course,

held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and, with notice of the deed, the purchaser had also notice of the fraud. The legislature thought proper in 1840 to alter this, and to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without

notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. *Hiatt v. Wade*, 30 N. C. 340 (1848). See also dissenting opinion in *Bank of New Hanover v. Adrian*, 116 N. C. 537, 21 S. E. 792 (1895).

It was formerly a settled and unbroken holding in this State that this section applied only to land. However, the need for an extension of its provisions to personal property was keenly felt. So, while the rule was too well established for the courts to break away, the statute brought relief by extending the section to "goods and chattels," the change appearing for the first time in § 1546 of the Code of 1883. See *Long v. Wright*, 48 N. C. 290 (1856), distinguishing *Plummer v. Worley*, 35 N. C. 423 (1852).

Section Construed with Registration Act.—This section and the Registration Act (§§ 47-17 to 47-20) were both intended to prevent fraud, and must be construed together with that view. *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338 (1900).

First Bona Fide Purchaser from Vendor or Vendee Protected.—The statute of 27 Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. *Hoke v. Henderson*, 14 N. C. 12 (1831).

Equity Will Not Deprive of Legal Advantage.—No one has claims to the consideration of a court of equity superior to those of a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. *Crump v. Black*, 41 N. C. 321 (1849).

"Purchaser" Defined.—The term "purchaser" is not used in this section in its technical sense for one who comes to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and, as we think, buys fairly and of course at a fair price. *Fullenwider v. Roberts*, 20 N. C. 420 (1839).

Good faith and a fair price are requisite to constitute a good purchase. *Fullenwider v. Roberts*, 20 N. C. 420 (1839).

What Is Full Value.—The second purchaser must now, as before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonable fair price, such as would indicate fair dealing and not be suggestive of fraud. *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338 (1900).

Purchase for "a Petty Sum."—When

the consideration is pecuniary, a "petty" sum as compared to the value of the land would not help a second over the head of a first conveyance. *Fullenwider v. Roberts*, 20 N. C. 420 (1839).

One-Half or Two-Thirds Value.—Under this section a man cannot be held to be a purchaser for a valuable consideration who gives for the land not more than one-half or two-thirds of the value. *Harris v. DeGraffenreid*, 33 N. C. 89 (1850).

A mortgage to secure a present loan constitutes the mortgagee a purchaser for value within the meaning of the section. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

Mortgage to Secure Past Indebtedness.—And the same principle obtains in reference to mortgages and deeds of trust to secure a past indebtedness, except as to an estate or interest existent in the property conveyed. *Potts v. Blackwell*, 57 N. C. 59 (1858); *Brem v. Lockhart*, 93 N. C. 191 (1885); *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

A deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against a prior deed of gift as being a subsequent sale to a purchaser for a valuable consideration under this section. *Ward v. Wooten*, 75 N. C. 413 (1876).

Assignee of Fraudulent Vendee.—An assignee for the benefit of creditors of a fraudulent vendee, incurring no new liability on the faith of his title, is not protected. *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892 (1892).

Such an assignee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. *Carpenter v. Duke*, 144 N. C. 291, 56 S. E. 938 (1907).

Possession by Third Person Legal Notice.—Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor. *Bost v. Setzer*, 87 N. C. 187 (1882).

It is clear that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance, and that such possession of the donee or for him amounts to notice in respect only to those tracts or parcels to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. *Wade v. Hiatt*, 32 N. C. 302 (1849).

Burden of Proof.—Where both parties

claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first, the plaintiff makes out a prima facie case, and the burden of proof is shifted upon the defendant to attack

the bona fides of the plaintiff's deed, and to defeat it, if he can, by establishing fraud. *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338 (1900).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (1840, c. 28, ss. 3, 4; R. C., c. 50, s. 3; Code, s. 1547; Rev., s. 962; C. S., s. 1007.)

When Voluntary Deed Void Per Se.—

A voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. *McCanless v. Flinchum*, 89 N. C. 373 (1883); *Hobbs v. Cashwell*, 152 N. C. 183, 67 S. E. 495 (1910).

It is a well-settled rule of law in this State that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. *McCanless v. Flinchum*, 89 N. C. 373 (1883); *Hobbs v. Cashwell*, 152 N. C. 183, 67 S. E. 495 (1910).

Rights of Prior and Subsequent Creditors.—The controlling principle is stated in *Aman v. Walker*, 165 N. C. 224, 227, 81 S. E. 162 (1914), as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally." See *Sutton v. Wells*, 177 N. C. 524, 99 S. E. 365 (1919).

Section Applies Only to Gifts Inter Vivos.—This section makes a qualification in the maxim "A man must be just before he is generous" in cases where the donor, at the time of the gift retained property, fully sufficient and available for the satisfaction of all of his then creditors. But this modification is confined to gifts inter vivos. In respect to legacies, or gifts by will, there has been no modification of

the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it, and the assent of an executor to a legacy, before he has paid all of the debts of the testator, is void as to creditors. *Pullen v. Hutchins*, 67 N. C. 428 (1872).

Judgment in Partition Proceeding as Voluntary Transfer.—A bankrupt was allotted an undivided interest in certain lands as his homestead, and the remainder in such undivided interest was sold to make assets, and at the sale was bought by the bankrupt's wife. The land was then partitioned by order of court, and in the partition proceeding the husband acknowledged the interest in remainder of his wife. It was held that, if the sale of the reversionary interest to the wife was invalid, the judgment in the partition proceeding estopped the husband from denying the interest of his wife, and operated as a gift to her within the meaning of this section, and in the absence of allegations that the husband had debts at the time of the partition, and that he did not retain sufficient assets to pay them, the land could not be reached by a subsequent creditor of the husband. *Wallace v. Phillips*, 195 N. C. 665, 143 S. E. 244 (1928).

Transfer in Consideration of Support of Debtor for Life.—A contract was made in consideration of support by a son of his father and mother for life, for one hundred dollars and certain shares of stock of the father, of the value of seven thousand dollars, and the father did not retain sufficient property out of which to pay his then existing creditors. The son acted in good faith without notice or knowledge. It was held that the transfer of the stock to the son was not valid as against his father's creditors beyond the amount he had expended for the support for which he was

liable under the terms of the contract. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 143 S. E. 518 (1928).

Transfer in Consideration of Support of Debtor's Invalid Children.—Where a deed from father to son provided that the grantee should support his invalid brothers (naming them) and comply with the conditions imposed, it was not voluntary within the meaning of this section, but rests upon a valuable consideration. Worthy v. Brady, 91 N. C. 265 (1884).

Deed Made for Benefit of Debtor's Family.—Where a deed, conveying all of a debtor's property, and made without consideration, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a then existing creditor. Sturdivant v. Davis, 31 N. C. 365 (1849).

Where Grantor Afterwards Pays Debt.—A voluntary conveyance to a son is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. Smith v. Reavis, 29 N. C. 341 (1847).

Where Grantor Retains Sufficient Property to Pay Debts.—A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Finch v. Cecil, 170 N. C. 114, 86 S. E. 991 (1915).

Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay his debts in existence at the time of the gift, it is not fraudulent as to creditors. Taylor v. Eatman, 92 N. C. 602 (1885).

Sufficiency of Property Retained.—In an action to set aside a deed, evidence that the grantor retained \$11,625 to pay debts to the amount of \$11,500 was not sufficient to show that the grantor retained property sufficient to pay his debts, in view of the fact the \$1000 worth of the property was of a perishable nature, and the debtor was entitled to \$1000 worth of real estate as his homestead exemption, and \$500 worth of property as his personal property exemption. Williams v. Hughes, 136 N. C. 58, 48 S. E. 518 (1904).

A deed of gift may be fraudulent, though the donor, at the time of the gift, honestly believed that he had property sufficient to satisfy all his debts then existing, when in fact he was mistaken. Black v. Sanders, 46 N. C. 67 (1853).

Gifts of Visible Estate and Retention of Choses in Action.—Gifts of visible estate cannot be defeated where the debtor has resources in stocks or other securities of value to meet his liabilities. Worthy v. Brady, 91 N. C. 265 (1884).

Necessary Allegations to Set Aside Gift.—In order for a creditor to set aside a gift from a debtor to his wife as fraudulent against creditors, the complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer to the complaint is good. Wallace v. Phillips, 195 N. C. 665, 143 S. E. 244 (1928).

When Question of Fraud for Jury.—This section only requires the question of fraud to be submitted to a jury in cases where property fully sufficient and available to pay all creditors is retained by the donor. Black v. Sanders, 46 N. C. 67 (1853). See Sturdevant v. Davis, 31 N. C. 365 (1849).

Retention of Sufficient Property Is Question for Jury.—It is a question of fact for the determination of the jury whether the donor had retained property amply sufficient to pay his creditors at the time of his making a gift, within the intent and meaning of the section, which determines the validity of the transaction. Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100 (1919).

Presumptions and Burden of Proof.—Where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available to satisfy his then creditors, the presumption of fraud formerly arising from a voluntary conveyance is removed by this section, and the indebtedness of the grantor is evidence only from which a fraudulent intent may be inferred. Thus a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Shuford v. Cook, 169 N. C. 52, 85 S. E. 142 (1915), citing Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495 (1910). But see Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100 (1919), wherein it was said that where there is a voluntary gift or settlement, the burden of, at least, going forward with proof of retention of sufficient property is on the defendant.

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor

failed to retain property sufficient and available to pay his then existing creditors. *Hood v. Cobb*, 207 N. C. 128, 176 S. E. 288 (1934).

Evidence of Tax Valuation of Property Retained.—In an action to set aside a deed as being fraudulent as to creditors, under this section, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. *Hood v. Cobb*, 207 N. C. 128, 176 S. E. 288 (1934).

When Value Determined.—A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, was held incompetent as evidence under this section, the issue being the value of all the debtor's lands at the time of the

voluntary deed attacked in the action. *Hood v. Cobb*, 207 N. C. 128, 176 S. E. 288 (1934).

Evidence of Grantee's Resulting Trust in Property Conveyed.—Where a deed from a husband to his wife was sought to be set aside by his creditors for fraud, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her was held inadmissible, under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee simple title with full covenants and warranty of title. *Kelly Springfield Tire Co. v. Lester*, 192 N. C. 642, 135 S. E. 778 (1926).

Effect of Decree.—When the court under this section has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. *Sturges v. Portis Min. Co.*, 206 F. 534 (1934).

§ 39-18. **Marriage settlements void as to existing creditors.**—Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (1785, c. 238, s. 2; R. C., c. 37, s. 25; 1871-2, c. 193, s. 11; Code, ss. 1270, 1820; Rev., s. 963; C. S., s. 1008.)

Cross References.—As to contracts between husband and wife, see § 52-13. As to antenuptial contracts of wife, see § 52-14. As to statutes concerning married women generally, see § 52-1 et seq.

Gifts between Husband and Wife.—All gifts from a husband to his wife are good inter se, and against all persons claiming under them; and good against all persons, if he is not in debt at the time; but such gifts are voidable as to existing creditors, if their rights are not secured. *Walton v.*

Parish, 95 N. C. 259 (1886). See note to § 39-17.

Husband May Surrender Curtesy Initiate.—Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. *Teague v. Downs*, 69 N. C. 280 (1873). See § 52-13.

§ 39-19. **Purchasers for value and without notice protected.**—Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud. (13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6; R. C., c. 50, s. 4; Code, s. 1548; Rev., s. 964; C. S., s. 1009.)

Cross Reference.—See note under § 39-15.

Section Is Intended as Proviso.—The purpose of the legislature in enacting this section was to constitute an independent provision, operating as a proviso to the other sections on fraudulent conveyances. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903).

Scope and Effect.—In *Young v. Lathrop*, 67 N. C. 63, 72, 12 Am. Rep. 603 (1872), the court held that this section was a proviso to the preceding sections of the chapter, and *Pearson, C. J.*, in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was

tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being impeached and made void." See *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903).

How Grantee May Protect His Title.—

When a grantor executes a deed with intention to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor. *Cansler v. Cobb*, 77 N. C. 30 (1877); *Saunders v. Lee*, 101 N. C. 3, 7 S. E. 590 (1888); *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639 (1903).

Bona Fide Purchaser from Fraudulent Vendor Gets Good Title.—Under this section a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from a fraudulent vendor. *Peoples Bank, etc., Co. v. Mackorell*, 195 N. C. 741, 143 S. E. 518 (1928).

Bona Fide Purchaser from Fraudulent Grantee before Execution Sale.—Where a fraudulent grantee of land conveyed it to a bona fide purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and teste of the terms where it was obtained, it was held that by force of the proviso obtained in this section (4th section of the 50th ch. of the Rev. Code, 13th Eliz., ch. 5, § 6), the title of the bona fide purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. *Young v. Lathrop*, 67 N. C. 63 (1872).

Trustees and Mortgagees Take Subject to Equities.—It is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration within the provisions of 13 and 27 Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers with-

out notice. *Potts v. Blackwell*, 56 N. C. 449 (1857).

Good Consideration.—"Good consideration" means valuable consideration, or a fair price. *Young v. Lathrop*, 67 N. C. 63 (1872); *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Conveyance to Daughter in Consideration of Services.—Where A made a deed to his daughter, in consideration of services rendered and to be rendered in the future for attending upon him in his old age, with intent to defraud his creditors, the deed is void, even though the daughter had no knowledge of such fraudulent intent. *Cansler v. Cobb*, 77 N. C. 30 (1877).

When Wife Takes with Notice of Fraud.—Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the section. *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59 (1891).

Section Relates to Matters of Defense.—The matters herein stated were intended to be strictly of a defensive character, and are required to be averred and proved by the party who relies on their existence in order to validate a conveyance which the law has declared to be void because made with a fraudulent intent. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903).

Burden of Proving Consideration and Lack of Notice.—When a deed is made with a fraudulent intent, the law condemns it and pronounces it void, and it remains void, of course, until it is shown for some reason to be valid. Nothing else appearing, it is void, and he who claims under it must aver and prove whatever is necessary to sustain its validity. The burden is on the purchaser, therefore, to show, under the statute, that he purchased not only for value, but without notice. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635 (1903), distinguishing *Lassiter v. Davis*, 64 N. C. 498 (1870); *Reiger v. Davis*, 67 N. C. 185 (1872). See *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639 (1903).

Cited in Threlkeld v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99 (1930); *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.) (1942).

§ 39-20. **Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.**—No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned,

by reason that the consideration of such debt, contract or agreement is forbidden by law, if such purchaser, at the time of his purchase, did not have notice of the unlawful consideration of such debt, contract or agreement. (1842, c. 70; R. C., c. 50, s. 5; Code, s. 1549; Rev., s. 965; C. S., s. 1010.)

Cross Reference.—As to registration of conveyances affecting validity thereof, see § 47-18.

When Part of Debts Secured Are Fictitious.—A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor. *McCorkle v. Earnhardt*, 61 N. C. 300 (1867).

Mortgage Note Tainted with Usury.—This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the “purchaser of the estate or property” at the sale under the mortgage, who buys without notice of the usurious taint in the debt secured. The only case in our reports that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is *Coor v. Spicer*, 65 N. C. 401

(1871), which held that a mortgage given to secure an usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the section. Aside from the fact that it is held expressly otherwise in the latter case of *Moore v. Woodward*, 83 N. C. 531 (1880), an examination of the section will show that *Coor v. Spicer* was a palpable inadvertence. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale for a valuable consideration without notice of the illegality of the consideration of the said debt, his title is not affected thereby. *McNeill v. Riddle*, 66 N. C. 290 (1872).

§ 39-21. **Bona fide purchaser of fraudulently conveyed property treated as creditor.**—Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase. (R. C., c. 50, s. 6; Code, s. 1550; Rev., s. 966; C. S., s. 1011.)

§ 39-22. **Persons aiding debtor to remove to defraud creditors liable for debts.**—If any person removes or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action. (1820, c. 1063; R. C., c. 50, s. 14; Code, s. 1551; Rev., s. 1939; C. S., s. 1012.)

What Constitutes Aid and Assistance.

—Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. *Wiley & Co. v. McRee*, 47 N. C. 349 (1855).

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. *Moore v. Rogers*, 48 N. C. 91

(1855).

Aid Consisting Mainly in Words.—

There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the criterion of the plaintiff's right of action and the defendant's liability being that the plaintiff should have been damaged in consequence of the fraud of the defendant. *March v. Wilson*, 44 N. C. 143 (1852).

Mere Advice Insufficient.—Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statute against the fraudulent removing of debtors. *Wiley & Co. v. McRee*, 47 N. C. 349 (1855).

Carrying Debtor to Railway Station.—

Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within this section. *Moffit v. Burgess*, 53 N. C. 342 (1861).

Property Not Carried Entirely Out of County.—Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. *Godsey v. Bason*, 30 N. C. 260 (1848).

Liability of Principal When Aid Rendered by Agent.—Where an agent, having money of his principal in his hands for a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus applied does not amount to such a ratification as to subject the principal. *Moore v. Rogers*, 51 N. C. 297 (1859).

Knowledge of Particular Debt Unnecessary.—Where a person who has removed a debtor out of a county is sued by a creditor, it is not necessary to show that this person had a knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors. *Godsey v. Bason*, 30 N. C. 260 (1848).

Intent of Escaped Debtor Immaterial.

—The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. *Moffitt v. Burgess*, 53 N. C. 342 (1861).

Action by Bail of One Arrested under Writ of Capias Ad Respondendum.—The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to pay the debt sued on. *March v. Wilson*, 44 N. C. 143 (1852).

Surety on Constable's Bond Not Creditor.—A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor so as to entitle him to recover against one for fraudulently removing his principal. *Booe v. Wilson*, 46 N. C. 182 (1853).

Measure of Damages.—In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. *Godsey v. Bason*, 30 N. C. 260 (1848).

Same Jury in Suit by Different Creditors.—An action on the case, brought by A against B, for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C against B for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A against B, and the challenge ought to be allowed, and this although additional evidence is to be adduced in the second trial. *Baker v. Harris*, 60 N. C. 271 (1864).

§ 39-23. Sales in bulk presumed fraudulent.—The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller, at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. Such sale, even though the above requirements as to inventory and notice are fully complied with, renders the transaction prima facie fraudulent, and open to attack on such ground by creditors of the seller. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as they will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any

creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; C. S., s. 1013; 1933, c. 190; 1945, c. 635.)

Cross References.—As to power of corporation to sell, transfer and convey property in course of business, see § 55-26, cl. 9. As to assignments for benefit of creditors, see § 23-1 et seq.

Editor's Note.—The words "seven days before the proposed sale," near the end of the first sentence, were substituted by the 1933 amendment for the words "within said time."

The 1945 amendment struck out the words "prima facie evidence of fraud, and" formerly appearing before the word "void" in the first sentence, and inserted the second sentence.

This section is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. *Pender v. Speight*, 159 N. C. 612, 75 S. E. 851 (1912).

Section Is Valid Exercise of Police Power.—This section is a valid exercise of the police powers of government, and such sale is to be regarded as prima facie fraudulent in the trial of an issue as to its validity. *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417 (1913); *Gallup & Co. v. Rozier*, 172 N. C. 283, 90 S. E. 209 (1916); *Whitmore-Ligon Co. v. Hyatt*, 175 N. C. 117, 95 S. E. 38 (1918); *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562 (1921).

Strict Construction.—The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919).

Sale Not in Compliance with Section Void as to Creditors.—A sale in bulk of a large part or the whole of a stock of merchandise under the conditions set forth in this section, without an inventory and proper notice to creditors or without an adequate and proper bond to account for the proceeds, is absolutely void as to

creditors, and the merchandise sold may be made available for their debts and claims. *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417 (1913); *Gallup & Co. v. Rozier*, 172 N. C. 283, 90 S. E. 209 (1916); *Whitmore-Ligon Co. v. Hyatt*, 175 N. C. 117, 95 S. E. 38 (1918).

Subsequent Creditors Not Included.—This section applies only to creditors of the seller at the time of the sale, and not to a subsequent creditor. *Farmers' Bank, etc., Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527 (1925).

Merchandise Defined.—Within the intent and meaning of this section the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or the furniture and fixtures used in connection with conducting the business of a restaurant. *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919).

Business of Purchaser Is Immaterial.—Where a dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the purchasers may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919), for the question is not what the purchaser has done, or proposed to do, with the goods, but what was the business of the vendor who sold them. *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562 (1921).

"Sale" within Statute.—Where a bankrupt transfers a large part of his stock of goods to a corporation, which does not assume any of the debts, but merely issues its capital stock in payment, the sale is void as against creditors, in view of this

section, the word "sale" in the statute meaning the transfer of property from one person to another for consideration of value, regardless of the mode of payment of consideration. *First Nat. Bank v. Raleigh Sav. Bank, etc., Co.*, 37 F. (2d) 301 (1930).

Purchaser Not Personally Liable.—Under the provisions of this section a creditor would be entitled, at most, to have the transfer set aside, but not to hold the purchaser personally liable. *Goldman & Co. v. Chank*, 200 N. C. 384, 156 S. E. 919 (1931), discussing but not deciding whether sale was contrary to section. See *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562 (1921).

Vendor's Right to Personal Property Exemption.—The vendor in a sale of merchandise in bulk which is void under our statute is not deprived of his right to his

personal property exemption under execution of his judgment creditor. *Whitmore-Ligon Co. v. Hyatt*, 175 N. C. 117, 95 S. E. 38 (1918).

When Compliance Is Question for Jury.—In an action to set aside the sale of a stock of merchandise in bulk as void against creditors, it is for the jury to determine whether the seller had complied with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void, is reversible error. *Gallup & Co. v. Rozier*, 172 N. C. 283, 90 S. E. 209 (1916).

Cited in *Begnell v. Safety Coach Lines*, 198 N. C. 688, 153 S. E. 264 (1930).

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. **Authority to acquire and hold real estate.**—Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or profession. (1939, c. 133, s. 1.)

Cross References.—As to unlawfulness of associations, etc., maintaining places for receiving, keeping, etc., liquors, see § 18-15. As to secret political and military organizations, see § 14-10.

§ 39-25. **Title vested; conveyance; probate.**—Where real estate has been or may be hereafter conveyed to such organizations or associations in their common or corporate name the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyances thus made by such organizations and associations shall convey good and fee simple title to said land. (1939, c. 133, s. 2.)

Cross References.—As to power of corporation to convey, see § 55-40. As to probate and registration for corporate conveyances, see §§ 47-16, 47-41.

§ 39-26. **Effect as to conveyances by trustees.**—Nothing in this article shall be deemed in any manner to change the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations where such land is conveyed to and held by such trustees. (1939, c. 133, s. 3.)

Cross Reference.—As to power of trustees of a religious body to convey property, see § 61-4.

§ 39-27. **Prior deeds validated.**—All deeds heretofore executed in con-

formity with this article are declared to be sufficient to pass title to real estate held by such organizations. (1939, c. 133, s. 4.)

ARTICLE 5.

Sale of Building Lots in North Carolina.

§ 39-28. **Application for permit to sell.**—After March 9, 1927, before a building lot or lots in a new subdivision of real estate is offered for sale or sold in North Carolina wherein it is represented or agreed that streets, sidewalks, water, sewer, lights or other improvements are to be made for the benefit of the purchaser or purchasers, the person, firm or corporation desiring to offer the same for sale shall first apply to the clerk of the superior court of the county wherein the building lot or lots are situated for a permit to so sell said lots. (1927, c. 210, s. 1.)

§ 39-29. **Contents of application.**—The application for a permit to sell must state the location of the lots or lot with an estimate of the cost of the improvement proposed to be made on each lot as a whole; the estimate of cost so made shall be certified as approximately correct by a civil engineer or county surveyor licensed to practice in the State of North Carolina. (1927, c. 210, s. 2.)

§ 39-30. **Investigation by clerk; bond.**—Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased. (1927, c. 210, s. 3.)

§ 39-31. **Application, certificate, bond and order filed as permanent record.**—The clerk of the superior court shall preserve the application, certificate and bond and his orders thereon as a permanent record for the benefit of any party whose rights are affected thereby and shall, when the provisions of this article have been fully complied with, and when a filing fee of one dollar has been paid, issue a permit to the applicant to sell said lot or lots. (1927, c. 210, s. 4.)

§ 39-32. **Penalty for violation.**—Any person, firm or corporation selling or offering for sale any building lot or lots in violation of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1927, c. 210, s. 5.)

ARTICLE 5A.

Control Corners in Real Estate Developments.

§ 39-32.1. **Requirement of permanent markers as "control corners."**—Whenever any person, firm or corporation shall hereafter divide any parcel of real estate into lots and lay off streets through such real estate development and sell or offer for sale any lot or lots in such real estate development, it shall be the duty of such person, firm or corporation to cause one or more corners of such development to be designated as "control corner" and to affix or place at such control corner or corners permanent markers which shall be of such material

and affixed to the earth in such a manner as to insure as great a degree of permanence as is reasonably practical. (1947, c. 816, s. 1.)

Cross Reference.—As to maps of streets and sidewalks in subdivisions, see § 160-226.

§ 39-32.2. **Control corners fixed at time of recording plat or prior to sale.**—Such control corner or corners, as described in § 39-32.1, and such permanent marker or markers, as described in § 39-32.1, must be designated and affixed at the time of recording the plat of said land or prior to the first sale of any lot or lots constituting a part of the real estate development which said person, firm or corporation has caused to be laid off in lots with designated streets. (1947, c. 816, s. 2.)

§ 39-32.3. **Recordation of plat showing control corners.**—Upon designating a control corner and affixing a permanent marker, said person, firm or corporation shall cause to be filed in the office of the register of deeds of the county in which the real estate development is located a map or plat showing the location of the control corner or corners and permanent marker or markers with adequate and sufficient description to enable a surveyor to locate such control corner or marker. The register of deeds shall not accept for registration or record any map or plat of a real estate subdivision or development made after the effective date of this article, unless the location of such control corner or corners is shown thereon. (1947, c. 816, s. 3.)

Editor's Note.—Section 6 of the act from which this article was codified made it effective on July 1st, 1947.

§ 39-32.4. **Description of land by reference to control corner; use of control corner to fix distances and boundaries prima facie evidence of correct method.**—Any lot or lots sold or otherwise transferred at the time of or subsequent to the establishment of a control corner may be described in any conveyance so as to include a reference to the location of said lot or lots which are being conveyed with respect to the control corner. Thereafter the use of the control corner in ascertaining distances so as to establish boundary lines of lots within or originally within such real estate development may be admissible as evidence in any court and shall be prima facie evidence of the correct method of determining the boundaries of any lot or lots within any such real estate development. (1947, c. 816, s. 4.)

ARTICLE 6.

Power of Appointment.

§ 39-33. **Method of release or limitation of power.**—A release or limitation of a power of appointment with respect to real or personal property exercisable by deed or will or otherwise may be effected, if such power may be released or limited under the laws of this State, by the execution by the holder of such power of an instrument in writing stating that the power is released or limited to the extent set forth therein, and the delivery of such instrument to any person who might be adversely affected if such power were exercised or to the fiduciary or one of the fiduciaries, if any, having possession or control of the property over which the power is exercisable. (1943, c. 665, s. 1.)

§ 39-34. **Method prescribed in § 39-33 not exclusive.**—The method of release prescribed in § 39-33 is not exclusive, and this article shall not invalidate or be construed to invalidate any instrument or contract of release or limitation of a power not executed and delivered in the manner provided in §

39-33, or as invalidating any other act of release or limitation of a power, whether such instrument, contract or act has been heretofore or may be hereafter executed, delivered or done. (1943, c. 665, s. 2.)

§ 39-35. **Requisites of release or limitation as against creditors and purchasers for value.**—No release or limitation of a power of appointment after the effective date of this article which is made by the owner of the legal title to real property in this State shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release or limitation is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3.)

Editor's Note.—The act from which this article was codified was ratified March 8, 1943.

§ 39-36. **Necessity for actual notice of release or limitation to bind fiduciary.**—No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 4.)

Chapter 40. Eminent Domain.

Article 1.

Right of Eminent Domain.

- Sec.
40-1. Corporation in this chapter defined.
40-2. By whom right may be exercised.
40-3. Right to enter on and purchase lands.
40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc.
40-5. Condemning land for industrial sidings.
40-6. Condemnation by schools for water supply.
40-7. Condemnation for steamboat wharves and warehouses.
40-8. May take material from adjacent lands.
40-9. How material paid for.
40-10. Dwelling houses and burial grounds cannot be condemned.

Article 2.

Condemnation Proceedings.

- 40-11. Proceedings when parties cannot agree.
40-12. Petition filed; contains what; copy served.
40-13. How process served.
40-14. Service where parties unknown.
40-15. Orders served as in special proceedings in absence of other provisions.
40-16. Answer to petition; hearing; commissioners appointed.
40-17. Powers and duties of commissioners.
40-18. Form of commissioners' report.
40-19. Exceptions to report; hearing; appeal; when title vests; restitution.
40-20. Provision for jury trial on exceptions to report.
40-21. When benefits exceed damage, corporation pays costs.
40-22. Title of infants, persons non compos, and trustees without power of sale, acquired.
40-23. Rights of claimants of fund determined.
40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.

Sec.

- 40-25. Court may make rules of procedure in.
40-26. Change of ownership pending proceeding.
40-27. Defective title; how cured.
40-28. Title to State lands acquired.
40-29. Quantity which may be condemned for certain purposes.

Article 3.

Public Works Eminent Domain Law.

- 40-30. Title of article.
40-31. Finding and declaration of necessity.
40-32. Definitions.
40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner.
40-34. Form of petition.
40-35. Inclusion of several parcels.
40-36. Notice of proceedings.
40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.
40-38. Appointment of special master.
40-39. Notice of hearing by special master.
40-40. Evidence admissible; increase in value; improvements.
40-41. Report of special master.
40-42. Notice of report.
40-43. Hearing of objections by clerk of superior court.
40-44. Certified copy of judgment.
40-45. Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award.
40-46. Right to dismiss petition.
40-47. Divesting title of owner.
40-48. Payment of award into court and disbursement thereof.
40-49. Recovery of award.
40-50. Appeal.
40-51. Costs.
40-52. Powers conferred are supplemental.
40-53. Necessity for certificate of public convenience and necessity from Utilities Commission.

ARTICLE 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.—For the purposes of this

chapter, unless the context clearly indicates the contrary, the word "corporation" includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain. (C. S., s. 1705.)

Cited in *Carolina Power, etc., Co. v. Bowman*, 229 N. C. 682, 51 S. E. (2d) 191 (1949).

§ 40-2. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipe lines originating in North Carolina for the transportation of petroleum products, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipe lines originating in North Carolina for the transportation of petroleum products, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the State or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Person or persons, firms, corporations or copartnerships operating or authorized by law to operate electric light plants, or distributing electric current for lights or power, or for the purpose of constructing wires, poles or other necessary things, and for such purposes or things.

4. Public institutions of the State for the purpose of providing water supplies, or for other necessary purposes of such institutions.

5. School committees of public school districts, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

6. The department of conservation and development in the administration of the laws relating to fish and fisheries.

7. Any educational, penal, hospital or other institution incorporated or chartered by the State of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the State for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary to the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter.

8. Franchised motor vehicle carriers or union bus station companies organized by authority of the utilities commission, for the purpose of constructing and operating union bus stations: Provided, that this subsection shall not apply to any city or town having a population of less than sixty thousand.

9. The State Highway and Public Works Commission, for the purpose of acquiring such land or property as may be necessary for the erection of or additions to any building or buildings for the purpose of housing its offices, shops, garages, for storage of supplies, material or equipment, for housing, caring or providing for prisoners, or for any other purpose necessary in its work, includ-

ing the administration of the State prison system. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C. S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806.)

- I. General Consideration.
- II. Nature and Purpose.
- III. Extent of Power.
- IV. To Whom Granted.
- V. Compensation Essential.

Cross References.

As to the power given railroad companies to condemn land, see § 60-37, paragraph 2. As to power of street and interurban railways to condemn land for water-power plants, see § 60-134. As to power of electric, telegraph and power companies to acquire property, see § 56-2 et seq. As to condemning of land for water supply, see §§ 130-111, 130-112. As to right of eminent domain conferred on pipe-line companies, see § 60-146. As to power of municipal corporations to acquire property by eminent domain, see §§ 160-204, 160-205. As to power of state institutions to condemn land for water supplies, etc., see §§ 143-144, 143-145. As to condemning land for school buildings, see § 115-85. As to condemning land for hospitals, see § 131-15. As to condemning lands for roads, see §§ 136-19, 136-52. As to condemning lands for mill where land on one side of stream is owned, see § 73-5 et seq. As to condemnation for races, waterways, etc., by owner of a mill or millsite, see § 73-14 et seq. As to condemnation for drainage ditches, see § 156-1 et seq.

I. GENERAL CONSIDERATION.

Editor's Note.—The 1923 amendment added subsection 7, and the 1924 amendment added a portion of subsection 6. The 1937 amendment inserted the reference to pipe lines in the first sentence of this section, and also in subsection 1. The 1939 amendment changed subsection 3. The 1941 amendment added subsection 8 and the 1947 amendment added subsection 9. For comment on subsection 8, see 19 N. C. Law Rev. 480.

Founded on Necessity.—The right of eminent domain is possessed by the government, and may be exercised by the legislature or under its authority. It is peculiarly fit to be wielded by the legislature—it is a power founded on necessity. Raleigh, etc., R. Co v. Davis, 19 N. C. 451 (1837).

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the

legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531 (1906).

Power of Condemnation Is Dependent upon Statute.—A public service corporation has no power to condemn land by reason of its being a riparian proprietor, but only under authority given by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).

Statutes Giving Power Must Be Strictly Construed.—Statutes which authorize the exercise of the power of eminent domain must be strictly construed. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041 (1890); Carolina, etc., R. Co. v. Pennearden Lbr., etc., Co., 132 N. C. 644, 44 S. E. 358 (1903); Board v. Forrest, 193 N. C. 519, 137 S. E. 431 (1927).

For example, it has been held that the statutory authority given the county board of education to condemn land for school purposes will be strictly construed as to the extent or limit of the power given. Board v. Forrest, 193 N. C. 519, 137 S. E. 431 (1927).

The right of eminent domain can be exercised only in the mode pointed out in the statute conferring it. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4 (1889).

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of this section, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. Crisp v. Nanthala Power, etc., Co., 201 N. C. 46, 158 S. E. 845 (1931).

Power Not Implied.—The power of eminent domain cannot be implied or inferred from vague or doubtful language. Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970 (1910).

If the statute is silent on the subject it is to be presumed that the legislature intended that the necessary property should be obtained by contract. Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970 (1910).

The provisions of the general railroad act prevail over provisions in the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

Shares of Dissenting Stockholders of Railroad—The legislature may by the exercise of the power of eminent domain authorize the consolidation of railroads and, in effect, condemn the shares of dissenting stockholders. *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 96 (1904).

II. NATURE AND PURPOSE.

Purpose of Grant.—The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. *Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5 (1914).

Draining Public Road.—Digging a ditch across private land for the purpose of draining a public road amounts to a taking of private property for a public use. *State v. New*, 130 N. C. 731, 41 S. E. 1033 (1902).

Remedy for Abuse.—If, after acquiring the land under condemnation for a public use, a company should devote it to private purposes, that is a remedy by quo warranto and otherwise. *Wadsworth Land Co. v. Piedmont Tract. Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

III. EXTENT OF POWER.

Discretion of Grantees.—A perusal of this entire chapter will clearly disclose that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only become an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

A railroad company may use and occupy a right of way acquired by it under condemnation proceedings when, in its own judgment, the proper management and business necessities of the road may require it. *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

In *Selma v. Nobles*, 183 N. C. 322, 325, 111 S. E. 543 (1922), the court said: "In construing this legislation, the court held that where the general power to condemn

exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law."

A Continuing Power.—The power of eminent domain conferred on electric public service corporations by this section is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

Rights Acquired.—Only an easement in lands passes from the owner to a railroad company under condemnation proceedings, divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company, but allowing them to use and occupy the right of way in any manner not inconsistent with the easement acquired. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902); *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

Same—As to Part Not Needed.—To the extent that the right of way is not presently required for the purpose of the road it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N. C. 254, 35 S. E. 458 (1900); *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

Unless the land is needed for some use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. *Ward v. Wilmington, etc., R. Co.*, 109 N. C. 358, 13 S. E. 926 (1891); *Ward v. Wilmington, etc., R. Co.*, 113 N. C. 566, 18 S. E. 211 (1893); *Blue v. Aberdeen, etc., R. Co.*, 117 N. C. 644, 23 S. E. 275 (1895).

Land acquired by one railroad company under a legislative grant of the right of eminent domain, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of

another railroad company. *North Carolina, etc., R. Co. v. Carolina Cent. R. Co.*, 83 N. C. 489 (1880).

IV. TO WHOM GRANTED.

Editor's Note.—The cross references above should be referred to for a list of the various corporations to which the right of eminent domain is especially granted by statute.

Public Service Corporation Engaging in Private Enterprise.—Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water, such corporation is a public service corporation and has the power of eminent domain, as provided by this section, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, nor does the fact that such public service corporation also engages in private enterprises not connected with its public service alter this result. *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N. C. 52, 175 S. E. 698 (1934).

Charter Giving Rights of Private Nature.—The right of a corporation, having the statutory powers, to condemn lands for a public use is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. *Mountain Retreat Ass'n v. Mt. Mitchell Develop. Co.*, 183 N. C. 43, 110 S. E. 524 (1922).

Where a corporation is authorized to operate a street railway, it may exercise the right of eminent domain, in respect to this business, given to it by its charter and by this section, notwithstanding it is also authorized to conduct business of a private nature. *Wadsworth Land Co. v. Piedmont Tract. Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

The use of the word "commercial railway" in a petition does not indicate that the land is to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public. *Wadsworth Land Co. v. Piedmont Tract. Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

A statute giving power to overseers of roads to cut poles on adjacent land is an

instance of the exercise on the part of the sovereign of the right to take private property for the use of the public upon making compensation. *Collins v. Creecy*, 53 N. C. 333 (1861).

V. COMPENSATION ESSENTIAL.

Cross Reference.—As to determining compensation, see note to § 40-17.

Necessity for Compensation.—The qualification of the right of eminent domain, that compensation should be made for private property taken for public use, is founded on justice and a due regard for basic property rights, and is applied in North Carolina. *Bennett v. Winston-Salem Southbound R. Co.*, 170 N. C. 389, 87 S. E. 133 (1915). See *Johnston v. Rankin*, 70 N. C. 550 (1874); *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public. *Stamey v. Brunsville*, 189 N. C. 39, 126 S. E. 103 (1925).

Unconstitutional Unless Compensation Provided.—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public or any other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 106 S. E. 497 (1921).

Where a statute makes no provision for compensation, it is to be presumed that the legislature did not intend that the power of eminent domain should be exercised. *Commissioners v. Bonner*, 153 N. C. 66, 68 S. E. 970 (1910).

When Compensation Implied.—Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. *Lloyd v. Venable*, 168 N. C. 531, 84 S. E. 855 (1915). See 15 N. C. Law Rev. 362.

§ 40-3. Right to enter on and purchase lands. — Such bodies politic,

corporation, or persons, may at any time enter upon the lands through which they may desire to conduct the roads or works authorized under § 40-2 and lay out the same, and they may also enter upon such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, tool houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land so entered on such sum as may be agreed on between them. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; C. S., s. 1707.)

Nature of Right of Entry.—The right of entry granted a railroad company under this section is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. And without the consent of the owner the company cannot enter by virtue of this section, for the pur-

pose of building its road. *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906).

Company Not a Trespasser.—A railroad company having the right of eminent domain, entering upon and occupying lands for building its tracks, is not a trespasser. *Abernathy v. South, etc., R. Co.*, 150 N. C. 97, 63 S. E. 180 (1908).

§ 40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc.—Any railroad company operating a line or railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting to a union depot which has been ordered by the Utilities Commission, or for the purpose of maintaining, operating, improving, or of straightening its line, or of altering its location, or of constructing double-tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall have the power to condemn all lands needed for such purpose under the provisions of this chapter. More than two acres may be condemned for yard or terminal facilities if required for due operation of the railroad. No lands in any incorporated towns shall be condemned under this section until approved by the Utilities Commission, nor shall any yard, garden or dwelling house be condemned, unless the Utilities Commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling house, except at an excessive cost. The power to condemn land under this section shall be enforceable and matters arising in regard thereto shall be tried only in the courts created by or under the Constitution of this State. No rights granted or acquired under the provisions of this section shall in any way destroy or abridge the rights of the State to regulate or control such railroad company or to exclude foreign corporations from doing business in this State. (1907, c. 458, ss. 1, 2, 3; C. S., s. 1708; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

In General.—This section confers on a railroad company the incidental right to make such changes in its line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public as contemplated by the statute. *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292 (1906).

This section was intended to apply to all cities and towns in the State, where, in the legal discretion of the commissioners, the move is practicable. *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292 (1906).

Right of Access to Union Depot.—This section confers upon any railroad com-

pany the right to condemn land for the purpose of getting to a union depot required by the order of the Utilities Commission to be built. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923).

When § 60-49 Applies.—Section 60-49, requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Utilities Commission, acting under express legislative authority and direction, requires the railroad to make the change

for the convenience of the general public. *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292 (1906).

When Injunction Will Not Issue.—Where the Utilities Commission, acting under this section, has selected a site after due inquiry, the railroads will not be en-

joined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city is being sidetracked or that their property will be damaged by the proposed change. *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292 (1906).

§ 40-5. Condemning land for industrial sidings.—Any railroad company doing business in this State, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the Utilities Commission to construct an industrial siding as provided in § 62-45, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right of way as may be necessary to carry out the orders of the Utilities Commission. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203; C. S., s. 1709; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

Cited in *State v. Allen*, 197 N. C. 684, 150 S. E. 337 (1929).

§ 40-6. Condemnation by schools for water supply.—If the school authorities mentioned in subsection 5 of § 40-2 shall be unable to agree with the owners of any lands which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in § 40-12, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or artesian wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply. (1907, c. 671; C. S., s. 1710.)

Cross Reference.—As to condemnation of land for school buildings, see § 115-85.

§ 40-7. Condemnation for steamboat wharves and warehouses.—Upon the order of the Utilities Commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter. (Ex. Sess. 1913, c. 52; C. S., s. 1711; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

Cross Reference.—As to power and duty of Utilities Commission to require steamboat companies to provide wharf and warehouse facilities, see § 62-39.

§ 40-8. May take material from adjacent lands.—For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: Provided, that

they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees. (R. C., c. 61, s. 22; 1874-5, c. 83; Code, s. 1702; Rev., s. 2576; 1907, c. 39, s. 2; C. S., s. 1712.)

In General.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

Liability to Adjacent Owners.—A corporation damaging adjacent property while constructing a railroad is liable in

damages just as a private individual would be. *Staton v. Norfolk, etc., Railroad*, 111 N. C. 278, 16 S. E. 181 (1892).

Compensation Granted.—The owner of the land is entitled to compensatory damages for the cutting of cross-ties on land not included in the right of way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. C. 648, 20 S. E. 718 (1894).

§ 40-9. How material paid for.—If for the value of the damages done to the owner by reason of the acts mentioned in § 40-8 the parties may be unable to agree, the same shall be valued in the manner hereinafter provided. (R. C., c. 61, s. 23; 1874-5, c. 83; Code, s. 1703; Rev., s. 2577; C. S., s. 1713.)

§ 40-10. Dwelling houses and burial grounds cannot be condemned.—No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code. (Rev., s. 2578; C. S., s. 1714.)

Local Modification.—City of Hickory: 1949, c. 310.

Cross Reference.—As to acquisition of residence property, graveyards, etc., by electric, telegraph and power companies, see § 56-6.

Exercise of Discretion.—The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

This section does not apply to tenant houses, but only to the dwellings of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenants. *Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5 (1914).

Subsequent Use by Owner Not Protected.—When a provision in a charter of a railroad company or a deed granting it a right of way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right of way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact

that it has since been appropriated to such use. *Dargan v. Carolina Cent. R. Co.*, 131 N. C. 623, 42 S. E. 979 (1902); *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

Nuisance a Taking under Section.—The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, withdrawing dwellings from the effect of the statute. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

Municipal Corporations.—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by this section. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

House Not Property of Railroad.—A house standing on the right of way does not become the property of the company. *Shields v. Norfolk, etc., R. Co.*, 129 N. C. 1, 39 S. E. 582 (1901); *Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5 (1914).

The North Carolina National Park Commission created by Public Acts 1927, c.

48, is an agency of the State created by statute, vested with the power of eminent domain, and is not subject to the limitations provided in this section and § 40-11.

Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563 (1928).

Cited in *Turner v. Reidsville*, 224 N. C. 42, 29 S. E. (2d) 211 (1944).

ARTICLE 2.

Condemnation Proceedings.

§ 40-11. **Proceedings when parties cannot agree.**—If any corporation, enumerated in § 40-2, possessing by law the right of eminent domain in this State, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s. 13; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1899, c. 64; 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C. S., s. 1715.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Proceeding Governed by Rules Laid Down for Civil Actions.—As a proceeding to condemn land under statutory power is a special proceeding and is so denominated by this section, the requirements of § 1-393 that, "except as otherwise provided," special proceedings shall be governed by the same rules laid down for civil actions are applicable thereto. *Nantahala Power, etc., Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936).

Remedy Not Exclusive.—It has been held that this statutory remedy was the only one open to one whose land was appropriated as a right of way. *McIntire v. Western, etc., Co.*, 67 N. C. 278 (1872); *Allen v. Wilmington, etc., Railroad*, 102 N. C. 381, 9 S. E. 4 (1889).

This doctrine has been limited, however, as only applying to the preliminary entry upon land and the acquisition of the same for right of way purposes. And where a railroad or other public service corporation has made the entry, appropriated the right of way, constructed its road and is operating the same, and neither party has seen fit to resort to the statutory method, the owner of the land has the right at his election to sue for permanent damages and on payment of the same the easement will pass to the defendant. *Mason v. Durham County*, 175 N. C. 638, 96 S. E. 110 (1918).

Applies to All Railroads.—The method of proceeding for the condemnation of land by railroad corporations prescribed by this section is applicable to all railroads, whether formed under the general law or special act of incorporation. *Allen v. Wilmington, etc., Railroad*, 102 N. C. 381, 9 S. E. 4 (1889).

Prior Attempt to Agree Mandatory.—The statutory method of condemning a

right of way can be exercised when the parties are unable to agree upon the terms of acquisition. *Allen v. Wilmington, etc., Railroad*, 102 N. C. 381, 9 S. E. 4 (1889).

Endeavor to Agree with Infant Owners Not Required.—It is not required of a quasi public service corporation authorized to condemn land under the provisions of § 40-2, that it first endeavor to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way. *Western Power Co. v. Moses*, 191 N. C. 744, 133 S. E. 5 (1926).

No Right of Entry Until Payment.—In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisal has been paid into court. *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906).

No Application to Trespasser.—The provisions of this section only apply to the mode of acquiring title to real estate and getting a right of way, but it has no application to trespasses committed outside of the right of way in building the road, and for such trespasses the corporations are liable in a civil action. *Bridgers v. Dill*, 97 N. C. 222, 1 S. E. 767 (1887).

Condemnation by County Board of Education.—Sections 40-11 to 40-19 apply only to those corporations enumerated in § 40-2, and have no application to a county board of education condemning land for school buildings, such proceedings being controlled by § 115-85. *Board v. Forrest*, 193 N. C. 519, 137 S. E. 431 (1927).

The State Highway and Public Works Commission is an unincorporated agency

of the State and may only be sued by the citizen when authority is granted by the General Assembly, but in the matter of condemnation of land for highways and compensation therefor right of action lies in the manner set out by the statutes. The procedure prescribed is open to the property owner as well as to the Commission. *Yancey v. North Carolina State*

Highway, etc., Comm., 222 N. C. 106, 22 S. E. (2d) 256 (1942).

Cited in *Western Power Co. v. Moses*, 191 N. C. 744, 133 S. E. 5 (1926); *Winston-Salem v. Ashby*, 194 N. C. 388, 139 S. E. 764 (1927); *Reed v. State Highway, etc., Comm.*, 209 N. C. 648, 184 S. E. 513 (1936).

§ 40-12. **Petition filed; contains what; copy served.**—For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court. (1871-2, c. 138, s. 14; Code, s. 1944; 1893, c. 396; Rev., s. 2580; 1907, c. 783, s. 3; C. S., s. 1716.)

Cross References.—As to summons in contested special proceedings, see §§ 1-394, 1-395. As to service of map and profile in condemnation proceeding by railroad, see § 60-71.

Action for Breach of Contract Not Authorized.—The special proceeding, provided by this section and § 136-19, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract. *Dalton v. State Highway, etc., Comm.*, 223 N. C. 406, 27 S. E. (2d) 1 (1943).

This section stating the requisites of the petition must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908). See *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

The particular language of the statute need not be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531 (1906).

What Petition Must Allege.—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and the reason of the failure to do so. In the absence of proof thereof the petition should be dismissed. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908); *Power Co. v. Moses*, 191 N. C. 744, 133 S. E. 5 (1926).

And the petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the Commissioners are appointed. *Hill v. Glendon*,

etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171 (1893).

Same—Where Landowner Files.—It is not necessary that the petition filed by a landowner, in proceedings for the assessment of damages for land taken by a railroad company for a right of way, shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the actor in such proceedings. *Hill v. Glendon, etc., Mfg. Co.*, 113 N. C. 259, 18 S. E. 171 (1893); *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531 (1906).

Description of Property Sought to Be Acquired Is Necessary.—A description of the property sought to be acquired and not merely a description of the entire tract over which the right of way, privilege, or easement is to run is necessary. *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459 (1940).

The clause "the corporation has not been able to acquire title thereto" has no reference to the pecuniary resources of the corporation. It may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. *Western Power Co. v. Moses*, 191 N. C. 744, 133 S. E. 5 (1926).

Map and Profile.—The filing of a proper profile is a condition precedent before an order of condemnation shall be granted to a railroad. *Kinston, etc., R. Co. v. Stroud*, 132 N. C. 413, 43 S. E. 913 (1903). But the failure to so file the map and profile may be cured by amendment. *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903); *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906).

It is deemed necessary, so that the landowner may know what land is intended to be appropriated and can have his grievances adjusted, to require the filing of maps, profiles, etc. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

Summons Should Issue.—The proceeding authorized by this section is a special proceeding and a summons should issue as in all other cases. *Carolina, etc., R. Co. v. Pennearden Lbr., etc., Co.*, 132 N. C. 644, 44 S. E. 358 (1903).

Fraudulent Deed May Be Set Aside.—Where a deed for a right of way was obtained from a landowner by fraud on the part of a railroad company, the superior court has jurisdiction to set aside the con-

veyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. *Allen v. Wilmington, etc., Railroad*, 102 N. C. 381, 9 S. E. 4 (1889).

Cotenant Can File Petition.—The fact that a cotenant of land has granted a right of way to a railroad company will not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor will such facts prevent the cotenant who has made such grant from becoming a party to the proceedings and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, and this, although such forfeiture did not occur until after the petition was first filed by his cotenant. *Hill v. Glendon, etc., Mfg. Co.*, 113 N. C. 259, 18 S. E. 171 (1893).

Clerk Has Jurisdiction.—Where the charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common-law jurisdiction, it was held that the clerk of a superior court has jurisdiction of such proceeding. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

In condemnation proceedings, the statement required by this section, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by the jury—a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal. *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531 (1906).

Clerk's Finding of Facts Not Final.—The finding of the facts of the clerk upon preliminary allegations, under this section, in condemnation proceedings are not final and may be appealed from. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908).

Section Does Not Apply to Telegraph Companies.—Inasmuch as § 56-7 sets forth all the necessary statements for the petition of the telegraph company, and § 56-8 provides for its service, only so much of the railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies, and this section cannot be made to apply to telegraph companies. Phillips

v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022 (1902).

Limit of Plaintiff's Recovery Where Evidence Is Insufficient to Show Taking for Private Purpose.—Where there is no evidence upon the record showing that the taking over of a road was for a private purpose sufficient to raise an issue of fact, the plaintiff is remitted to his rights under this section and § 136-19 for the recovery of just compensation. *Reed v. State Highway, etc., Comm.*, 209 N. C. 648, 184 S. E. 513 (1936).

Waiver of Right to Require Proceeding before Clerk.—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe line is upon the State's highway over the plaintiff's land, the plaintiff, as the servient owner, may maintain his action, and the denial of this title or right by the defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under this section; and the plaintiff may maintain his action of trespass in the superior court. *Rouse v. Kinston*, 188 N. C. 1, 123 S. E. 482 (1924).

Waiver of Preliminary Hearing.—Where

§ 40-13. **How process served.**—The summons and a copy of the petition shall be served in the same manner as in special proceedings. (1871-2, c. 138, s. 14; Code, s. 1944; Rev., s. 2581; C. S., s. 1717.)

Cross Reference.—As to service of summons in special proceedings generally, see §§ 1-394, 1-395.

Applied in Carolina, etc., R. Co. v. Pennearden Lbr., etc., Co., 132 N. C. 644, 44 S. E. 358 (1903).

§ 40-14. **Service where parties unknown.**—If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situated, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh. (Code, s. 1944, subsec. 5; Rev., s. 2582; C. S., s. 1718.)

§ 40-15. **Orders served as in special proceedings in absence of other provisions.**—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings. (Code, s. 1944, subsec. 7; Rev., s. 2583; C. S., s. 1719.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 40-16. **Answer to petition; hearing; commissioners appointed.**—On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts

it is stipulated by the parties in condemnation proceedings that a hearing before commissioners appointed by the clerk under the provisions of this section should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained. *State v. Wilmington-Wrightsville Beach Causeway Co.*, 205 N. C. 508, 171 S. E. 859 (1933).

Cited in State v. Suncrest Lumber Co., 199 N. C. 199, 154 S. E. 72 (1930); *Lewis v. North Carolina State Highway, etc., Comm.*, 228 N. C. 618, 46 S. E. (2d) 705 (1948); *Bailey v. State Highway, etc., Comm.*, 230 N. C. 116, 52 S. E. (2d) 276 (1949).

alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners. (1871-2, c. 138, s. 15; Code, s. 1945; Rev., s. 2584; C. S., s. 1720.)

Finding of Facts Conclusive.—In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908).

Collateral Attack by Landowner.—The court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation. *Wadsworth Land Co. v. Piedmont Tract. Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

Advisability of Project.—The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither the defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531 (1906).

Denial That Land Necessary.—A railroad company is entitled to so much of the right of way as may be necessary for the purpose of the company, and the denial by a person in the possession of a portion of the right of way that the portion in controversy is necessary for the purposes of the company does not raise an issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use. *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

If a corporate charter is on its face inoperative and void, a court will so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. *Kinston, etc., R. Co. v. Stroud*, 132 N. C. 413, 43 S. E. 913 (1903); *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903).

What Matters Issuable.—A perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912), distinguishing *Carolina Cent. R. Co. v. Love*, 81 N. C. 434 (1879).

Where issuable matters are raised before the clerk under this section he should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

Rights Protected by Injunction.—And the rights of the parties may be protected in the meantime from interference by an injunction issued by the judge on application made in the cause, and in instances properly calling for such course. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

Appeal from Order Appointing Commissioners.—An order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners. *Telegraph Co. v. R. R.*, 83 N. C. 420 (1880); *Commissioners v. Cook*, 86 N. C. 18 (1882); *Norfolk, etc., R. Co. v. Warren*, 92 N. C. 620 (1885); *Hendrick v. Carolina Cent. R. Co.*, 98 N. C. 431, 4 S. E. 184 (1887), distinguishing *Click v. Western, etc., R. Co.*, 98 N. C. 390, 4 S. E. 183 (1887).

§ 40-17. Powers and duties of commissioners.—The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to

be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days. (1871-2, c. 138, ss. 16-18; Code, s. 1946; 1891, c. 160; Rev., s. 2585; C. S., s. 1721.)

Editor's Note.—In the published Acts of 1871-72, ch. 138, a large part of § 18 was erroneously printed under § 16. This error was repeated in the Revisal, ch. 99. See note to *American Union Tel. Co. v. Wilmington, etc., Railroad*, 83 N. C. 420 (1880). In the Code of 1883 § 1946 included §§ 16-18 of ch. 138 supra. In the Consolidated Statutes, §§ 1721 and 1723 both contained a part of § 1946 of the Code of 1883. Those sections have been brought forward in the General Statutes as § 40-17 and § 40-19.

Not Interference with Right to Jury Trial.—It seems to have been settled in *Raleigh, etc., R. Co. v. Davis*, 19 N. C. 451 (1837), that the Constitution (art. 1, sec. 19), guarantees the right to trial by jury in controversies respecting property only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the quantum of compensation to the landowner for a right of way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. *Chowan, etc., R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328 (1890). As to provision for jury trial on exceptions to report, see § 40-20.

Basis of Award.—The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. *Blue v. Aberdeen, etc., R. Co.*, 117 N. C. 644, 23 S. E. 275 (1895).

Just Compensation—Measure of Damages.—It seems to be the general rule in this jurisdiction that "the compensation which ought justly to be made" is such compensation after special benefits pecu-

liar to the land are set off against damages. *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103 (1925).

In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103 (1925).

The owner of lands, through which a railroad has acquired a right of way by condemnation, is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

Market Value.—In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right of way, subject to modification under special circumstances, as where there is a mineral deposit with the use of which the easement does not interfere. *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

General Benefits.—Prior to 1872 in estimating damages the jury were not allowed to deduct any benefits arising from the railroad under construction, which were common to the owner and all other persons in the vicinity, but could set off any benefits peculiar to the particular tract involved. *Freedle v. North Carolina R. Co.*, 49 N. C. 89 (1856). At the session of 1871-2 the legislature changed this rule so that no benefits whatever could be deducted. Code § 1946. This latter provision was repealed in 1891, Laws 1891, ch. 160. The courts have subsequently construed this repeal to mean a restoration of the old rule as stated in *Freedle's Case*,

supra. *Southpart, etc., R. Co. v. Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903).

The legislature has the power to allow municipal corporations to have the general benefits assessed as offsets against damages in an action to acquire land for a public purpose. But the power or authority must be given either by special charter or general state act. *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103 (1925).

Value as of Date Taken Governs.—For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and the land is taken within the meaning of this principle when the proceeding is begun. *Western Carolina Power Co. v. Hayes*, 193 N. C. 104, 136 S. E. 353 (1927).

Only Actual and Direct Damage Considered.—In estimating damages of any kind to lands taken by a railroad company it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property. *Madison County R. Co. v. Galligan*, 161 N. C. 190, 76 S. E. 696 (1912).

The owner is entitled to compensation for the actual and direct damages which he may sustain by being deprived of his property. *Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5 (1914).

Damage to Adjoining Land.—The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed. *Hendrick v. Carolina Cent. R. Co.*, 101 N. C. 617, 8 S. E. 236 (1888).

The owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. *Western Carolina Power Co. v. Hayes*, 193 N. C. 104, 136 S. E. 353 (1927).

Damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. *Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5 (1914).

Evidence Admissible.—In a proceeding to condemn land for a right of way, evidence to show the value of the land by its location and surroundings is admissible. But a tax list is not admissible for that pur-

pose. *Railroad v. Land Co.*, 137 N. C. 330, 49 S. E. 350 (1904).

Additional Burdens.—When a railroad company puts additional burdens upon a right of way which it has acquired by condemnation not properly embraced in the general purpose for which it was obtained, the owner is entitled to compensation for them. *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912).

A telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868 (1902); *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572 (1903); *Query v. Postal Tel. Cable Co.*, 178 N. C. 639, 101 S. E. 390, 8 A. L. R. 1290 (1919). The same rule applies to electric light wires placed along the street. *Brown v. Asheville Electric Light Co.*, 138 N. C. 533, 51 S. E. 62, 60 L. R. A. 631, 107 Am. St. Rep. 554 (1905). But the use of streets for a street railway is one of the ordinary purposes for which streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the abutting property owner to further compensation. *Hester v. Durham Traction Co.*, 138 N. C. 288, 50 S. E. 711, 1 L. R. A. (N. S.) 981 (1905).

Owner at Time of Taking Is One to Be Paid.—Compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of the taking, and not to the owner at an earlier or later date. *Empie v. United States*, 131 F. (2d) 481 (1942).

The right to flood lands in derogation of plaintiffs' easement of access does not arise merely upon the erection of the structure causing the flooding, but upon the institution of proceedings looking to the award of due compensation; and, until such proceedings are instituted by one side or the other, the flooding constitutes a mere invasion of rights which pass with a conveyance of the property to which they are attached. *Empie v. United States*, 131 F. (2d) 481 (1942).

If plaintiff does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. *Abernathy v. South, etc., R. Co.*, 150 N. C. 97, 63 S. E. 180 (1908).

Diversion of Water.—Damages caused by diversion of water are not covered by

statute providing for equipment of a right of way by railroad companies. *Ward v. Albemarle, etc., R. Co.*, 112 N. C. 168, 16 S. E. 921 (1893).

taken for railroad purposes received no special benefit is conclusive. *Southport, etc., Co. v. Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903).

Finding of Commissioners Conclusive.
—The finding of commissioners that land

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929).

§ 40-18. **Form of commissioners' report.**—When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of County:

We,, commissioners appointed by the court to assess the damages that have been and will be sustained by, the owner of certain land lying in the county of, which the corporation proposes to condemn for its use, do hereby certify that we met on (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of \$.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of \$.....

Given under our hands, the day of, A. D. 19..... (R. C., c. 61, s. 17; 1874-5, c. 83; Code, s. 1700; Rev., s. 2586; C. S., s. 1722.)

Seal Not Required.—It was formerly provided that the report of the commissioners should be under seal. In *Hanes v. North Carolina R. Co.*, 109 N. C. 490, 13 S. E. 896 (1891), the court held that this provision was not mandatory but directory only and the omission of the seal was not a fatal defect.

Description of Land Not Essential.—A report of the commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right of way. *Hanes v. North Carolina R. Co.*, 109 N. C. 490, 13 S. E. 896 (1891).

Report Need Not State Particulars as to Benefits.—The report of the commissioners will not be set aside because it fails to show in what the benefits assessed consist, where no objection was made when the report was submitted. *Wilmington, etc., R. Co. v. Smith*, 99 N. C. 131, 5 S. E. 237 (1888).

But as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, it seems that the said easement should be described therein as fully and correctly as it would be in a grant. *Railroad v. Land Co.*, 137 N. C. 330, 49 S. E. 350 (1904).

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929).

§ 40-19. **Exceptions to report; hearing; appeal; when title vests; restitution.**—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such

real estate during the corporate existence of the corporation aforesaid. A certified copy of such judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723.)

Exceptions May Be General.—Upon proper denial of the matters alleged in the petition, exceptions to the clerk's order appointing commissioners in condemnation proceedings may be of general character, and, upon appeal, will present any question appearing upon the record. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908).

No Appeal to Judge at Chambers.—No appeal lies to the judge at chambers under this section. *R. R. v. Stewart*, 132 N. C. 248, 43 S. E. 638 (1903).

Effect of Appeal.—The appeal, provided by this section, from a judgment by the clerk of the superior court in condemnation proceedings, under § 40-12, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. *Johnson City, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908).

Same—By Both Parties.—On appeal by both parties in proceedings to condemn land to the superior court in term, the trial is de novo; and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. *Durham v. Davis*, 171 N. C. 305, 88 S. E. 433 (1916).

Power of Judge.—The judge has authority unquestionably to set aside the re-

port, and to direct a new appraisal by the same commissioners or others appointed in their stead, on the ground that the damage assessed was excessive. *Hanes v. North Carolina R. Co.*, 109 N. C. 490, 13 S. E. 896 (1891).

Same—No Appeal from Remanding Order.—An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom. *Cape Fear, etc., R. Co. v. King*, 125 N. C. 454, 34 S. E. 541 (1899). This is true though a plea in bar was filed by the defendant. *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903).

Payment before Entry.—Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right of way, nor was the compensation required to be paid before entry. This section changed this by requiring the company to pay into court the sum assessed before entry. *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

Injunction Will Not Issue before Payment.—Where a railroad company, seeking to condemn land for its right of way, has given ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction will not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court. *Wellington, etc., R. Co. v. Cashie, etc., R. Co.*, 116 N. C. 924, 20 S. E. 964 (1895); *Holly*

Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549 (1903).

The title of the landowner is not divested until final confirmation and payment in full of the amount appraised. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 184 S. E. 48 (1936). See § 40-26 and note.

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report, since this section provides that the title shall pass at that time, and since petitioner may withdraw at any time prior thereto, and in proceedings instituted by the United States, the federal practice requires that the proceedings shall conform, as nearly as may be, to the law of the state in which they are brought. Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843 (1938).

It is obvious that a procedural statute may specify the stage of a condemnation proceeding at which the taking of the property of the owner and the acquisition of title by the condemnor shall occur; and this is precisely what this section has been held to accomplish. *Empie v. United States*, 131 F. (2d) 481 (1942).

If Value of Land Is Not Paid within Year the Right to Condemn Ceases.—After final judgment fixing petitioner's right to condemn, if the appraised value of the land be not paid within one year, the petitioner's right to take the property shall end, and the petitioner or claimant shall not be liable for the consideration (value of the land). *Nantahala Power, etc., Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936).

Petitioners Liable for Costs.—This section contemplates that in the event, for any reason, the condemnation proceedings are not carried through, all the costs of the proceeding, except the appraised value of the land, shall be paid by the petitioners. *Nantahala Power, etc., Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936).

Charter May Grant Power to Enter before Condemnation.—The legislature may by charter empower a railroad company to enter land and construct their road before instituting condemnation proceedings. Compensation must be provided to warrant the taking, but it need not precede the taking and the owner is confined to the special remedy given him by the statute under which his property is seized. *State v. Lyle*, 100 N. C. 497, 6 S. E. 379 (1888);

Watauga, etc., R. Co. v. Ferguson, 169 N. C. 70, 85 S. E. 153 (1915); *State v. Jones*, 170 N. C. 753, 87 S. E. 235 (1915).

Same—Power Must Be Express.—When the legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms in the charter. *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

The counsel fees authorized to be taxed in proceedings to condemn lands for railway uses under this section, can only be allowed and taxed in those cases where the court, under § 40-24, is directed to appoint an attorney to represent a party in interest who is unknown or whose residence is unknown. *North Carolina R. Co. v. Goodwin*, 110 N. C. 175, 14 S. E. 687 (1892); *Durham v. Davis*, 171 N. C. 305, 88 S. E. 433 (1916).

Judgment Should Fix Boundaries.—In an action for damages for the location of a railroad, the judgment should definitely fix the land over which the road is located and the width of the right of way. *Beal v. Railroad Co.*, 136 N. C. 298, 48 S. E. 674 (1904).

Interest from Rendition of Judgment.—Damages given in proceedings under this section fall directly under § 24-5 and the law gives interest only from the rendition of the judgment. Hence a judgment allowing interest from the date of condemnation would be erroneous. *Durham v. Davis*, 171 N. C. 305, 88 S. E. 433 (1916).

Effect of Judgment.—A railroad company by condemnation proceedings acquires an easement upon the land condemned with the right to actual possession of so much only thereof as is necessary for the operation of its road and to protect it against contingent damages. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902). And hence a house situated on the right of way at the time of the condemnation proceedings does not become the absolute property of the company. *Shields v. Norfolk, etc., R. Co.*, 129 N. C. 1, 39 S. E. 582 (1901).

Provision as to Registration Superseded.—The provision of this section that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies is superseded by § 47-27. *Carolina Power, etc., Co. v. Bowman*, 228 N. C. 319, 45 S. E. (2d) 531 (1947).

No Nonsuit after Order of Ejectment.—In proceedings by one railroad company to condemn a right of way upon which another has lawfully constructed its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after a decree has been made, for rights which the defendant is entitled to have settled by the

action have attached. *Johnson City, etc., Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908).

Cited in *Carolina Power & Light Co. v.*

Reeves, 198 N. C. 404, 151 S. E. 871 (1930); *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

§ 40-20. **Provision for jury trial on exceptions to report.**—In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded. (1893, c. 148; Rev., s. 2588; C. S., s. 1724.)

Editor's Note.—Previous to 1893 if the parties did not demand trial by jury before the appointment of the commissioners they were deemed to have waived it and it would not be thereafter granted. This section, however, specifically grants the right of trial by jury upon an appeal from the report of the commissioners. *Chowan, etc., R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328 (1890); *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903); *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531 (1906).

Limitations on Right to Jury Trial.—This section is a limitation upon the right to demand trial by jury and clearly excludes the idea that any such right is given in respect to the questions of the fact to be decided preliminary to the question of damages. *Madison County R. Co. v. Gahagan*, 161 N. C. 190, 76 S. E. 696 (1912).

Thus a landowner is not entitled at the hearing before the clerk to have issues tried by a jury. *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903).

Municipal Corporations.—Where a municipal charter provides for condemning lands of private owners for cemetery purposes in the manner prescribed for con-

demnation thereof for street or other purposes, without specific provision for appeal, this section preserves the right of appeal, and the charter provisions will not be declared unconstitutional for failure to specially provide therefor. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461 (1924).

In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by the jury in the superior court to determine his damages when he has duly preserved the right by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. *Ayden v. Lancaster*, 195 N. C. 297, 142 S. E. 18 (1928).

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 871 (1930); *Moody v. Wickard*, 136 F. (2d) 801 (1943).

§ 40-21. **When benefits exceed damage, corporation pays costs.**—In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant or other structure, are ascertained to exceed the damages to the land, then the corporation acquiring the same by right of eminent domain shall pay the costs of the proceeding except as provided by law, and shall not have a judgment for the excess of benefits over the damage. (1891, c. 160; Rev., s. 2589; C. S., s. 1725.)

Cross Reference.—As to provision that petitioner pay costs in certain condemnation proceedings, see § 6-22, paragraph 3.

Cost in Trial Court.—Where, in an action to recover damages for the taking of land for use as a side walk by defendant municipality, the jury finds plaintiff is entitled to recover nothing, the court may properly tax the costs against defendant. *Jervis v. Mars Hill*, 214 N. C. 323, 199 S.

E. 96 (1938).

Cost upon Appeal.—When it is decided by the superior court that the defendant's benefit equals the damages, the plaintiff corporation pays the costs, but if the defendant appeals and the decision of the lower court is affirmed then the cost of the appeal falls upon the defendant. *Madison County R. Co. v. Gahagan*, 161 N. C. 190, 76 S. E. 696 (1912).

§ 40-22. Title of infants, persons non compos, and trustees without power of sale, acquired.—In case any title or interest in real estate required by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same. (1871-2, c. 138, s. 28; Code, s. 1956; Rev., s. 2590; C. S., s. 1726.)

Cross References.—As to requirement that judge approve special proceeding where petitioner is infant, see § 1-402. As to sales of ward's estate by guardian, see

§§ 33-31, 33-33. As to sale of land required for public use on cotenant's petition, see § 46-27.

§ 40-23. Rights of claimants of fund determined.—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (1871-2, c. 138, s. 19; Code, s. 1947; Rev., s. 2591; C. S., s. 1727.)

Editor's Note.—The purpose of this section is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation. Under the provisions of the section

the company acquires the right of way and the court distributes the compensation. See *Abernathy v. South, etc., R. Co.*, 150 N. C. 97, 63 S. E. 180 (1908).

Applied in *Stubbs v. United States*, 21 F. Supp. 1007 (1938); *Meadows v. United States*, 144 F. (2d) 751 (1944).

§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.—The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (1871-2, c. 138, s. 20; Code, s. 1948; Rev., s. 2592; C. S., s. 1728.)

Counsel fees for attorneys appointed under this section are provided for in § 40-19. See *North Carolina R. Co. v. Goodwin*,

110 N. C. 175, 14 S. E. 687 (1892); *Durham v. Davis*, 171 N. C. 305, 88 S. E. 433 (1916).

§ 40-25. Court may make rules of procedure in.—In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceed-

ings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts. (1871-2, c. 138, s. 21; Code, s. 1949; Rev., s. 2593; C. S., s. 1729.)

In General.—The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure, and the legislature, recognizing the difficulty of doing more than outlining the practice so as to safeguard the rights of the parties, has conferred upon the court

the power to make rules of procedure when they are not expressly provided by the statute. *Abernathy v. South, etc., R. Co.*, 150 N. C. 97, 63 S. E. 180 (1908).

Quoted in *Nantahala Power, etc., Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936).

§ 40-26. Change of ownership pending proceeding.—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C. S., s. 1730.)

The right to convey land is not affected by the mere filing of condemnation proceedings, nor by appraisal without confirmation and payment, as all rights would pass to the grantee. *Nantahala Power, etc., Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936), citing *Liverman v. Roanoke, etc., R. Co.*, 109 N. C. 52, 13 S. E. 734 (1891); *Beal v. Durham, etc., R. Co.*, 136 N. C. 298, 48 S. E. 674 (1904).

Subsequent Purchaser May Recover Compensation.—An owner of land who acquires title subsequent to the location by a railroad company is not barred of his remedy for compensation where the road was not finished more than two years before he begins his action. *Hendrick v. Carolina Cent. R. Co.*, 101 N. C. 617, 8 S. E. 236 (1888); *Beattie v. Carolina Cent. R. Co.*, 108 N. C. 425, 12 S. E. 913 (1891).

The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken. *Phillips v. Postal Tel. Cable Co.*,

130 N. C. 513, 41 S. E. 1022 (1902); *Beal v. Railroad Co.*, 136 N. C. 298, 48 S. E. 674 (1904).

Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. *Liverman v. Roanoke, etc., R. Co.*, 109 N. C. 52, 13 S. E. 734 (1891).

Action for Unlawful Entry Is Personal.—The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent conveyance of the premises. *Liverman v. Roanoke, etc., R. Co.*, 109 N. C. 52, 13 S. E. 734 (1891).

The purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company. *Liverman v. Roanoke, etc., R. Co.*, 109 N. C. 52, 13 S. E. 734 (1891).

§ 40-27. Defective title; how cured.—If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same. (1871-2, c. 138, s. 23; Code, s. 1951; Rev., s. 2595; C. S., s. 1731.)

§ 40-28. Title to State lands acquired.—The Secretary of State shall

have power to grant to any railroad company any land belonging to the people of this State which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. (1871-2, c. 138, s. 27; Code, s. 1955; Rev., s. 2596; C. S., s. 1732.)

§ 40-29. Quantity which may be condemned for certain purposes.—

1. Right of way of railroad.—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. Plankroads, etc.—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

3. Depot or station.—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume, or canal, shall be condemned at one place for a depot or station. (1852, c. 92; R. C., c. 61, ss. 27, 28, 29; 1874-5, c. 83; Code, ss. 1707, 1708, 1709; Rev., s. 2597; 1907, c. 39; C. S., s. 1733.)

Cross Reference.—As to power of railroad companies to condemn more than two acres, see § 40-4.

If the charter prescribes no maximum or minimum width of the right of way, then paragraph 1 of this section applies, and the law presumes the width therein specified subject to the right of the owner to recover compensation by compliance with § 1-51. *Griffith v. Southern R. Co.*, 191 N. C. 84, 131 S. E. 413 (1926).

Company May Use Entire Right of Way.—A railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, though the owner of the land can use and occupy a part of the right of way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement. *Atlantic Coast Line R. Co. v. Bunting*, 168 N. C. 579, 84 S. E. 1009 (1915); *Tighe v. Seaboard Air Line R. Co.*, 176 N. C. 239, 97 S. E. 164 (1918).

A right of way of specified width must be located and constructed in order to be exclusive. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N. C. 254, 35 S. E. 458 (1900).

Easement over Portion Not Occupied.—It is universally held in this jurisdiction that a railroad corporation acquires by condemnation an easement over that portion of its right of way not actually occupied by its roadbed, tracks, drains and side ditches. *Griffith v. Southerland Ry. Co.*, 191 N. C. 84, 131 S. E. 413 (1926).

Owner's Right to Use.—To the extent

that the land covered by the right of way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. *Railroad Co. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779 (1897); *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N. C. 254, 35 S. E. 458 (1900); *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906); *Earnhardt v. Southern R. Co.*, 157 N. C. 358, 72 S. E. 1062 (1911); *Virginia, etc., R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (1912); *Coit v. Owenby-Wofford Co.*, 166 N. C. 136, 81 S. E. 1067 (1914).

Same—Permitting Others to Use.—The grant of a right of way of a specified width does not preclude the grantor from such use of his land himself or permitting the same to others, which is not in conflict therewith. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N. C. 254, 35 S. E. 458 (1900).

Crop Raised Must Not Endanger Company's Business.—While land included in the right of way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature when matured or maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines, for, in such case, the company would have the right to enter and remove such crops. *Raleigh, etc., R. Co. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779 (1897).

Duty of Company to Clear Right of Way.—A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes; but is required to keep the right of way clear of such growth to the outside of the side ditches on either side of the track. *Ward v. Wilmington, etc., R. Co.*, 109 N. C. 358, 13 S. E. 926 (1891).

Same—Negligence.—Where a railroad company permitted dry grass or leaves or other combustible rubbish to remain near

its track, and the same took fire from sparks emitted from one of its locomotives which had no spark arrester, and the fire was thereby communicated to the plaintiff's adjoining land, destroying timber, etc., it was held that the injury resulted from the negligence of the defendant company. *Aycock v. Raleigh, etc., Railroad*, 89 N. C. 321 (1883).

Cited in *Dowling v. So. Ry. Co.*, 194 N. C. 488, 140 S. E. 213 (1927); *Carolina, etc., Ry. Co. v. Piedmont Wagon, etc., Co.*, 229 N. C. 695, 51 S. E. (2d) 301 (1949).

ARTICLE 3.

Public Works Eminent Domain Law.

§ 40-30. **Title of article.**—This article may be referred to as the “Public Works Eminent Domain Law.” (1935, c. 470, s. 1.)

Editor's Note.—For act authorizing North Carolina Cape Hatteras Seashore Commission, created by Public Laws 1939,

c. 257, to condemn land according to the procedure contained in this article, see Public Laws 1941, c. 100.

§ 40-31. **Finding and declaration of necessity.**—(a) It is hereby declared that widespread unemployment exists throughout the State, making it impossible for many people in the State to support themselves and their families; that these conditions create a public emergency and constitute a menace to the health, safety, morals and welfare of the people of the State; that it is essential that public works projects, financed in whole or in part by the United States of America or by the State, be commenced as soon as possible in order to reduce and relieve this unemployment and prevent irreparable injury to the people of the State; that to this end, it is necessary to provide a method for the expeditious acquisition of any lands necessary for such public works projects; that such public works projects are hereby declared to be in furtherance of the public welfare and to be public uses and purposes for which public money may be spent and private property acquired; and the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination.

(b) Without limitation upon the generality of the foregoing paragraph hereof, it is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside therein; that these conditions cause an increase in and spread of disease and crime, constitute a menace to the health, safety, morals and welfare of the citizens of the State, impair economic values and are not being, and cannot within a reasonable time be corrected by the investment of private capital available for profit-making enterprises; that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe conditions exist and the provision of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired. (1935, c. 470, s. 2.)

§ 40-32. **Definitions.**—The following terms whenever used or referred to in this article shall have the following respective meanings unless a different meaning clearly appears from the context:

(a) “Public works project” shall mean any work or undertaking which is financed in whole or in part by a federal agency, as herein defined, or by a State public body, as herein defined.

(b) “Federal agency” shall mean the United States of America, the federal

emergency administration of public works, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

(c) "State public body" shall mean this State or any county, city, town, municipal corporation, authority, or any other subdivision, agency, or instrumentality, corporate or otherwise, thereof.

(d) "Authorized corporation" shall mean any corporation or association engaged or about to engage in any public works project, as herein defined, for a public use: Provided, that the construction of said public works project and its conduct thereafter by the corporation or association shall be subject to regulation or supervision by a federal agency, as heretofore defined, or a State public body, as herein defined, whether by virtue of an agreement, provision of law, or otherwise.

(e) "Real property" or "property" or "land" shall include all lands, including improvements and fixtures thereon, lands under water, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and all rights, interests, privileges, easements, encumbrances, and franchises relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

(f) "Court" shall mean the court in which jurisdiction over proceedings hereunder is vested by the provisions of § 40-33.

(g) "Petitioner" shall mean the one by whom proceedings for the acquisition of real property, as herein defined, are instituted hereunder pursuant to the provisions of § 40-33. (1935, c. 470, s. 3.)

§ 40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner.—Any federal agency, State public body or authorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project.

Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The clerk of the superior court shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which is required by this article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property. (1935, c. 470, s. 4; 1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote the second sentence of the second paragraph.

§ 40-34. Form of petition.—A proceeding may be instituted hereunder by the filing of a petition which shall be sufficient if it sets forth:

(a) The name of the petitioner.

(b) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof.

(c) A statement that the acquisition of such property by the petitioner is necessary for a public works project and a brief general description of said public works project.

(d) A statement that the proceedings are being instituted under this article.

(e) A suitable prayer for relief. (1935, c. 470, s. 5.)

§ 40-35. Inclusion of several parcels.—Any number of parcels of land, whether owned by the same or different persons and whether contiguous or not, may be included and condemned in one proceeding: Provided, such parcels are to be used for a single public works project. (1935, c. 470, s. 6.)

§ 40-36. Notice of proceedings.—Notice of such proceedings shall be given by one publication in a newspaper having a general circulation in each county in which any part of the property sought to be condemned is located. Such publication shall be at least twenty days and not more than thirty days prior to the date set for the hearing of the validity of the proceedings. Such notice shall be in substantially the following form (the blanks being appropriately filled):

TO WHOM IT MAY CONCERN:

Notice is hereby given that (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for (here give brief general description of the public works project for which the land is sought to be acquired) the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

Notice is further given that on (here insert date of hearing, which must be at least twenty days and not more than thirty days after the date of publication) there will be a hearing in this court, at the opening thereof, for (1) determining the validity of said proceedings and the right of the petitioner, if it so elects, to take title to and possession of such property prior to final judgment, as authorized by § 40-45, of the Public Works Eminent Domain Law, and any persons having any interest in or lien upon the above described property shall be deemed to have waived their rights thereafter to object to the court's decision with respect to such issues, unless prior to said date they shall have filed in writing with the clerk of said court their objections thereto; (2) the appointment of a special master to determine the compensation to be awarded for such property and the persons entitled thereto; (3) the fixing of the date and place at which said special master shall hear and determine the compensation to be paid for such property and the person entitled thereto.

Notice is further given that all claims or demands for compensation because of the taking and condemnation of such property must be filed with the above court before (here insert date fifteen days after the date above specified for the court hearing), or the same shall be deemed waived.

Dated, the day of, A. D.,

.....
Clerk of said Court.

Notice of such proceedings shall also be given (a) by posting a copy of the above notice in conspicuous places on the real property sought to be condemned, (b) by filing a copy thereof in the office of the clerk of the court in which such proceedings are pending, and (c) by filing a copy thereof in the proper office or offices for the filing of lis pendens in each county in which any part of the real property is situated.

Such publication, posting and filing shall constitute a legal and sufficient notice to all persons having any interest in or lien upon the property described in said notice. The filing of such notice in the aforesaid county office shall also be a constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the petitioner shall take all property condemned under this article free of the claims of any such person. (1935, c. 470, s. 7.)

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.—All persons who have not filed written objections with the court prior to the time of the hearing specified in the notice prescribed by § 40-36 shall be deemed to have waived the right to file objections as to the sufficiency and validity of the petition, the proceedings and the relief sought thereby, and as to the right of the petitioner to take title and possession prior to final judgment, as authorized by § 40-45.

The court, at the time specified in said notice, after hearing and determining

all issues of fact and law raised by the objections which have been filed, if any there be, shall enter a final judgment with respect to such issues, and thereafter there shall remain for determination only the amount of the compensation to be paid and the persons entitled thereto.

If any infant or other person under a legal disability shall not have appeared in the proceedings by his duly authorized legal representative, the court shall appoint a guardian ad litem to represent such person's interest in the proceedings before the special master. (1935, c. 470, s. 8.)

§ 40-38. Appointment of special master. — The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to anyone having an interest in or lien upon the property sought to be condemned. The compensation of said special master shall not exceed fifteen (\$15.00) dollars per day plus travel and subsistence expenses. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9.)

§ 40-39. Notice of hearing by special master. — Immediately after his appointment and taking of oath, the special master shall cause notice to be sent by registered mail to all persons who have appeared in the proceedings or to their attorneys of record and to all others having any interest in or lien upon the property sought to be condemned, as shown by the record of the proper county office or offices for the recording of documents pertaining to such real estate, and to all guardians ad litem appointed pursuant to the provisions of § 40-37, such notice to be addressed to such persons at their respective last known addresses. Such notice shall be substantially in the following form (with the blanks appropriately filled):

IN THE COURT FOR THE OF
TO WHOM IT MAY CONCERN:

Notice is hereby given that (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for (here give brief general description of the public works project for which the land is sought to be acquired), the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

All persons having an interest in or lien upon the above described property, for which compensation will be demanded, are hereby notified that all claims or demands for compensation by reason of the taking and condemnation of such property shall be filed in writing with said court before (here insert date at least fifteen days after the date set for the court hearing in the notice specified in § 40-36 hereof), and shall be deemed waived unless so filed, and that on a hearing will be held by the special master at (insert time and place fixed by the court for such hearing in blanks) with respect to (1) the amount of compensation to be paid for the property sought to be condemned, and (2) the persons entitled to such compensation.

Dated day of, A. D.,

.....
Special master appointed by said Court.

The special master shall also cause a copy of said notice to be posted in conspicuous places on the property sought to be condemned.

After such notice by mailing and posting, the special master, on the date for hearing specified in the aforesaid notice, shall proceed immediately to hear and

determine the question of just compensation for the taking and condemnation of the property and the persons entitled to such compensation. To this end, the special master may issue subpoenas, administer oaths to witnesses, and receive evidence and cause same to be recorded. (1935, c. 470, s. 10.)

§ 40-40. Evidence admissible; increase in value; improvements.— For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted and considered by the special master:

(a) Evidence that a building or improvement is unsafe or insanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition.

(b) Evidence that any state public body, charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or insanitary structures, issued an order directing the abatement or correction of any conditions existing with respect to said building or improvement or the demolition of said building or improvement, and of the cost which compliance with any such order would entail.

(c) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on account of obsolescence or depreciation of such property.

(d) Evidence that such buildings and improvements are being used for illegal purposes or are being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use.

(e) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

The award of compensation shall not be increased by reason of any increase in the value of the property resulting from the public works project to be placed thereon.

No allowance shall be made for improvements begun on property after the publication of the notice specified in § 40-36, except upon good cause being shown. (1935, c. 470, s. 11.)

§ 40-41. Report of special master.— The report of the special master must be filed with the clerk of the court in which said proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the court. The court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence, be prepared within the time fixed. (1935, c. 470, s. 12.)

§ 40-42. Notice of report.— Upon the filing of such report by the special master, the court, without delay, shall fix a date for the hearing of any objections filed thereto. Notice that said report has been filed, that all objections thereto must be filed with the court within ten days after the date of the mailing of such notice and that the court has fixed a certain date (which shall be stated therein) for the hearing of such objections, shall be given by sending a copy of such notice by registered mail to all persons who have appeared in the proceeding or their attorneys of record at their last known addresses. Upon the expiration of ten days after the mailing of such notice, all objections to the report shall be deemed

waived by all persons who have not filed written objections with the court. (1935, c. 470, s. 13.)

§ 40-43. Hearing of objections by clerk of superior court.—If no objections are filed to the special master's report, the clerk of the superior court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the clerk of the superior court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the clerk of the superior court shall at once appoint another special master in the same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the clerk of the superior court shall approve the special master's report, with or without modification, the clerk of the superior court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the clerk of the superior court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the clerk of the superior court shall designate the day (not exceeding thirty days thereafter, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 14; 1947, c. 781.)

Editor's Note.—The 1947 amendment substituted "clerk of the superior court" for "court" at seven places in the section.

§ 40-44. Certified copy of judgment. — Upon the rendition of the final judgment vesting title in the petitioner, the clerk of the court shall make and certify, under the seal of the court, a copy or copies of such judgment, which shall be filed or recorded in the proper county office or offices for the recording of documents pertaining to the real property described therein, and such filing or recording shall constitute notice to all persons of the contents thereof. A copy of the judgment certified by the clerk of the court as aforesaid shall be competent and admissible evidence in any proceedings at law or in equity. (1935, c. 470, s. 15.)

§ 40-45. Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award. — At any time at or after the filing of the petition referred to in § 40-34, and before the entry of final judgment, the petitioner may file with the clerk of the court a declaration of taking signed by the duly authorized officer or agent of the petitioner declaring that all or any part of the property described in said petition is to be taken for the use of the petitioner.

Said declaration of taking shall be sufficient if it sets forth: (1) a description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof; (2) a statement of the estate or interest in said prop-

erty being taken; and (3) a statement of the sum of money estimated by the petitioner to be just compensation for the property taken.

Upon the filing of said declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration title to the property specified in said declaration shall vest in the petitioner and said property shall be deemed to be condemned and taken for the use of the petitioner, and the right to just compensation for the same shall vest in the persons entitled thereto. Upon the filing of the declaration of taking, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession shall be required to surrender possession to the petitioner. In the event that the petitioner is an authorized corporation, the court, prior to directing surrender of possession to the petitioner, shall require such security to be given, in addition to the amount deposited in court, as will reasonably assure the payment of any amount ultimately determined as the compensation to be paid.

The ultimate amount of compensation shall be fixed in the manner heretofore specified. If the amount so fixed shall exceed the amount so deposited in court by the petitioner, the court shall enter judgment against the petitioner in the amount of such deficiency, together with interest at the rate of six per centum per annum on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the petitioner) and the court shall order the petitioner to deposit the amount of such deficiency in court. (1935, c. 470, s. 16.)

§ 40-46. **Right to dismiss petition.**—At any time prior to the vesting of title to the property in the petitioner, the petitioner may withdraw or dismiss its petition with respect to any or all of the property therein described. (1935, c. 470, s. 17.)

§ 40-47. **Divesting title of owner.**—Upon vesting of title to any property in the petitioner, all the right, title and interest of all persons having any interest therein or lien thereupon shall be divested immediately, and such persons thereafter shall be entitled only to receive compensations for such property. (1935, c. 470, s. 18.)

§ 40-48. **Payment of award into court and disbursement thereof.**—The payment into court by the petitioner of the amount of any award or the deposit into court by the petitioner of the amount of any award or the deposit in court of the amount estimated by the petitioner to be the just compensation for the property taken or condemned shall be deemed to be a payment or deposit of money for the use of the persons entitled thereto. Such payment or deposit shall constitute a payment to the persons entitled thereto to the extent of the moneys so paid or deposited into court.

Any such payment shall be as valid and effectual in all respects as if it were made by the petitioner directly to the person entitled thereto or, in the case of a person under legal disability, to his guardian, whether or not (a) such person or his whereabouts is known or unknown, (b) such person is under a legal disability, or (c) there are adverse or conflicting claims to such awards.

The money paid into court shall be secured in such manner as may be directed by the court and shall be paid out by the special master to the persons found to be entitled thereto by the final judgment of the court. (1935, c. 470, s. 19.)

§ 40-49. **Recovery of award.**—If an award shall be paid to a person not entitled thereto, the sole recourse of the person to whom it should have been paid shall be against the person to whom it shall have been paid. In such event the person entitled to the award may sue for and recover the same, with the law-

ful interest and costs of suit, as such money had and received to his use by the person to whom the same shall have been paid. (1935, c. 470, s. 20.)

§ 40-50. Appeal.—Any time within thirty days from the filing of any interlocutory or final order or judgment by the court, any person or persons of record in the proceedings, who shall have filed exceptions at any stage of the proceedings within the time and in the manner specified, may appeal therefrom, but only with respect to those questions or issues which were raised by such exceptions.

The taking of an appeal shall not operate to stay the proceedings under this article except when the person or persons appealing shall have obtained a stay of the execution of the judgment or order appealed from, in which event the proceedings shall be stayed only with respect to the person or persons appealing and their respective interests in the proceedings. Upon the taking of an appeal the proceedings shall be deemed severed as to the person or persons appealing and their respective interests in the proceedings.

Any interlocutory or final order or judgment shall be final and conclusive upon all persons affected thereby who have not appealed within the time herein prescribed.

Any petitioner, other than an authorized corporation, may appeal without giving bond; but any other person or persons appealing shall give bond, with good and sufficient surety, to be approved by the court, conditioned to pay all costs taxed against appellant on such appeal. (1935, c. 470, s. 21.)

§ 40-51. Costs.—If the petitioner, prior to the making of the award, shall have tendered to an interested person for his property or deposited in court for such property an amount which such interested person refused to accept or agree to as just compensation, all costs shall be assessed against such person in the event that the aforesaid amount tendered or deposited is equal to or in excess of the award fixed or confirmed by the court with respect to such parcel. (1935, c. 470, s. 22.)

§ 40-52. Powers conferred are supplemental.—The powers conferred by this article shall be in addition and supplemental to and not in substitution for the power conferred by any other law. The power of eminent domain may be exercised hereunder, notwithstanding that any other law may provide for the exercise of said power for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Procedure hereunder, which is not prescribed herein, shall be that which is otherwise prescribed by the law of the State. (1935, c. 470, s. 23.)

§ 40-53. Necessity for certificate of public convenience and necessity from Utilities Commission.—Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the Utilities Commission of North Carolina, the said Utilities Commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 470, s. 25.)

Chapter 41.

Estates.

Sec.	Sec.
41-1. Fee tail converted into fee simple.	41-9. Spendthrift trusts.
41-2. Survivorship in joint tenancy abolished; proviso as to partnership.	41-10. Titles quieted.
41-3. Survivorship among trustees.	41-11. Sale, lease or mortgage in case of remainders.
41-4. Limitations on failure of issue.	41-11.1. Sale, lease or mortgage of property held by a "class", where membership may be increased by persons not in esse.
41-5. Unborn infant may take by deed or writing.	41-12. Sales or mortgages of contingent remainders validated.
41-6. "Heirs" construed "children" in certain limitations.	41-13. Freeholders in petition for special taxes defined.
41-7. Possession transferred to use in certain conveyances.	
41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.	

§ 41-1. **Fee tail converted into fee simple.**—Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. (1784, c. 204, s. 5; R. C., c. 43, s. 1; Code, s. 1325; Rev., s. 1578; C. S., s. 1734.)

I. General Consideration.

II. Rule in Shelley's Case.

III. Application and Illustrative Cases.

Cross Reference.

As to fee presumed, though word "heirs" omitted, see § 39-1.

I. GENERAL CONSIDERATION.

Editor's Note.—For an account of the history and purpose of this section, see *Walter v. Trollinger*, 192 N. C. 744, 135 S. E. 871 (1926).

Estates Tail Converted.—The section converted by one stroke of the legislative pen estates tail into fee simple. *Hodges v. Lipscomb*, 128 N. C. 57, 38 S. E. 281 (1901).

Form of Acquisition Not Changed.—The act of 1784, which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase. *Ballard v. Griffin*, 4 N. C. 237 (1815).

"Heirs of their bodies" is equivalent to the words "heirs general." *Revis v. Murphy*, 172 N. C. 579, 90 S. E. 573 (1916); *Cohoon v. Upton*, 174 N. C. 88, 93 S. E. 446 (1917).

Remainder Dependent upon Estate Tail.—The section will bar a remainder dependent upon an estate tail, in possession of tenant in tail, at the time of passing the section. *Lane v. Davis*, 2 N. C. 277 (1796).

Confirmation of Alienation in Fee.—This section converted no estates tail into estates in fee, but such whereof there was

a person seized and possessed, and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. *Wells v. Newbolt*, 1 N. C. 537 (1802).

Cited in *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

II. RULE IN SHELLEY'S CASE.

Editor's Note.—For a discussion of the effect of this section upon the application of the rule in Shelley's case, see 1 N. C. Law Rev. 110. See also § 41-6 and note.

Statement of Rule.—A good definition of the rule in Shelley's case, and the most general, is as follows: "That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase." *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459 (1895). See also the statement of the rule in *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172 (1905).

Force of Rule in North Carolina.—The common-law doctrine known as the rule in Shelley's case is in force in this State. *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459 (1895). It has never been abolished in North Carolina, and this section does not affect that principle of law. *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483 (1896).

Nature and Operation of Rule.—The rule in Shelley's case is a rule of law and

not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker. *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459 (1895).

Limitation within Rule Passes a Fee Simple.—A limitation coming within the rule in *Shelley's* case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501 (1921).

When Rule Inapplicable.—See post, this note, "III. Application and Illustrative Cases."

"Heirs" or "Heirs of Body."—The words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501 (1921).

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed Sufficient Formerly to Convey Fee Tail.—A deed, which was sufficient under the old law to confer a fee tail, is sufficient under this section, where a contrary intent may not be gathered from the instrument construed as a whole, to convey an estate in fee simple, but such a deed must be distinguished from a conveyance in which the words "bodily heirs" are used as descriptive personarum, which merely conveys to them an estate in remainder and as purchasers from the grantor. *Harrington v. Grimes*, 163 N. C. 76, 79 S. E. 301 (1913). See *Whitfield v. Garris*, 134 N. C. 24, 45 S. E. 904 (1903); *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842 (1906); *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907); *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507 (1910). See also *Acker v. Pridgon*, 158 N. C. 337, 74 S. E. 335 (1912); *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15 (1912).

Conveyance to One and Heirs of the

Body.—A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee tail at common law, but under this section it is converted into a fee simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. *Revis v. Murphy*, 172 N. C. 579, 90 S. E. 573 (1916); *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. (2d) 906 (1941).

An estate to H. during his life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee simple title. *Howard v. Edwards*, 185 N. C. 604, 116 S. E. 1 (1923), distinguishing *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657 (1888) and *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111 (1897).

Devise to One and Lawful Heirs of His Body.—A devise to S. and the lawful heirs of his body forever confers an estate in fee tail, converted into a fee simple under the section. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907). See *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785 (1904).

If testatrix intended to use the term in its strict technical sense, a devise to one and his "bodily heirs" would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. *Elledge v. Parrish*, 224 N. C. 397, 30 S. E. (2d) 314 (1944).

Effect of § 41-6.—Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living, the deed conveys a fee tail special to M. which is converted to a fee simple by this section, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, § 41-6, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the

execution of the deed, and the ulterior limitation is not barred by the birth of such issue. *Paul v. Paul*, 199 N. C. 522, 154 S. E. 825 (1930), distinguishing *Sharpe v. Brown*, 177 N. C. 294, 98 S. E. 825 (1919). See *Bank of Pilot Mountain v. Snow*, 221 N. C. 14, 18 S. E. (2d) 711 (1942).

A deed to a married woman and her heirs by her present husband, with granting clause, habendum and warranty to "parties of the second part, their heirs and assigns," is held to convey to the married woman a fee tail special, which is converted into a fee simple absolute by this section. *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. (2d) 906 (1941).

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by this section into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land; § 41-6 is not applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs." *Bank of Pilot Mountain v. Snow*, 221 N. C. 14, 18 S. E. (2d) 711 (1942).

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. *Sharpe v. Isley*, 219 N. C. 753, 14 S. E. (2d) 814 (1941).

Life Estate with Limitation over to Bodily Heirs.—A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under this section. *Keziah v. Medlin*, 173 N. C. 237, 91 S. E. 836 (1917).

Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in *Shelley's case*, converted into a fee simple absolute by this section. *Morehead v. Montague*, 200 N. C. 497, 157 S. E. 793 (1931).

Conveyance to Husband and Wife for Life Then to Heirs of the Body of Wife.—A deed conveyed to husband and wife a

life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the feme grantee. It was held that the husband took only a life estate, and the conveyance being to the wife and then to heirs of her body, the rule in *Shelley's case* applied, and the estate in fee tail conveyed to the wife was converted by this section into a fee simple absolute. *Edgerton v. Harrison*, 230 N. C. 158, 52 S. E. (2d) 357 (1949).

Devise "to Have and to Hold for the Heirs of Their Bodies."—A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, to have and to hold during their natural lives for the heirs of their bodies, constitutes an estate tail, converted by this section into a fee simple. *Washburn v. Biggerstaff*, 195 N. C. 624, 143 S. E. 210 (1928).

When Rule in Shelley's Case Inapplicable.—The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike" and it was held that even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of this section, the addition of the words "share and share alike" prevents the application of the rule in *Shelley's case*, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will. *Cheshire v. Drewry*, 213 N. C. 450, 197 S. E. 1 (1938).

Word "Heirs" Not Used in Technical Sense.—The rule in *Shelley's case* does not apply to a devise to testator's grandchildren during the term of their natural lives, then "to their bodily heirs, or issue surviving them," with limitation over of the share of any grandchild who should die without issue to his next of kin, since it is apparent that the word "heirs" was not used in its technical sense, and the grandchildren take only a life estate. *Williams v. Johnson*, 228 N. C. 732, 47 S. E. (2d) 24 (1948).

The use of the word "children" following the life estate does not create a fee simple estate or fee tail estate which would be converted by this section into a fee simple estate where a will devises real estate to the three daughters of testator, naming them, "during the time of their natural lives" and provides that "the share of each one of my said daughters shall upon her death go to her children and their heirs absolutely," for the word "children"

is a word of purchase. *Moore v. Baker*, 224 N. C. 133, 29 S. E. (2d) 452 (1944).

"Lawful Heirs."—Where a devise is to one for life and then to his "lawful heirs," the word "lawful," qualifying the word "heirs," does not have the effect of preventing the latter word from operating as one of limitation and of restricting the meaning of the words "lawful heirs" to that of "children," who will take not by descent from their parent, but by purchase from the devisor. *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785 (1904).

"Heirs, if Any."—A conveyance to one for "his lifetime, and at his death to his heirs, if any," invokes the application of the rule in *Shelley's case* and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. *Glover v. Glover*, 224 N. C. 152, 29 S. E. (2d) 350 (1944).

"Heirs or Heiresses."—A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple. *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657 (1888).

Devise "for Life Only."—A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in *Shelley's case*, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee simple title. *Merchants Nat. Bank v. Dortch*, 186 N. C. 510, 120 S. E. 60 (1923), citing *Harrington v. Grimes*, 163 N. C. 76, 79 S. E. 301 (1913).

When Conveyance Is of Defeasible Fee.—The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee simple title, under this section, does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. *Smith v. Parke*, 176 N. C. 406, 97 S. E. 209 (1918).

A devise to testator's daughter and her bodily heirs, and if she dies without bodily

heirs, then in trust for the heirs of testator's sisters, is held to create a fee simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. *Murdock v. Deal*, 208 N. C. 754, 182 S. E. 466 (1935).

Where land is devised to a person for life at her death to vest in the children of the testator during their natural lives and at their death to vest in their lawful heirs, and should they leave no lawful heirs, then to the testator's lawful heirs, such children take a fee simple absolute on the death of the life tenant. *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785 (1904).

Where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he die without leaving heirs of his body. *Whitefield v. Garris*, 134 N. C. 24, 45 S. E. 904 (1903).

When Such Estate Becomes Absolute.—A conveyance to a granddaughter and the heirs of her own body passed an estate in fee tail, which by this section was converted into a fee simple, defeasible under the terms of the deed if no child was born to her, but which became absolute upon the birth of a child. *Sharpe v. Brown*, 177 N. C. 294, 98 S. E. 825 (1919). See *Paul v. Paul*, 199 N. C. 522, 154 S. E. 825 (1930).

An estate in remainder to the testator's son "and to his children or issue, but in case he should die childless and without issue, then . . . to my heirs in equal degree in fee simple," there being no child or children of the son until long after the testator's death, was held to create an estate tail at common law, which was converted into a fee simple by this section, defeasible upon the testator's son dying without issue, and as there was an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue could not convey a fee simple title. *Ziegler v. Love*, 185 N. C. 40, 115 S. E. 887 (1923).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.—In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and

promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. (1784, c. 204, s. 6; R. C., c. 43, s. 2; Code, s. 1326; Rev., s. 1579; C. S., s. 1735; 1945, c. 635.)

I. General Consideration.

II. Estates of Husband and Wife.

III. Joint Tenancy in Partnership Property.

Cross References.

As to executors, administrators, or collectors holding in joint tenancy, see § 28-184. As to survivorship among trustees given power of sale, see § 45-8.

I. GENERAL CONSIDERATION.

Editor's Note.—Prior to the 1945 amendment this section also applied to "assigns."

Meaning of "Estate."—"Estate" is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. In this sense it includes choses in action. *Pippin v. Ellison*, 34 N. C. 61 (1851); *Webb v. Bowler*, 50 N. C. 362 (1858); *Hurdle v. Outlaw*, 55 N. C. 75 (1854). But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. *Taylor v. Dawson*, 56 N. C. 87 (1856). The word "estate" was used in this later sense by the Rev. Stat., ch. 43, § 2 [now this section]. *Bond v. Hilton*, 51 N. C. 180 (1858).

Section Applies Only to Estates of Inheritance.—The act of 1784, converting joint tenancies into estates in common, applies only to estates of inheritance. *Blair v. Osborne*, 84 N. C. 417 (1881); *Powell v. Morisey*, 84 N. C. 421 (1881).

If the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the "jus accrescendi" in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personalty. *Powell v. Allen*, 75 N. C. 450 (1876).

Joint Estates for Life and Estates by Entirety Not Affected.—Joint tenancies

are not abolished by the section. It abolishes the right of survivorship in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. *Vass v. Freeman*, 56 N. C. 221 (1857); *Powell v. Allen*, 75 N. C. 450 (1876); *Blair v. Osborne*, 84 N. C. 417 (1881); *Powell v. Morisey*, 84 N. C. 421 (1881); *Burton v. Cahill*, 192 N. C. 505, 135 S. E. 332 (1926).

In *Powell v. Allen*, 75 N. C. 450 (1876), in construing the act of 1784, now this section, Chief Justice Pearson says: "It is obvious that these words cannot be made to apply to joint tenants for life." *Burton v. Cahill*, 192 N. C. 505, 508, 135 S. E. 332 (1926).

Legatees May Hold as Joint Tenants.—Legatees may still hold by a joint tenancy in North Carolina, though the incident of survivorship was abolished by the act of 1784, now this section. *Vass v. Freeman*, 56 N. C. 221 (1857).

Severance of Joint Tenancy by This Section.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that between the children, by the act of 1784, now this section. And in a suit in trover by one of the children he was allowed to recover only one-third part of the value. *Witherington v. Williams*, 1 N. C. 89 (1789).

When Remaindermen Take as Tenants in Common.—A deed of gift, executed by W. E. to his son J. B., "during his natural life only, and then to return to the male children of the said J. B., lawfully begotten of his body, for the want of such to return to the male children of my other sons W. and B., their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," vested a life estate in J. B., with remainder in fee to his sons as tenants in common under the section. *Brown v. Ward*, 103 N. C. 173, 9 S. E. 300 (1889).

Survivorship May Be Provided for by Contract.—The section abolishes survivorship, where the joint tenancy would other-

wise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202 (1895); *Jones v. Waldroup*, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

Survivorship in Personalty Must Be Pursuant to Contract.—Since the abolition of survivorship in joint tenancy, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision. *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. (2d) 468 (1947).

A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid. *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202 (1895).

Instrument Held Ineffective to Provide for Survivorship.—While this section may not preclude tenants in common from providing for survivorship by adequate contract inter sese, an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. The execution by the administrator of the deceased tenant in common of a deed to the surviving tenant, made under the supposed authority of the contract, is without effect. *Pope v. Burgess*, 230 N. C. 323, 53 S. E. (2d) 159 (1949).

Applied in *Powell v. Malone*, 22 F. Supp. 300 (1938).

Cited in *Buffaloe v. Barnes*, 226 N. C. 313, 38 S. E. (2d) 222 (1946).

II. ESTATES OF HUSBAND AND WIFE.

Section Inapplicable to Conveyances to Husband and Wife.—The act of 1784, now this section, abolishing survivorship in joint tenancies, does not apply to conveyances to husband and wife, for the reason assigned in *Motley v. Whitmore*, 19 N. C. 537 (1837), that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." *Long v. Barnes*, 87 N. C. 329 (1882); *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. 769 (1891).

In construing this statute, the Supreme Court held that it had no application to an estate granted to husband and wife, on the ground that it is not an estate in joint tenancy, but an entirety estate. *Motley v. Whitmore*, 19 N. C. 537 (1837); *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318 (1895).

Estate by Entireties Not Abolished.—It has been held in several well considered decisions of the Supreme Court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a conveyance to a husband and wife. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790 (1891); *Ray v. Long*, 132 N. C. 891, 44 S. E. 652 (1903); *West v. Railroad*, 140 N. C. 620, 53 S. E. 477 (1906); *Bynum v. Wicker*, 141 N. C. 95, 53 S. E. 478 (1906); *Jones v. Smith & Co.*, 149 N. C. 318, 62 S. E. 1092 (1908); *McKinnon, etc., Co. v. Caulk*, 167 N. C. 411, 83 S. E. 559 (1914). See also *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180 (1924).

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and title vests in the heirs of the one surviving the other. *Murchison v. Fogleman*, 165 N. C. 397, 81 S. E. 627 (1914).

A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole. *Needham v. Branson*, 27 N. C. 426 (1845); *Todd v. Zachary*, 45 N. C. 286 (1853); *Woodford v. Highly*, 60 N. C. 234 (1864); *Long v. Barnes*, 87 N. C. 329 (1882).

Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety and not a joint estate is created which they hold per tout et non per my. *Ray v. Long*, 132 N. C. 891, 44 S. E. 652 (1903).

III. JOINT TENANCY IN PARTNERSHIP PROPERTY.

Joint Tenancy of Partnership in Land.—This section provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive to the others for the purpose of paying the partnership debts. Real estate held and used for partnership purposes is subject to partnership debts to the exclusion of the heir or widow of the deceased. When the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to the heirs, executors, administrators or assigns. *Stroud v. Stroud*, 61 N. C. 525 (1868).

Upon Settlement Partnership Land Descends as Real Estate.—When land is purchased in fee by partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partner-

ship debts his share of the land descends to his heir as real estate. *Summey v. Patton*, 60 N. C. 601 (1864).

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. *Sherrod v. Mayo*, 156 N. C. 144, 72 S. E. 216 (1911).

Heir May Recover from Surviving Partner.—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. *Sherrod v. Mayo*, 156 N. C. 144, 72 S. E. 216 (1911).

§ 41-3. Survivorship among trustees.—In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four. (1885, c. 327, s. 1; Rev., s. 1580; C. S., s. 1736.)

Cross References.—As to survivorship among trustees with power of sale, see § 45-8. As to limitation on actions by cotenants of personal property, see § 1-29.

The trustees of a trust estate hold as joint tenants, and not as tenants in common. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728 (1906); *Webb v. Borden*, 145 N. C. 188, 58 S. E. 1083 (1907).

§ 41-4. Limitations on failure of issue.—Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed

Immaterial Whether Claim Is by Deed or Inheritance.—When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. *Sherrod v. Mayo*, 156 N. C. 144, 72 S. E. 216 (1911).

Section 59-74 is to be read in connection with this section respecting the settlement of partnership affairs by surviving partners. *Coppersmith v. Upton*, 228 N. C. 545, 46 S. E. (2d) 565 (1948).

The fact that the surviving partner instituting action on a partnership asset has not filed a bond as required by § 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with § 59-75, which provides that upon failure of the surviving partner to file bond, the clerk of the superior court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner. *Coppersmith v. Upton*, 228 N. C. 545, 46 S. E. (2d) 565 (1948).

Loss of Right to Trustee Is Loss to Cestui and Cotrustees.—When a right of entry is barred and the right of action lost by a trustee, through an adverse occupation, the cestui que trust and the cotrustees are also concluded from asserting claim to the land. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728 (1906).

before the fifteenth of January, one thousand eight hundred and twenty-eight. (1827, c. 7; R. C., c. 43, s. 3; Code, s. 1327; Rev., s. 1581; C. S., s. 1737.)

Purpose of Section.—This section was enacted for the primary purpose of making contingent limitations good by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. *Sain v. Baker*, 128 N. C. 256, 138 S. E. 858 (1901); *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909 (1908); *Kirkman v. Smith*, 174 N. C. 603, 94 S. E. 423 (1917); *Bell v. Kessler*, 175 N. C. 525, 95 S. E. 881 (1918).

Section Is Obligatory.—The rule laid down by this section is obligatory on the courts, and must be observed in all cases except, as provided by the statute, when a contrary intent is “expressly and plainly declared in the face of the deed or will.” *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919).

Inapplicable to Wills Executed before January 15, 1828.—See *Rice v. Satterwhite*, 21 N. C. 69 (1835); *Brown v. Brown*, 25 N. C. 131 (1842); *Gibson v. Gibson*, 49 N. C. 425 (1857); *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919).

Does Not Interfere with Rule in Shelley's Case.—The section does not interfere with the application of the principle laid down in Shelley's case in determining the nature and extent of the precedent estate. This is declared in *Sanderlin v. Deford*, 47 N. C. 75 (1854), in construing a will executed in 1838. *King v. Utley*, 85 N. C. 59 (1881). See note to § 41-1, “II. Rule in Shelley's Case.”

Doctrine of Shifting Uses and Executory Devises Unaffected.—This section is a rule of construction upholding the second and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907).

Common-Law Rule Superseded.—Where there was a devise of lands for life, then to J. and C. equally, and in case “they or either of them die without issue,” then to the heirs of certain others and the survivor of J. and C. equally, it was held that the common-law doctrine that a limitation contingent upon death and failure of issue is void for remoteness gives place to the new rule of construction enacted by this

section, made applicable since 15 January, 1828, without restriction as to immediate estates, and a contrary intent not being expressly and plainly declared in the face of the instrument, the death without issue referred to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survived, with issue, the absolute fee simple title to the lands was in C. and the other ulterior remaindermen. *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919).

Rule When Will Is Ambiguous.—Where there is ambiguity in a will as to whether the vesting of an estate devised for life with contingent limitation over shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. *Westfeldt v. Reynolds*, 191 N. C. 802, 133 S. E. 168 (1926).

Provisions of Section Prevail over Rule of Stare Decisis.—A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expressions of a statutory change of the rule to the contrary, where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves or upon prior executed instruments excepted by the statute, or without express reference thereto; and this section, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected by the rule laid down in *Hilliard v. Kearney*, 45 N. C. 221 (1853), and subsequent decisions on the subject. *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919).

A contingent remainder dependent upon the death of a certain donee without issue means, under the terms of this section, without issue living at the time of death. *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916).

Roll Must Be Called as of Death of

First Taker.—To determine the effectiveness of a limitation over the roll must be called as of the date of the death of the first taker. *Turpin v. Jarrett*, 226 N. C. 135, 37 S. E. (2d) 124 (1946).

Where a will set up a trust with provision that the income therefrom be divided among named beneficiaries for life and the corpus proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, his share of the corpus should become a part of, and be distributed in accordance with, the residuary clause, it was held that the person entitled to each share of the corpus was contingent upon whether each of the life beneficiaries died with or without issue surviving, and therefore the will set up a contingent and not a vested limitation, and the roll must be called as to each share of the corpus as of the death of its life beneficiary. *Van Winkle v. Berger*, 228 N. C. 473, 46 S. E. (2d) 305 (1948).

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

Not as of Death of Testator.—A devise of land to L. with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "die without issue surviving her, then the property to return to my eldest daughter," the vesting of the estate in remainder depends upon the contingency of the death of L. without leaving "issue" surviving her, and not upon the death of the testatrix. *Rees v. Williams*, 164 N. C. 128, 80 S. E. 247 (1913).

Unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the deviser, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till the event occurs by which same is to be determined, or the estate becomes absolute. *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919). See *Williams v. Lewis*, 100 N. C. 142, 5 S. E. 435 (1888); *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539 (1908).

Rule in Hilliard v. Kearney Changed.—Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate

time, such as the termination of the life estate, or some other designated period, and held that the phrase "dying without issue" was to be referred to this intermediate period. *Hilliard v. Kearney*, 45 N. C. 221 (1853). This principle was entirely changed by the act of 1827, which is now this section. *American Yarn, etc., Co. v. Dewstoe*, 192 N. C. 121, 133 S. E. 407 (1926). See *Clapp v. Fogleman*, 21 N. C. 467 (1836); *Tillman v. Sinclair*, 23 N. C. 183 (1840); *Moore v. Barrow*, 24 N. C. 436 (1842); *Garland v. Watt*, 26 N. C. 287 (1844); *Jones v. Oliver*, 38 N. C. 369 (1844); *Weeks v. Weeks*, 40 N. C. 111 (1847); *Spruill v. Moore*, 40 N. C. 284 (1848); *Holton v. McAllister*, 51 N. C. 12 (1853); *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919); *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919); *Willis v. Mutual Loan, etc., Co.*, 183 N. C. 267, 111 S. E. 163 (1922); *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412 (1923); *Alexander v. Fleming*, 190 N. C. 815, 130 S. E. 867 (1925).

Section Applies Notwithstanding Intervening Life Estate.—On devise of an estate to M. for life, then to G. and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. *Kirkman v. Smith*, 175 N. C. 579, 96 S. E. 51 (1918). The section has been construed by the Supreme Court at least twenty-six times, and in every case in which it has come before the court for construction it has uniformly been held that "dying without heirs or issue," upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919). See *Cowand v. Meyers*, 99 N. C. 198, 6 S. E. 82 (1888); *Dunning v. Burden*, 114 N. C. 33, 18 S. E. 969 (1894); *Kornegay v. Morris*, 122 N. C. 199, 29 S. E. 875 (1898); *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909 (1908); *Dawson v. Ennett*, 151 N. C. 543, 66 S. E. 566 (1909); *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507 (1910); *Elkins v. Seigler*, 154 N. C. 374, 70 S. E. 636 (1911); *Vinson v. Wise*, 159 N. C. 653, 75 S. E. 732 (1912); *Hobgood v. Hobgood*, 169 N. C. 485, 86 S. E. 189 (1915); *Whichard v. Craft*, 175 N. C. 128, 95 S. E. 94 (1918).

First Taker Has Base and Qualified Fee.

—O. devised his lands to certain of his children, S., D., and J. By item 3 of the will a certain tract was devised to D. and “the lawful heirs of his body lawfully begotten;” by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations. It was held that these items should be construed together, and that the estate devised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507 (1910).

First Taker Dying without Issue Cannot Devise Property.—When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son, dying without children, cannot by will give his wife a life estate with the remainder to a third party. *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858 (1901).

Estate Created Direct to Second Taker.—When by the operation of § 41-1 a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the enactment of this section. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907).

A devise of lands to B in fee, “provided he has a child or children;” but if he has no child, then to him for life,” with limitation over to the testator’s heirs at law, carries to the devisee a fee simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself; and upon the death of B and the nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. *Burden v. Lipsitz*, 166 N. C. 523, 82 S. E. 863 (1914).

An estate to M. and her bodily heirs, without further limitation, is converted

into a fee simple under § 41-1, but such an estate followed by the words “if no heirs, said lands shall go back to my estate,” will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event, as a shifting use under the statute of uses, § 41-7, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. *Willis v. Mutual Loan, etc., Co.*, 183 N. C. 267, 111 S. E. 163 (1922).

An estate to testator’s daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation “and if she should die leaving no heirs, then the lands to return to the G. family,” gives N. a fee defeasible upon her death without issue, children, etc., under this section, and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412 (1923).

Where a father devised the land in question to plaintiff “to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children,” and at the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children, it was held that the plaintiff’s deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, or as not coming within the rule in *Shelley’s case*. *Hudson v. Hudson*, 208 N. C. 338, 180 S. E. 597 (1935).

Applied in *Conrad v. Goss*, 227 N. C. 470, 42 S. E. (2d) 609 (1947).

Cited in *West v. Murphy*, 197 N. C. 488, 149 S. E. 731 (1929); *Rigsbee v. Rigsbee*, 215 N. C. 757, 3 S. E. (2d) 331 (1939); *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941).

§ 41-5. Unborn infant may take by deed or writing.—An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born. (R. C., c. 43, s. 4; Code, s. 1328; Rev., s. 1582; C. S., s. 1738.)

Unborn Infant Takes from Time of Conception.—This section gives the same capacity to an unborn infant to take prop-

erty as such infant has under the law governing its right to take by inheritance or devise, which is from the time of con-

ception. *Mackie v. Mackie*, 230 N. C. 152, 52 S. E. (2d) 352 (1949).

When Child Presumed In Esse.—For the purpose of capacity to take under a deed, it will be presumed in the absence of contrary evidence that a child is in esse 280 days prior to its birth. *Mackie v. Mackie*, 230 N. C. 152, 52 S. E. (2d) 352 (1949).

Grant Directly to Children of Living Person.—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then en ventre sa mere. *Powell v. Powell*, 168 N. C. 561, 84 S. E. 860 (1915).

Under a deed to a woman "and her children" a child en ventre sa mere at the date of the conveyance will take, but children born more than a year thereafter will not. *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155 (1894).

Child Takes as Tenant in Common.—By virtue of this section a child if en ventre sa

mere at the time the deed is executed takes as tenant in common with the living children. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

Life Estate to Parent with Limitation Over.—Where there is a reservation of a life estate in the parent or another, with limitation over to the children, all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. *Powell v. Powell*, 168 N. C. 461, 84 S. E. 860 (1915).

Remainder after Freehold to Children Not in Esse.—Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the life estate of the first taker is sufficient to uphold the estate of his children, though not in esse at the time, by way of contingent remainder till they are born, and thereafter as owners of a vested remainder. *Johnson Bros. v. Lee*, 187 N. C. 753, 122 S. E. 839 (1924).

§ 41-6. "Heirs" construed "children" in certain limitations. — A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will. (R. C., c. 43, s. 5; Code, s. 1329; Rev., s. 1583; C. S., s. 1739.)

Purpose of Section.—It seems that the main object of this section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated that by "the heirs" was meant the children of the person named. This section provides that in such a case the word "heirs" shall be construed to mean "children" and the limitation therefore would be good. By this construction of the section it does not affect the rule in *Shelley's case*. *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893); *Hartman v. Flynn*, 189 N. C. 452, 127 S. E. 517 (1925).

"Limitation" Explained.—The word limitation has two different senses: the original sense, namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the derivative sense, namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate. In this statute, the word is manifestly used in its derivative or secondary sense. *Campbell v. Everhart*, 139 N.

C. 503, 52 S. E. 201 (1905). See *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893).

The rule in Shelley's case is not abrogated by this section. *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893). As to the rule in *Shelley's case*, see note to § 41-1.

Common-Law Rule Changed.—While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that *nemo est haeres viventis*, this does not prevail under the provisions of this section. *Thompson v. Batts*, 168 N. C. 333, 84 S. E. 347 (1915).

Section Applies Only When No Precedent Estate to Said Living Person.—The Code of 1883, § 1329, now this section, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842 (1906); *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. (2d) 906 (1941).

If it were not true that this section applies only when there is no precedent estate conveyed to said living person, it would not only repeal the rule in *Shelley's*

case, but would pervert every conveyance to "A and his heirs" into something entirely different from what those words have always been understood to mean. *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 735 (1904).

Conveyance to Living Person and Limitation to Heirs.—This section applies only when there is no precedent estate conveyed to said living person, nor is this section applicable where there is a conveyance to a living person, with a limitation to his heirs. *Bank of Pilot Mountain v. Snow*, 221 N. C. 14, 18 S. E. (2d) 711 (1942).

This section does not apply when the limitation is to a living person and his heirs. *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. (2d) 906 (1941).

Section Validates Conveyance Directly to Heirs of Living Person.—By virtue of the section a deed conveying land directly to the "heirs" of a living person passes whatever title the grantor had to the children of such person. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

A deed to "the heirs" of A., he being still alive, although void at common law, is good under this section, and is construed to be a limitation to the children of A., and includes after-born children. *Graves v. Barrett*, 126 N. C. 267, 35 S. E. 539 (1900).

A devise to the "heirs" of a person will be construed to be to his "children" in the absence of a contrary intention expressed in the instrument. *Moseley v. Knott*, 212 N. C. 651, 194 S. E. 100 (1937).

An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, s. 1583, now this section, which construes the word "heirs" to mean children, in such instances. *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921 (1908).

Child Born during Life of Life Tenant.—A devise was of lands to the widow of the testator for life, then to the heirs of his son J., and it appeared that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate. It was held that the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it included all who were members of the class and filled the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, took his share

with the other children of J. *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915).

Limitation to Heirs of One with Conditional Limitation Over.—Where an estate was devised to A "and the heirs of his body, but if he die without heirs living at the time of his death, then to the heirs of B", "heirs" was construed to mean children. *Smith v. Brisson*, 90 N. C. 284 (1884).

Limitation Over Provided First Taker Dies without Heirs.—Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858 (1901).

Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon the first taker's dying without issue, this section has no application. *Massengill v. Abell*, 192 N. C. 240, 134 S. E. 641 (1926).

Reverter to Heirs upon Nonhappening of Contingency.—A conveyance of land in contemplation of marriage, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, the "reverter" to his heirs under this section meant to his children after the death of his wife and the nonhappening of the stated contingency. *Thompson v. Batts*, 168 N. C. 333, 84 S. E. 347 (1915).

Devise to "Heirs of His Children."—By his will, the testator devised a lot to trustees for twenty years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," as used in the will, must be construed to mean "children." *Lide v. Wells*, 190 N. C. 37, 128 S. E. 477 (1925).

"Lawful Heirs of Her Body."—Where a testator, by separate devises, gave to each of his three daughters, who were his only heirs at law, a certain tract of his land, with provision in each item "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs," by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. *Kornegay v.*

Cunningham, 174 N. C. 209, 93 S. E. 754 (1917).

"Lawfully Begotten Heirs of the Body."

—In *Lockman v. Hobbs*, 98 N. C. 541, 4 S. E. 627 (1887), it was held that "the lawfully begotten heirs of her body" in a will referred most obviously to the children of the devisee for life, of whom there were only two, and was construed to mean "the children of such person" since contrary intention did not appear from the will.

When Children Illegitimate.—Where a

§ 41-7. **Possession transferred to use in certain conveyances.**—By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant. (27 Hen. VIII, c. 10; R. C., c. 43, s. 6; Code, s. 1330; Rev., s. 1584; C. S., s. 1740.)

Editor's Note.—It is conceded, on all hands, that the Statute of Uses, 27 Hen. VIII, c. 10, was in force and in use, in this State, up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land adopted and used in this State are based on, and take effect by, the operation of that statute. In the Rev. Stat., c. 43, s. 4, and the Rev. Code, c. 43, s. 6, the words used in 27 Hen. VIII, c. 10, i. e., "When one person or persons stand, or be seized, or at any time thereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.," are omitted and the provision is simply "By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc." Substantially in this form the section is carried through all the various codes up to this one. The tendency, while no material change has been made, has been to make the section all inclusive by extending its application to every possible case involving the principle. *Wilder v. Ireland*, 53 N. C. 85 (1860).

Possession Transferred.—The statute of uses, substituted for 27 Hen. VIII, now this section, provides that the possession of the bargainor shall be transferred to the bargainee as perfectly as if the bargainee "had been enfeoffed at common law with the livery of seizin of the land

bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate, they have the right to take under the section which declares that a limitation to the "heirs" shall be construed to be the "children" of such person, unless a contrary intention appears. *Howell v. Tyler*, 91 N. C. 207 (1884).

Cited in *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

intended to be conveyed, etc." *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896).

Same Footing with Feoffments at Common Law.—Deeds of bargain and sale, and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. *Ivey v. Granberry*, 66 N. C. 224 (1872); *Love v. Harbin*, 87 N. C. 249 (1882). A use may be limited on a use. *Rowland v. Rowland*, 93 N. C. 214 (1885).

Necessity of Consideration.—A deed of bargain and sale is governed in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable, consideration. *Blount v. Blount*, 4 N. C. 389 (1816); *Brocket v. Foscue*, 8 N. C. 64 (1820); *Bruce v. Faucett*, 49 N. C. 391 (1857).

If no consideration, either good or valuable, appears on the face of the instrument, or can be proved aliunde, the instrument will be void. *Springs v. Hanks*, 27 N. C. 30 (1844); *Jackson v. Hampton*, 30 N. C. 457 (1848); *Bruce v. Faucett*, 49 N. C. 391 (1857).

Resulting Use at Common Law.—At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61 (1890).

Love and Affection as Consideration.—Though in form a deed is one of bargain and sale, yet if the only consideration is

that of love and affection, it will operate as a covenant to stand seized. *Slade v. Smith*, 2 N. C. 248 (1796); *Hatch v. Thompson*, 14 N. C. 411 (1832); *Cobb v. Hines*, 44 N. C. 343 (1853); *Bruce v. Faucett*, 49 N. C. 391 (1857).

This section merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trusts, the legal title vests and remains in the trustee for the purpose of the trust. *Fisher v. Fisher*, 218 N. C. 42, 9 S. E. (2d) 493 (1940). See *Security Nat. Bank v. Sternberger*, 207 N. C. 817, 178 S. E. 595 (1935).

Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the *cestui que trust*; but where the use is not executed, the legal title passes to the trustee. *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916).

In *Lee v. Oates*, 171 N. C. 717, 726, 88 S. E. 889 (1916), it was said: "As to Mrs. Lee's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her." See *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541 (1903); *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728 (1906); *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774 (1916).

Where Legal and Equitable Title in Same Person.—Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect. *Peacock v. Scott*, 101 N. C. 149, 7 S. E. 885 (1888); *Odom v. Morgan*, 177 N. C. 367, 99 S. E. 195 (1919).

Exceptions to Rule That Beneficial Use Is Converted into Legal Ownership.—Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operation, i. e.: (1) where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the separate use and maintenance of a married woman. *Wilder v. Ireland*, 53 N. C. 85

(1860); *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896).

Rule Does Not Apply to Active Trusts.—While this section converts the beneficial use into the legal ownership and unites the legal and equitable estates in the beneficiary, this rule applies only to passive or simple trusts and not to active trusts. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936), citing *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916); *Patrick v. Beatty*, 202 N. C. 454, 163 S. E. 572 (1932).

An active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936), citing *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541 (1903).

Trust for "Sole and Separate Use" of Married Woman.—The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created. *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896).

Passive Trust for Husband and Wife.—Where a husband purchases realty and has the deed made to a trustee of a passive trust for the benefit of himself and wife, nothing else appearing, the instrument creates an estate by entirety. *Akin v. First Nat. Bank*, 227 N. C. 453, 42 S. E. (2d) 518 (1947).

An estate of freehold to commence in futuro can be conveyed by a deed of bargain and sale operating under this section, or by executory devise; therefore, an estate to H. for life and at her death to her children in fee, reserving a life estate to the grantor, is good. *Savage v. Lee*, 90 N. C. 320 (1884).

Covenant to Stand Seized on Death of Grantor.—In *Davenport v. Wynne*, 28 N. C. 128 (1845), where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by the court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendee on the death of the donor. To the same effect is *Hodges v. Spicer*, 79 N. C. 223 (1878). And in *Sasser v. Blythe*, 2 N. C. 259 (1796), overruling *Ward v. Ward*, 1 N. C. 59 (1793), a similar construction was given to an instrument of like import. In the note to that case Judge Battle says: "There can-

not be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities." *Savage v. Lee*, 90 N. C. 320 (1884).

Life Estate to Woman with Limitation Over to Children.—Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was held that the legal estate in the remainder, by force of the statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. *Wilder v. Ireland*, 53 N. C. 85 (1860).

Future Contingent Use.—It is settled that a future contingent use to one unknown, or not in esse, cannot be raised

by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger. *Smith v. Smith*, 46 N. C. 135 (1853); *Bruce v. Faucett*, 49 N. C. 391 (1857).

Shifting or Springing Use.—Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use. *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916).

Fee Simple Limited after a Fee Simple.—A fee simple may be limited after a fee simple either by a deed or will by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise. *Smith v. Brisson*, 90 N. C. 284 (1884). See *Rowland v. Rowland*, 93 N. C. 214 (1885).

§ 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.—All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations. (4 Anne, c. 16, s. 21; 1852, c. 16; R. C., c. 43, s. 10; Code, s. 1334; Rev., s. 1587; C. S., s. 1741.)

Editor's Note.—For history and discussion of section, see *Southerland v. Stout*, 68 N. C. 446 (1873); *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

Remainder Not Defeated by Warranty.—A warranty in a deed of a life tenant cannot defeat the remainder of the heirs by way of rebutter. *Moore v. Parker*, 34 N. C. 123 (1851); *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893).

Where land is devised to a person for life, and at her death to her children, the children are not stopped by a deed with covenant of warranty executed by the life tenant. *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756 (1904).

Warranty by Tenant by Curtesy.—Where a tenant by the curtesy sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty, the right of the heir of the wife to the land is not rebutted by the warranty. *Johnson v. Bradley*, 31 N. C. 362 (1849).

Warranty to Grantee but Not to Assigns.—Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor. *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

Heir Rebutted by Ancestor's Warranty.—Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it, the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. *Olds v. Richmond Cedar Works*, 173 N. C. 161, 91 S. E. 846 (1917).

§ 41-9. Spendthrift trusts.—It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall pro-

vide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant. (1871-2, c. 204, s. 1; Code, s. 1335; Rev., s. 1588; C. S., s. 1742.)

Substantial Compliance with Section Necessary.—The provisions of the section should be at least substantially met and complied with to create the trust with its incidents contemplated by the statute. *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363 (1903).

Mere Declaration of Intent Insufficient.—A mere declaration that it is the object of the deed, in part, to create a trust under this section, and that the appointment of a trustee is left to the court, does not create such a trust as the court would enforce by the appointment of a trustee. *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363 (1903).

Trusts Restricted as to Amount and Duration.—A perusal of the law will disclose that such trusts are only permissible for a restricted amount, "an annual income not to exceed \$500 net," and by correct interpretation to be applied to the support of the beneficiary for his life only. *Bank v. Heath*, 187 N. C. 54, 121 S. E. 24 (1924).

Trust Limitations Defeated by Fee Simple Devise.—In a fee simple devise with a subsequent provision that during the life of the devisee the property is to be "managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. *Vaughan v. Wise*, 152 N. C. 31, 67 S. E. 33 (1910).

Section Does Not Create Personal Property Exemption.—The effect of the spendthrift trust statute, Revisal, s. 1588, now this section, is not to create a personal property exemption in favor of a nonresident cestui que trust in the income from the trust estate. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

Spendthrift Trust Not Executed under Statute of Uses.—A devise creating a spendthrift trust, under this section, for the trustees to receive and pay the profits annually or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, nor is it one executed under the statute of uses. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

A spendthrift trust directing the trustee

to collect the rents and profits and pay same over to the beneficiary is, so far as the corpus of the estate is concerned, an active trust upon which § 41-7 does not operate to unite the beneficial and legal interests. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

Not Subject to Debts.—The courts cannot, without violating the right of property possessed by the trustor, and the proper discharge of the trust by the trustee, condemn any part of the income for the foreign purpose of paying the debts of the cestui que trust, since the whole idea and purpose of this trust is that the beneficiary is unfit to handle the income of the fund. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

A spendthrift trust created under this section is not subject to the payment of debts created by the cestui que trust, though he is a nonresident of this State. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

The interest of the cestui que trust in a spendthrift trust is not subject to attachment under § 1-440 et seq., since by express provision of this section the property is not liable for the debts of the cestui que trust in any manner. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

Not Subject to Alienation.—In a spendthrift trust the beneficiary cannot exercise the highest right of property, namely, alienation, as to the income, nor will it upon his death be assets. In spendthrift trusts authorized by the statute the beneficiary acquires no interest or property in the income any more than he does in the principal of the fund. He cannot alienate the income, he cannot direct its application in the purchase of any article whatever, or its disposal for any purpose. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

Trustee Makes All Disbursements.—The trustee holds the income just as he holds the principal, to be applied for the designated purposes. It is his duty to make the disbursement, whether for board or clothing or in any other method in his judgment required for the support of the beneficiary. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

Not to Pay Over Income to Cestui Que Trust.—The trustee is not authorized to pay over any part of the income to the beneficiary that he may spend it or use it

or disburse it. The cardinal idea is that the cestui que trust is incompetent and cannot be trusted with the handling of the income, which duty is to be discharged by the trustee. *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

Trustee May Defend Action without Appearance of the Cestui.—The trustee of a spendthrift trust may defend an action

seeking to attach the interest of the cestui que trust, both in the superior court and in the Supreme Court on appeal, without the appearance of the cestui, the preservation and protection of the property being incumbent upon the trustee under the terms of the trust. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

§ 41-10. **Titles quieted.**—An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section. (1893, c. 6; 1903, c. 763; Rev., s. 1589; 1907, c. 888; C. S., s. 1743.)

I. General Consideration.

II. Nature and Scope of Remedy.

A. Purpose.

B. Interest Necessary to Bring Action.

C. What Constitutes Cloud.

III. Pleading and Practice.

A. In General.

B. Pleadings.

C. Jurisdiction of Courts.

I. GENERAL CONSIDERATION.

Editor's Note.—As to the history and purpose of this section, see *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634 (1899); *Rumbo v. Gay Mfg. Co.*, 129 N. C. 9, 39 S. E. 531 (1901); *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213 (1909); *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541 (1924).

This section is highly remedial. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541 (1924). This is a remedial statute which has been liberally construed; it is more comprehensive than the old suit in equity to remove a cloud from title. *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756

(1924); *Maynard v. Holder*, 216 N. C. 524, 5 S. E. (2d) 535 (1939).

This section and the amendatory acts thereto, being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will, *Stocks v. Stocks*, 179 N. C. 285, 102 S. E. 306 (1920), and to advance the remedy and permit the courts to bring the parties to an issue. *Asheville Land Co. v. Lange*, 150 N. C. 26, 63 S. E. 164 (1908).

The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on the defendant's pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

If title becomes involved in a processioning proceeding under §§ 38-1 to 38-4, the proceeding becomes in effect an action to quiet title under this section. *Roberts v.*

Sawyer, 229 N. C. 279, 49 S. E. (2d) 468 (1948). See note to § 38-3.

Restraining Sale under Execution.—

Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. *Mizell v. Bazemore*, 194 N. C. 324, 139 S. E. 453 (1927).

Cited in *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928); *Sears v. Braswell*, 197 N. C. 515, 149 S. E. 846 (1929); *Bechtel v. Bohannan*, 198 N. C. 730, 153 S. E. 316 (1930); *Hinton v. Whitehurst*, 214 N. C. 99, 198 S. E. 579 (1938).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

In General.—This section was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And suit should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs. *Satterwhite v. Gallagher*, 173 N. C. 525, 92 S. E. 369 (1917); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

To Leave Lands Unfettered.—The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. *Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949 (1914); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918); *Plotkin v. Merchants Bank,*

etc., Co., 188 N. C. 711, 125 S. E. 541 (1924).

To Broaden the Equitable Remedy.—

This section, giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. *Southern State Bank v. Sumner*, 187 N. C. 762, 122 S. E. 848 (1924).

The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and for that reason is entitled to favorable consideration. *Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949 (1914); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

B. Interest Necessary to Bring Action.

Generally.—In *Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57 (1908), it was held that suit may be instituted by any person against any other person claiming an interest adverse to his title.

Plaintiff Need Not Prove Estate in or Title to Land.—In *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541 (1924), it was held that the contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land that the claim of the defendant is adverse to him. But see *Johnson v. Kramer Bros. & Co.*, 203 F. 733 (1913).

Remedy Given Whether in or out of Possession.—This section affords the remedy whenever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affords a remedy by disclaimer when the party

does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. *Satterwhite v. Gallagher*, 173 N. C. 525, 92 S. E. 369 (1917); *Vick v. Winslow*, 209 N. C. 540, 183 S. E. 750 (1936). See *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897).

The authorities to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893, c. 6, Revisal, s. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897); *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213 (1909); *Speas v. Woodhouse*, 162 N. C. 66, 77 S. E. 1000 (1913).

Adverse Claimant to Execution Debtor.

—If real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer to have the cloud removed from his title than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the section. *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634 (1899).

Judgment Lien.—In *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634 (1899), it was held that it was not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest," as they are used in this section. This case was decided at September Term, 1899. The legislature, at its session in 1903, by chapter 763, amended Laws 1893, c. 6, s. 1, by adding thereto the last sentence of the present section. "Estate" and "interest" now expressly embrace a judgment lien. *Crockett v. Bray*, 151 N. C. 615, 66 S. E. 666 (1909).

Correction of Life Estate into Fee Simple.—Defendants have a right, in order to avoid multiplicity of suits, to ask for the correction of a life estate deed, under which they claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under this section. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900).

When Land Conveyed Pendente Lite.—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite conveys the land to another with full warranty deed, he may continue to prosecute

his suit against the mortgagee as to the title, being a real party in interest under § 1-57, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541 (1924).

Nonpayment of Taxes.—In a suit to remove a cloud on the title to lands, the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, is immaterial, because to do so does not, under any statute in force in this State, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law. *Johnston v. Kramer Bros. & Co.*, 203 F. 733 (1913).

C. What Constitutes Cloud.

Includes Any Adverse Interest.—The language of this section is broad and liberal, showing the purpose of the General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541 (1924).

Action Lies to Prevent Creation of Cloud.—An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created, and where the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

Defendant Need Only Be Claimant.—Under Laws 1893, c. 6, now this section, a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. *Duncan v. Hall*, 117 N. C. 443, 23 S. E. 362 (1895).

Apparent Invalidity of Defendant's Title.—The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897); *Rumbo v. Gay Mfg. Co.*, 129 N. C. 9, 39 S. E. 581 (1901); *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613 (1904); *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213 (1909); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

Obscure Contingent Limitations.—This section enlarges the power of the courts to entertain suits to quiet titles, where

the conditions were formerly such that a possessory action could not be brought; and the section is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213 (1909).

Invalid Judgment as Cloud.—A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of this section. *Stocks v. Stocks*, 179 N. C. 285, 102 S. E. 306 (1920).

An action to quiet title or to remove a cloud from title is equitable in its nature, and may now be maintained to remove from the title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. *Holden v. Totten*, 224 N. C. 547, 31 S. E. (2d) 635 (1944).

In an action to remove a cloud from plaintiff's title, caused by a docket judgment alleged to be invalid, a demurrer to the complaint, as not stating a cause of action, was properly overruled, this section being sufficiently broad to entitle plaintiff to maintain an independent action. *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424 (1942).

Judgment Obtained by Fraud.—A complaint alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right. The complaint was held sufficient for the plaintiff to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under this section to remove the former judgment as a cloud upon her title. *Stocks v. Stocks*, 179 N. C. 285, 102 S. E. 306 (1920).

Tax Deed.—Where a judgment entered in favor of the county in an action against the owner of land for taxes has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment cancelling the tax deed. *Galer v. Auburn-Asheville Co.*, 204 N. C. 683, 169 S. E. 642 (1933).

Foreclosure of Mortgage Given by Tenant in Common Prior to Partition.—The

purchaser of land from one tenant in common, after the land had been allotted to the tenant in a special proceeding for partition, may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition, when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. *Rostan v. Huggins*, 216 N. C. 386, 5 S. E. (2d) 162, 126 A. L. R. 410 (1939).

Contract without Married Woman's Privy Examination.—A contract to convey the lands of a married woman, signed by her and her husband, but without her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, within the intent and meaning of this section, though she is and remains in possession of the land. *Satterwhite v. Gallagher*, 173 N. C. 525, 92 S. E. 369 (1917).

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, under § 24-2, and a suit brought to remove a cloud upon title to the lands under this section to the extent of the usurious charge of interest on the notes cannot be maintained. *Briggs v. Industrial Bank*, 197 N. C. 120, 147 S. E. 815 (1929).

Proof Required of Plaintiff.—In a suit to remove a cloud upon the plaintiff's title under this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207 (1920).

III. PLEADING AND PRACTICE.

A. In General.

When Suit Treated as Action of Ejectment.—A suit instituted to determine conflicting claims to real property, under Laws 1893, c. 6, now this section, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant. *Hines v. Moye*, 125 N. C. 8, 34 S. E. 103 (1899).

When Court Will Hear and Determine without Action.—The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein a vendee has refused to accept the title on the

ground of its being doubtful, either in the exercise of their equitable jurisdiction, treating the controversy as a bill for specific performance, or under the provisions of this section, for the purpose of removing clouds upon obscure titles. *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213 (1909).

When Adverse Claim Invalid.—Under Laws 1893, c. 6, now this section, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed, but the court should enter its decree removing the cloud upon the title. *Rumbo v. Gay Mfg. Co.*, 129 N. C. 9, 39 S. E. 581 (1901).

No defense bond is required in an action to quiet title under this section. *Roberts v. Sawyer*, 229 N. C. 279, 49 S. E. (2d) 468 (1948).

A judgment binds parties and privies only. *Hines v. Moye*, 125 N. C. 8, 34 S. E. 103 (1899).

Costs.—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of this section. *Clemmons v. Jackson*, 183 N. C. 382, 111 S. E. 609 (1922).

In an action for trespass and for damages, the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. *Clemmons v. Jackson*, 183 N. C. 382, 111 S. E. 609 (1922).

B. Pleadings.

Sufficiency of Bill of Complaint.—Where a bill asserts that the complainant is the owner of certain designated lands, sets forth the chain of title, and alleges that the defendant claims an adverse interest in the said lands, which claim renders sale impossible and otherwise casts a cloud over complainant's title, it sufficiently states a cause of action to quiet title under this section. *North Carolina Min. Co. v. Westfeldt*, 151 F. 290 (1907).

Unnecessary to Allege Possession.—This section removed the necessity for alleging that the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim, the plaintiff pays the cost, and the title as between them is settled. *Asheville Land Co. v. Lange*, 150 N. C. 26, 63 S. E. 164 (1908).

When Occupation Is Alleged.—But

where the plaintiff alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. *Duncan v. Hall*, 117 N. C. 443, 23 S. E. 362 (1895).

Answer Sufficient to Raise Issue.—Where the complaint in a suit to remove a cloud upon plaintiff's title to land alleges that the plaintiff is the owner of the locus in quo, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed is sufficient to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. *Brinson v. Morris*, 192 N. C. 214, 134 S. E. 453 (1926).

Issue as to Delivery of Deed.—Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery under this section the court's refusal to submit an issue thereon entitles appellant to a new trial. *Ferguson v. Ferguson*, 206 N. C. 483, 174 S. E. 304 (1934).

Pleadings Sufficient for Determination of Damages as in Condemnation.—Where, in addition to the fact that general relief was prayed, the parties specifically asked that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiffs owned mineral interests in derogation of plaintiffs' right of access, it was held that the damages resulting to plaintiffs from such floodings must be ascertained as in a suit for condemnation. *Duke Power Co. v. Toms*, 118 F. (2d) 443 (1941).

C. Jurisdiction of Courts.

Advisory Jurisdiction of Courts.—The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. And such jurisdiction is not sustained under this section, when the suit is not brought by the plaintiff against some person claiming an adverse estate or interest. *Heptinstall v. Newsome*, 146 N. C. 503, 60 S. E. 416 (1908).

Concurrent Jurisdiction of State and Federal Courts.—The remedy given by statutes of this character may be enforced

in the federal court when the parties are inhabitants of different states. *Johnston v. Kramer Bros. & Co.*, 203 F. 733 (1913).

Where there is an action pending in the State courts to try the title to lands under this section, the State courts have thereby acquired jurisdiction over the property, and the federal courts will not entertain a suit in equity on the same facts and for the same relief. *Westfeldt v. North Carolina Min. Co.*, 166 F. 706 (1909).

This section does not enlarge the jurisdiction of federal courts of equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be considered as creating an equitable right, it would not authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the

reason that in such action the defendant is entitled under the federal Constitution to a trial by jury. *Wood v. Phillips*, 50 F. (2d) 714 (1931).

In an action under this section, while it is true that a federal court of equity lacks jurisdiction of a suit brought against a number of defendants claiming severally different portions of the land in dispute, that ground may oust the court's jurisdiction only in respect to those defendants who raise the objection, and, where title and possession in the complainant is sufficiently alleged, it is error to dismiss the suit as to those defendants who have made no defense, but submitted themselves and their interests to the jurisdiction of the court. *New Jersey, etc., Co. v. Gardner-Lacy Lumber Co.*, 178 F. 772 (1910).

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions, as provided by § 1-94, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable

upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made. The approval by the resident judge of the district may be made by him either in term or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either in term or at chambers are hereby ratified and validated.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or State bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter

into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interests and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (1903, c. 99; 1905, c. 548; Rev., s. 1590; 1907, cc. 956, 980; 1919, c. 17; C. S., s. 1744; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; 1947, c. 377.)

- I. General Consideration.
- II. Action in Superior Court for Sale.
- III. Sale and Reinvestment.
- IV. Illustrative Cases.

Cross References.

As to constitutional restriction against perpetuities, see North Carolina Const., Art. I, § 31. As to partition sales of real property generally, see §§ 46-22 to 46-34. As to vagueness of description of land in pleadings, see § 8-39; in conveyance, see § 39-2. As to sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse, see § 41-11.1.

I. GENERAL CONSIDERATION.

Editor's Note.—The 1923 amendment inserted the present first sentence of the third paragraph.

The 1925 amendment inserted in the fourth paragraph the provisions as to State bonds, and made other changes.

The section was further changed by the 1927 amendment so as to permit a life tenant to bring an action for sale and reinvestment without joinder of remaindermen or reversioners.

The 1933 amendment inserted in the next to the last sentence of the second paragraph, following the word "property" and preceding the word "reinvestment," the words "for the purpose of obtaining funds for improving other non-productive," etc.

The 1935 amendment inserted the provision at the end of the second sentence of the fifth paragraph relating to existing liens.

The 1941 amendment inserted the word "lease" in the first sentence of the first paragraph and in the third paragraph. It also added the provision that the mortgagees shall not be held responsible for determining the validity of liens, etc., where the court directs such liens, etc., to be paid. For comment on the amendment, see 19 N. C. Law Rev. 506.

The first 1943 amendment made changes in the fourth paragraph. And, as amended by Laws 1943, c. 729, it expressly provided

that its intent and purpose was "to provide for the temporary reinvestment of funds received from the sale of contingent remainders in United States bonds and bonds guaranteed as to principal and interest by the United States."

The 1947 amendment added the last two sentences of the third paragraph. For brief discussion of the amendment, see 25 N. C. Law Rev. 390.

Constitutionality and Validity.—Revisal, s. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. *Smith v. Miller*, 151 N. C. 620, 66 S. E. 671 (1910).

This section does not interfere with the essential rights of ownership, but, operating in addition to those already possessed, is constitutional and valid. *Pendlen v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918).

Retroactive Effect.—Chapter 99, Laws 1903, Rev., s. 1509, now this section, is valid, even when allowed to reach back and affect estates already created by will, though only so far as it is permitted to apply to interests not yet vested. *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272 (1906). See *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116 (1903).

The decision in *Springs v. Scott* was approved in *Hodges v. Lipscomb*, 133 N. C. 199, 45 S. E. 556 (1903), a case in which it appeared that the will was made prior to the passage of Laws 1903, c. 99. It was there held that the act of 1903 operated retrospectively, so as to apply to contingent interest created by a will which had already taken effect by the death of the testator. *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272 (1906).

Purpose of Section.—To prevent any possible doubt of the existence of the power of the court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, and to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the act of 1903, now this section, was passed. *McAfee v. Green*, 143 N. C. 411, 55 S. E. 828 (1906).

Section Does Not Destroy Interest of Remote Contingent Remaindermen.—It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323 (1922). See *Lancaster v. Lancaster*, 209 N. C. 673, 184 S. E. 527 (1936).

It will be noted that this section does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, and, subject to the right to use a reasonable portion of the amount for the improvement of the remainder, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. *Dawson v. Wood*, 177 N. C. 158, 98 S. E. 459 (1919).

When Section Applicable.—This section [before the 1927 amendment] and § 41-12 apply only to a sale of property in which there are or have been contingent interests. *Waddell v. United Cigar Stores*, 195 N. C. 434, 142 S. E. 585 (1928).

The 1927 amendment, where the land is unproductive, etc., extends the right of action to include life estates where there are vested remaindermen and reversioners without their joinder. The section therefore had reference only to contingent remainders. *Stepp v. Stepp*, 200 N. C. 237, 156 S. E. 804, 76 A. L. R. 536 (1931).

Applied to Charitable and Other Trusts.—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estate in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780 (1920).

The sale of an estate in remainder af-

fectured under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780 (1920).

Section Does Not Limit Power of Court over Trusts.—This section, authorizing those who have a vested interest in land with contingent remainders over to persons not in being to petition for and procure the sale of the land for reinvestment, does not limit the power of the court to supervise the administration of trust estates and to enter such orders and decrees in respect thereto as circumstances may require, so that the interest of contingent remaindermen and other beneficial owners may be sold to preserve the trust estate from destruction. *First-Citizens Bank, etc., Co. v. Rasberry*, 226 N. C. 586, 39 S. E. (2d) 601 (1946).

Power of Court Independent of Section.—The court, without regard to the act of 1903, now this section, has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, and upon failure thereof, over to persons, all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116 (1903).

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there is a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine who the remaindermen are, under the procedure therein laid down. *Dawson v. Wood*, 177 N. C. 158, 98 S. E. 459 (1919).

Decree May Be Binding on Persons Not in Esse.—A lease authorized by the decree

of a court of chancery may be binding upon beneficiaries not in esse, when their interests are the same as those of persons in being who are subjected by due process to the jurisdiction of the court. *Waddell v. United Cigar Stores*, 195 N. C. 434, 142 S. E. 585 (1928), wherein a lease of trust property was held valid over the objection that it might extend beyond the term of the trust.

Status of Remainders.—Contingent remainders are no longer considered mere possibilities which cannot be transferred, but a remainderman whose estate is contingent may convey it. 2 N. C. Law Rev. 126; *Beacon v. Amos*, 161 N. C. 357, 77 S. E. 407 (1913).

Cited in *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402 (1917); *Hines v. Williams*, 198 N. C. 420, 152 S. E. 39 (1930); *Greene v. Stadiem*, 198 N. C. 445, 152 S. E. 398 (1930); *Cole v. Cole*, 229 N. C. 757, 51 S. E. (2d) 491 (1949).

II. ACTION IN SUPERIOR COURT FOR SALE.

General Requirements for Sale.—Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so requires, and those living and in present interest are represented in person, and unborn children by guardian ad litem. *McLean v. Caldwell*, 178 N. C. 424, 100 S. E. 888 (1919).

Jurisdiction Cannot Be Conferred by Consent.—Jurisdiction of the superior court of an action by owner of a vested estate against contingent remaindermen to sell land cannot be conferred by consent, and this section, authorizing such an action, must be strictly complied with. *Watson v. United States*, 34 F. Supp. 777 (1940).

Jurisdiction on Appeal from Proceedings Improperly Brought before Clerk.—Lands subject to contingent limitations may be sold by order of the judge of the superior court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508 (1917).

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing.

Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903).

Authority of Clerk.—It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the superior court in ordinary special proceedings without approval or confirmation by a judge of the superior court. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5 (1924).

Proceedings Brought under § 46-3.—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of § 46-3, and these proceedings so brought cannot be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements for the protection of contingent remaindermen, which must be strictly followed; and, though under §§ 46-23, 46-24 a sale is provided when the land is affected with a contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5 (1924).

Life Tenant May Not Have Partition under § 46-24.—A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds under § 46-24, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of this section. *Smith v. Suitt*, 199 N. C. 5, 153 S. E. 602 (1930).

Who May Institute Suit.—Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. *Dawson v. Wood*, 177 N. C. 158, 98 S. E. 459 (1919).

Plaintiff Must Have Vested Interest.—In a proceeding under this section to sell real property in which there is a contingent interest, plaintiff must be a person having a vested interest in the property to be sold, and the sale must be passed upon by the judge of the superior court. The contingent interest alone cannot be

sold. *Butler v. Winston*, 223 N. C. 421, 27 S. E. (2d) 124 (1943).

Where one who had no vested estate in land brought action in the superior court against contingent remaindermen to sell land, the court lacked jurisdiction of the action, and hence the judgment ordering sale of the land was void and could be collaterally attacked. *Watson v. United States*, 34 F. Supp. 777 (1940).

Necessary Parties.—Where timber growing upon lands was devised to testator's daughter for her life, and at her death to such of her children and grandchildren then living as she might have appointed in her will, or, upon her failure to exercise the power of appointment, to her children and grandchildren then living, objection to proceedings brought by the devisee and her children and grandchildren then living on the ground that no one having a vested interest in the land had been made a party could not be sustained. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386 (1923). See *Thompson v. Humphrey*, 179 N. C. 44, 101 S. E. 738 (1919).

In proceedings under this section certain contingent interests in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired under the original deed in trust by the trustee had become passive in him, and it was held that as, under the statute of uses, the legal and equitable title had merged in the same person, neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit. *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916).

Construing the statute, as amended, in *Hodges v. Lipscomb*, 133 N. C. 199, 45 S. E. 556 (1903), the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could have their interest represented and protected by a guardian ad litem as the statute provides. *Dawson v. Wood*, 177 N. C. 158, 98 S. E. 459 (1919).

Effect of Omission of Persons Having Contingent Interests.—An order of sale and judgment of confirmation will not be vacated on the ground that certain contingent remaindermen were not made parties to the proceedings to sell, where the in-

terest of the contingent remaindermen has, since the sale, been extinguished by failure of the contingency. *Beam v. Gilkey*, 225 N. C. 520, 35 S. E. (2d) 641 (1945).

Setting Aside Sale for Failure to Serve Summons on Infant.—Where in proceedings to sell lands affected with contingent interests the provisions of this section have been observed, and the clerk has appointed a guardian ad litem for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale void and a nullity. However, on a proper showing, the sale may be set aside as to all the parties except an innocent purchaser without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. *Welch v. Welch*, 194 N. C. 633, 140 S. E. 436 (1927).

Where Guardian Appointed after Sale.—In a proceeding under this section to sell all the contingent interest in certain lands of minors and unborn children, where petitioners were represented by a guardian, judgment of sale signed on the day before the guardian's appointment was void. *Butler v. Winston*, 223 N. C. 421, 27 S. E. (2d) 124 (1943).

When Action Abates.—An action against a contingent remainderman to sell the lands under this section abates upon the death of the remainderman prior to the termination of the life estate, when his limitation over is made to depend upon his surviving the life tenant. *Redden v. Toms*, 211 N. C. 312, 190 S. E. 490 (1937).

Estoppel by Judgment.—Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make sale of the lands as fully as the executor under the will was therein authorized to make. *Hayden v. Hayden*, 178 N. C. 259, 100 S. E. 515 (1919).

Preliminary Judgment for Payment of Betterments.—Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon

the parties as an estoppel. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918).

Judgment under Former Law Does Not Work Estoppel.—A former action determined before the enactment on the subject by the legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested unite in the decree, cannot estop the parties to proceedings thereafter brought under the provisions of this section. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918).

Irregularities in Judgment against Person Having No Interest.—Irregularity of entering a consent judgment against testator's minor grandson without investigation and approval of the court may be disregarded where the minor had no interest. *Beam v. Gilkey*, 225 N. C. 520, 35 S. E. (2d) 641 (1945).

III. SALE AND REINVESTMENT.

Public or Private Sale Permissible.—The sale of estates affected with contingent interests, under the provision of this section, may, in the sound discretion of the trial judge and subject to his approval, be made either at public auction or by private negotiation, as the best interests of the parties may require. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780 (1920). See *McAfee v. Green*, 143 N. C. 411, 55 S. E. 828 (1906).

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323 (1922).

Where the provisions of this section have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386 (1923).

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are

properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. *DeLaney v. Clark*, 196 N. C. 282, 145 S. E. 398 (1928). See *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508 (1917).

Decree Must Provide for Reinvestment.—Where real estate is sold under order of the court, the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests. *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116 (1903).

Discretion of Court and Clerk in Reinvestment.—Before the 1923 amendment, which inserted the first sentence of the third paragraph of this section, it was held that the preservation of the proceeds of the sale of lands, under this section, was referred to the sound discretion of the trial judge, and no error was found to an order requiring the funds to be paid into the office of the clerk of the superior court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, it appearing that they were given the usufruct of the land. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918).

Time of Reinvestment.—In Laws 1905, c. 548, the reinvestment in realty was required to be within two years, but such requirement was removed by the later Laws 1907, cc. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered. *Dawson v. Wood*, 177 N. C. 158, 98 S. E. 459 (1919).

Effect of Omitting Bond Required by § 1-407.—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by § 1-407 that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the superior court. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323 (1922).

Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed

for the sale to give bond for the preservation and proper application of the proceeds of sale, etc., under § 1-407; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386 (1923).

Purchaser's Liability Ends When Money Paid into Court.—A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of this section, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. *McLean v. Caldwell*, 178 N. C. 424, 100 S. E. 888 (1919).

Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the fund, its safety being taken care of by the court in its final decree. *DeLaney v. Clark*, 196 N. C. 282, 145 S. E. 398 (1928).

Purchaser Takes Fee Simple Title.—A purchaser at a sale of land with contingent interests allowed under the provisions of this section acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 550 (1918).

Commissioner Held without Authority to Insert Restrictions in Deed.—Where a commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of this section, and there were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase no authority to restrict the use of the property was asked, and none granted in the order of the court, it was held that the commissioner was without authority to insert restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the distribution of the proceeds of sale. *Southern Real Estate Loan, etc., Co. v. Atlantic Refining Co.*, 208 N. C. 501, 181 S. E. 633 (1935).

IV. ILLUSTRATIVE CASES.

Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made to appear that the interest of all parties requires, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323 (1922).

Complaints Held Good on Demurrer.—A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc., that the property as it stood was rapidly depreciating, and that there were no available funds, otherwise, to meet the necessary and insistent demands. It was held that a demurrer was bad, and properly overruled. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780 (1920).

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause for action. *Stepp v. Stepp*, 200 N. C. 237, 156 S. E. 804 (1931).

Suit Regarding Management of Trust Estate.—In a suit regarding the management of a trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented

by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. *Spencer v. McCleneghan*, 202 N. C. 662, 163 S. E. 753 (1932).

Where the grantors in a deed have erroneously assumed that they had title to the lands which they conveyed in fee, but which were affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, and in these proceedings have protected the interest of the remote remaindermen by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment authorizing and confirming the sale, being had in conformity with the provisions of the statute, perfects the title, and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. *Myer v. Thompson*, 183 N. C. 543, 112 S. E. 328 (1922).

Foreclosure of Tax Lien.—Where land held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant, was mortgaged by the life tenant and the mortgage was foreclosed upon default, it was held that in an action to foreclose the lien for taxes against the land under § 105-414, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen were made parties, and the minor contingent remaindermen, the unknown contingent remaindermen and those not in esse were represented by guardian ad litem under this section, and the provisions of both statutes were fully and accurately followed, the purchaser at the commissioner's sale acquired the fee simple title. *Rodman v. Norman*, 221 N. C. 320, 20 S. E. (2d) 294 (1942).

Sale of Growing Timber.—The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, was affected by the contingencies contemplated by this section. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386 (1923).

Order of Sale Held Invalid.—The proceeding in which an order for the sale of a lot was made was not instituted and was not conducted in accordance with this section. The power of sale was not exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors were not represented by guardian ad litem appointed by the judge, but by a next friend appointed by the clerk. The order or sale was signed, not during the term of the superior court in Haywood County, but by the judge holding the courts of the twentieth district (which includes Haywood County) at Sylva, in Jackson County, in said district. The order of sale could not, therefore, be held valid. *Lide v. Wells*, 190 N. C. 37, 128 S. E. 477 (1925).

Effect of Invalid Decree for Sale and Reinvestment.—In an action brought under the provisions of this section, to sell certain lands devised to E. for life with a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but the funds being only sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left. It was held: (1) that the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interests involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived to a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or materialmen of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner should sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of material-

men, etc. *Smith v. Miller*, 151 N. C. 620, 66 S. E. 671 (1910).

Mortgage for Permanent Improvements Held Improper.—The locus in quo was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements upon the property, and instituted this proceeding against their children, in esse or which might thereafter be born, seeking to have a mortgage in the sum of \$20,900 placed on the property to refinance an existing mortgage on the property in the sum of \$10,000, and also unsecured

notes executed by the life tenant representing a part of the moneys used in making said improvements. It was held that since the remaindermen were in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court that the execution of the mortgage to refinance the indebtedness would materially enhance the interest of the remaindermen was erroneous, and judgment directing the execution of the mortgage to refinance the indebtedness should be reversed. *Hall v. Hall*, 219 N. C. 805, 15 S. E. (2d) 273 (1941).

§ 41-11.1. Sale, lease or mortgage of property held by a "class", where membership may be increased by persons not in esse.—Wherever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility in law that the membership of the class may later be increased by one or more members not then in esse, a special proceeding may be instituted in the superior court for the sale, lease or mortgage of such real or personal property, or both, as provided in this section.

All petitions filed under this section wherein an order is sought for the sale, lease or mortgage of real property, or of both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real property is situated. If the order sought is for sale, lease or mortgage of personal property, the petition may be filed in the office of the clerk of the superior court of the county in which any or all of such personal estate is situated.

All members of the class in esse shall be parties to the proceeding, and where any of such members are under legal disability, their duly appointed general guardians or their guardians ad litem shall be made parties. The clerk of the superior court shall appoint a guardian ad litem to represent the interests of the possible members of the class not in esse, and such guardian ad litem shall be a party to the proceeding.

Upon a finding by the clerk of the superior court that the interests of all members of the class, both those in esse and those not in esse, would be materially promoted by a sale, lease or mortgage of any such property, he shall enter an order that the sale, lease or mortgage be made, and shall appoint a trustee to make such sale, lease or mortgage, in such manner and on such terms as the clerk may find to be most advantageous to the interests of the members of the class, both those in esse and those not in esse; but no sale, lease or mortgage shall be made, or shall be valid, until approved and confirmed by the resident judge of the district, or the judge holding the courts of the district. As a condition precedent to receiving the proceeds of the sale, lease or mortgage, the trustee shall be bonded in the same manner as a guardian for minors.

In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided, the trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until the occurrence of the event which will finally determine the identity of all members of the class; all such investments and reinvestments shall be made in accordance with the laws of North Carolina relating to the investment of funds held by guardians or minors; and all the provisions of G. S. § 36-4, relating to the reduction in bonds of guardians or trus-

tees upon investment in certain registered securities and the deposit of the securities with the clerk of the superior court, shall be applicable to the trustee appointed hereunder.

In the event the proceeds of sale shall be paid over to a trustee and invested by him as authorized above, the entire income actually received by the trustee from such investment shall be paid by said trustee periodically, and not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment, or to the duly appointed guardians of any such living members under legal disability.

In the event the court orders a lease of the property, the proceeds from the lease shall be first used to defray the expenses, if any, of the upkeep and maintenance of the property, and the discharge of taxes, liens, charges and encumbrances thereon, and any remaining proceeds shall be paid over by the trustee in their entirety, not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment or to the duly appointed guardians of any such members under legal disability.

Payments of income to the living members of the class as aforesaid shall constitute a full and final acquittance and disposition of the income so paid, it being the intent of this section that only the living members of the class (as they may be constituted at the time of each respective income payment) shall be entitled to the income which is the subject of the respective payment, and that possible members of the class not in esse shall not share in, or become entitled to the benefit of any income payment made prior to the time that such members are born and become living members of the class.

In the event that there has been a sale of any of the property, and the proceeds of sale are being held, managed, invested and reinvested by a trustee as provided above, any member of the class who is of legal age and who is not otherwise under legal disability may sell, assign and transfer his entire right, title and interest (both as to principal and income) in the funds or investments so held by the trustee. Upon receiving written notice of such sale, assignment or transfer, the trustee shall recognize the purchaser, assignee and transferee as the lawful successor in all respects whatsoever to the right, title and interest (both as to principal and income) of the seller, assignor and transferor; but no such sale, transfer or assignment shall divest the trustee of his legal title in, or possession of, said funds or investments or (except as provided above) affect his administration of the trusts for which he was appointed.

The court shall order a mortgage of the property only for one or more of the following purposes: (1) to provide funds for the costs and expenses of court incurred in carrying out any of the provisions of this section; (2) to provide funds for the necessary upkeep and maintenance of the property; (3) to make reasonable improvements to the property; (4) to pay off taxes, other existing liens, charges and encumbrances on the property. The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. As used in this section, references to mortgages shall also apply to deeds of trust executed for loan security purposes.

Every trustee appointed pursuant to the provisions of this section shall file with the clerk of the superior court an inventory and annual accounts in the same manner as is now provided by law with respect to guardians.

The superior court shall allow commissions to the trustee for his time and trouble in the effectuation of a sale, lease or mortgage, and in the investment and management of the proceeds, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators, and collectors.

Provided, however, this section shall not be applicable where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of the creation of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restric-

tions as to the use, form, investment, leasing, mortgage, or other disposition of the property.

And provided further, this section shall not alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. But where, under the laws and legal principles existing without regard to this section, a gift, devise, bequest, transfer or conveyance has the legal effect of being made to all members of a class, some of whom are in esse and some of whom are in posse, the procedures authorized hereby may be utilized for the purpose of promoting the best interests of all members of the class, and this section shall be liberally construed to effectuate this intent. The remedies and procedures herein specified shall not be exclusive, but shall be cumulative, in addition to, and without prejudice to, all other remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

The provisions of this section shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after the effective date of this section. (1949, c. 811, s. 1.)

Editor's Note.—Section 3 of the act inserting this section made it effective upon its ratification on April 5, 1949. For discussion of this section, see 27 N. C. Law Rev. 415.

§ 41-12. Sales or mortgages of contingent remainders validated.—In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court has been rendered authorizing the sale or mortgaging, including execution of deeds of trust, of such property discharged of such contingent remainder, executory devise, or other limitations in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being or whose estates had not then vested: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (1905, c. 93; Rev., s. 1591; C. S., s. 1745; 1923, c. 64; 1935, c. 36.)

Cross Reference.—As to revocation of deeds of future interests made to persons not in esse, see § 39-6.

Editor's Note.—The 1923 amendment re-enacted this section, validating sales of property under a judgment of the superior court, where the property has been conveyed by deed or devised by will, upon contingent remainder, executory devise, or other limitation, and the judgment has authorized a sale of the property discharged of the contingent remainder or other limitation. The section was enacted in 1905, validating such sales made before that date, and the 1923 amendment extends to such sales made since 1905 and up to March 6, 1923. 1 N. C. Law Rev. 285.

By the 1935 amendment this section was made to apply to mortgages and deeds of trust. The amendment also added the clause just preceding the proviso, reading "or whose estates had not then vested."

Constitutionality and Validity.—This section is a valid exercise of legislative

power. *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272 (1906).

This section, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Planters Cotton-Seed Oil*, 165 N. C. 63, 80 S. E. 972 (1914).

So long as the interest remains contingent only, the legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties. *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272 (1906).

Partition Sale Not Authorized.—This section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5 (1924).

Application.—A testator devised certain

lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings,

were not estopped by the judgment in partition. It was held that the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the Validating Act of 1905 (Revisal, s. 1591, now this section). *Bullock v. Planters Cotton-Seed Oil Co.*, 165 N. C. 63, 80 S. E. 972 (1914).

Cited in *Hines v. Williams*, 198 N. C. 420, 152 S. E. 39 (1930); *Watson v. United States*, 34 F. Supp. 777 (1940).

§ 41-13. **Freeholders in petition for special taxes defined.**—In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement. (1915, c. 22; C. S., s. 1746.)

Former Law.—The word "freeholders," used in Laws 1911, c. 135, s. 1, amending Revisal, s. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, did not include females. *Gill v. Board*, 160 N. C. 176, 76 S. E. 203 (1912).

Women Now Included.—In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, women freeholders must be counted, under the provisions of this section. *Chitty v. Parker*, 172 N. C. 126, 90 S. E. 17 (1916).

Chapter 42. Landlord and Tenant.

Article 1.

General Provisions.

- Sec.
42-1. Lessor and lessee not partners.
42-2. Attornment unnecessary on conveyance of reversions, etc.
42-3. Term forfeited for nonpayment of rent.
42-4. Recovery for use and occupation.
42-5. Rent apportioned, where lease terminated by death.
42-6. Rents, annuities, etc., apportioned, where right to payment terminated by death.
42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.
42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.
42-9. Agreement to rebuild, how construed in case of fire.
42-10. Tenant not liable for accidental damage.
42-11. Willful destruction by tenant misdemeanor.
42-12. Lessee may surrender, where building destroyed or damaged.
42-13. Wrongful surrender to other than landlord misdemeanor.
42-14. Notice to quit in certain tenancies.
- ### Article 2.
- #### Agricultural Tenancies.
- 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.
42-16. Rights of tenant.
42-17. Action to settle disputes between parties.
42-18. Tenant's undertaking on continuance or appeal.

Sec.

- 42-19. Crops delivered to landlord on his undertaking.
42-20. Crops sold, if neither party gives undertaking.
42-21. Tenant's crop not subject to execution against landlord.
42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.
42-22.1. Failure of tenant to account for sales under tobacco marketing cards.
42-23. Terms of agricultural tenancies in certain counties.
42-24. Turpentine and lightwood leases.
42-25. Mining and timber land leases.

Article 3.

Summary Ejectment.

- 42-26. Tenant holding over may be dispossessed in certain cases.
42-27. Local: Refusal to perform contract ground for dispossession.
42-28. Summons issued by justice on verified complaint.
42-29. Service of summons.
42-30. Judgment by default or confession.
42-31. Trial by justice; jury trial; judgment; execution.
42-32. Damages assessed to trial.
42-33. Rent and costs tendered by tenant.
42-34. Undertaking on appeal; when to be increased.
42-35. Restitution of tenant, if case quashed, etc., on appeal.
42-36. Damages to tenant for dispossession, if proceedings quashed, etc.

Article 4.

Forms.

- 42-37. Forms sufficient.

ARTICLE 1.

General Provisions.

§ 42-1. **Lessor and lessee not partners.**—No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (1868-9, c. 156, s. 3; Code, s. 1744; Rev., s. 1982; C. S., s. 2341.)

Agreement Not Constituting Agricultural Partnership.—The lessor and lessee are not partners. *State v. Keith*, 126 N. C. 1114, 36 S. E. 169 (1900). Thus, where B. was to furnish land, farming implements, feed and team and W. was to do the work, and the crops were to be equally

divided, it was held that this was not an agricultural partnership. *Lawrence v. Week*, 107 N. C. 119, 12 S. E. 120 (1890). See also *Day v. Stevens*, 88 N. C. 83 (1883), explaining and correcting *Curtis v. Cash*, 84 N. C. 41 (1881).

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.—Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17; Code, s. 1764; Rev., s. 947; C. S., s. 2342.)

§ 42-3. Term forfeited for nonpayment of rent.—In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease. (1919, c. 34; C. S., s. 2343.)

Purpose of Section.—This section was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reëntry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Written into Leases.—The section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Forfeiture for Benefit of Lessor.—The forfeiture implied by this section is for the benefit of the lessor, and to be declared only at his application. *Monger v. Lutterloh*, 195 N. C. 274, 142 S. E. 12 (1928), holding section not applicable to facts of case.

Necessity of Demand for Rent.—Where

§ 42-4. Recovery for use and occupation.—When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation. (1868-9, c. 156, s. 5; Code, s. 1746; Rev., s. 1986; C. S., s. 2344.)

Lease Void under Statute of Frauds.—Where a lease was void under the statute of frauds, the lessors could only recover

for the time the premises were occupied. *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90 (1897).

lease contains no forfeiture clause for failure to pay rent, and lessee, after lessor's death, pays rent to lessor's personal representative to the knowledge of lessor's heir, the heir, who made no demand for the rent, may not declare the lease forfeited, since in the absence of a forfeiture clause, this section applies, and forfeiture under it is not effective until the expiration of ten days after demand. *First-Citizens Bank, etc., Co. v. Frazelle*, 226 N. C. 724, 40 S. E. (2d) 367 (1946).

Forfeiture Denied upon Tender of Rent and Costs.—Where, during the hearing and before judgment on a petition for forfeiture of a lease under this section, all rents and costs lawfully incurred are tendered to the petitioner, the petition is properly denied. *Coleman v. Carolina Theatres*, 195 N. C. 607, 143 S. E. 7 (1928).

Where lessee waives all notice to vacate in the lease he cannot claim the benefit of this section. *Tucker v. Arrowood*, 211 N. C. 118, 189 S. E. 180 (1937).

Construed with § 42-33.—This section and § 42-33 are in pari materia, and should be construed together. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

§ 42-5. Rent apportioned, where lease terminated by death.—If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allow-

ances; and if any security was given for such rent it shall be apportioned in like manner. (1868-9, c. 156, s. 6; Code, s. 1747; Rev., s. 1987; C. S., s. 2345.)

§ 42-6. Rents, annuities, etc., apportioned, where right to payment terminated by death.—In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event. (1868-9, c. 156, s. 7; Code, s. 1748; Rev., s. 1988; C. S., s. 2346.)

Not Applicable to Certain Annuities.—This section providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision

for successive owners, but the right to payment terminates upon the death of insured. *Wells v. Guardian Life Ins. Co.*, 213 N. C. 178, 195 S. E. 394, 116 A. L. R. 130 (1938).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.—When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession. (1868-9, c. 156, s. 8; Code, s. 1749; Rev., s. 1990; C. S., s. 2347; 1931, c. 173, s. 1.)

Editor's Note.—The 1931 amendment changed this section to permit a tenant for years, in case the tenancy is terminated by sale of the land under mortgage or deed of trust, to continue his occupation to the end of the current year and to apportion the rent. See 9 N. C. Law Rev. 379.

Section Reasonable and Constitutional.—This section is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate and is constitutional. *King v. Foscue*, 91 N. C. 116 (1884).

Protection of Remainderman.—This section was passed to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is

entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate and before the surrendering of possession to the remainderman. See *King v. Foscue*, 91 N. C. 116 (1884); *Hayes v. Wrenn*, 167 N. C. 229, 83 S. E. 356 (1914); *Collins v. Bass*, 198 N. C. 99, 150 S. E. 706 (1929).

Lease Continued.—A lease of land made by a tenant for life terminates at his death, but by this section the lease is continued to the end of the current lease year so that the tenant's representatives may gather his crop. *King v. Foscue*, 91 N. C. 116 (1884).

Lease for One Year Included.—The phrase "any lease for years" is used in a technical sense, and it embraces a lease for a single year. *King v. Foscue*, 91 N. C. 116 (1884).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.—The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their

assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; Code, s. 1765; Rev., s. 1989; C. S., s. 2348.)

§ 42-9. Agreement to rebuild, how construed in case of fire.—An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (1868-9, c. 156, s. 11; Code, s. 1752; Rev., s. 1985; C. S., s. 2349.)

Changes Made by Section.—This section was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to

more than half its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. *Chambers v. North River Line*, 179 N. C. 199, 102 S. E. 198 (1920).

§ 42-10. Tenant not liable for accidental damage.—A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (1868-9, c. 156, s. 10; Code, s. 1751; Rev., s. 1991; C. S., s. 2350.)

When Lessor Liable for Injuries.—While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to keep the premises in repair, the liability may be extended to the owner, where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it at the solicitation of the tenant. *Knight v. Foster*, 163 N. C. 329, 79 S. E. 614 (1913).

Lessor and Lessee Both Liable.—Where a landlord has leased the lower floor of his building as a store and has rented an office above, which has defective plumbing, to a dentist, in an action by the lessee of the

store for water damages to his stock of goods, evidence that the lessor had contracted to repair, but for years had failed to inspect or repair the plumbing, and that the dentist had approved an insufficient outlet for the water flowing from his cuspidor and had negligently left his cuspidor turned on during the night, is sufficient, if believed by the jury, to sustain a verdict against the landlord and the dentist jointly, the negligence of each being the proximate cause of the injury. *Rucker, etc., Co. v. Willey*, 174 N. C. 42, 93 S. E. 379 (1917).

Cited in *Rountree v. Thompson*, 226 N. C. 553, 39 S. E. (2d) 523 (1946).

§ 42-11. Willful destruction by tenant misdemeanor.—If any tenant shall, during his term or after its expiration, willfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor. (1883, c. 224; Code, s. 1761; Rev., s. 3686; C. S., s. 2351.)

Cross References.—As to burning or destroying crops, see § 14-141. As to larceny of ungathered fruit and crops, see § 14-78. As to local regulations of landlord and tenant, see §§ 14-358, 14-359.

Meaning of "Willful."—The word "willful" as used in this section means some-

thing more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be

brought within the meaning of a criminal statute. *State v. Whitener*, 93 N. C. 590 (1885).

If the defendants reasonably and bona fide believe that they have the right to remove the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910).

Right to Remove Certain Fixtures.—It is intimated that an away-going tenant has the right to remove fixtures put on the premises by himself for his own convenience. *State v. Whitener*, 93 N. C. 950 (1885), approved in *State v. Morgan*, 136 N. C. 628, 48 S. E. 670 (1904).

Houses Covered by Section.—For meaning of "tenement house," "uninhabited house" and "outhouse" as used in this section, see *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910).

Corporation Liable.—A corporation is indictable for the acts of its officers and

agents under this section. *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910).

Indictment.—An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within this section. *State v. Graham*, 121 N. C. 623, 28 S. E. 409 (1897).

Burden of Proof.—In an indictment under this section the burden of proof is upon the State to establish, first, that the relation of landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement house. *State v. Godwin*, 138 N. C. 582, 50 S. E. 277 (1905).

Admissibility of Evidence.—In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offense is inadmissible. *State v. Graham*, 121 N. C. 623, 28 S. E. 409 (1897).

§ 42-12. Lessee may surrender, where building destroyed or damaged.—If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage or destruction occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged or destroyed was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage or destruction, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage or destruction, proportionate to the time between the last period of payment and the occurrence of the damage or destruction, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease. (1868-9, c. 156, s. 12; Code, s. 1753; Rev., s. 1992; C. S., s. 2352.)

The modification of the common-law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common-law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884 (1920).

Section Not Applicable.—See *Chambers v. North River Line*, 179 N. C. 199, 102 S. E. 198 (1920).

Where the terms of a lease fully provide for the rights of the parties upon destruc-

tion of the property by a fire such rights will be determined in accordance with the written agreement, without reference to this section. *Grant v. Borden*, 204 N. C. 415, 168 S. E. 492 (1933).

Damage Insufficient to Enable Lessee to Surrender Premises.—*Carolina Mtg. Co. v. Massie*, 209 N. C. 146, 183 S. E. 425 (1936).

Time Allowed Lessee for Repairs.—Where a monthly rental to be paid by the lessee of a building, and an obligation to make certain repairs by him, are specified as the consideration for the lease, with forfeiture of the lease upon the nonpayment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in

which to make the repairs if no time is stated in the lease. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884 (1920).

When Landlord Restores Building.—Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for a breach the landlord may be held responsible. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884 (1920).

Repairs by Lessor within Reasonable Time.—Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time when the extent of the damage is insufficient to terminate the lease under its written

§ 42-13. **Wrongful surrender to other than landlord misdemeanor.**—Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor. (1883, c. 138; Code, s. 1760; Rev., s. 3682; C. S., s. 2353.)

§ 42-14. **Notice to quit in certain tenancies.**—A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. (1868-9, c. 156, s. 9; Code, s. 1750; 1891, c. 227; Rev., s. 1984; C. S., s. 2354.)

Local Modification.—Forsyth: 1935, c. 119; Halifax: 1935, c. 22; Hertford: 1939, c. 367; Montgomery: 1925, c. 196, s. 2; Perquimans: 1935, c. 472; Pitt: 1925, c. 196, s. 2; Randolph: 1925, c. 196, s. 2; Wake: 1931, c. 20.

Notice Must Be Given.—A tenant from year to year is entitled to a written or verbal notice to quit, and a mere demand for possession is insufficient. *Vincent v. Corbin*, 85 N. C. 108 (1881).

A landlord has no right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice. *Fayetteville Waterworks Co. v. Tillinghast*, 119 N. C. 343, 25 S. E. 960 (1896).

Verbal Notice Sufficient.—A verbal notice by landlord to tenant is sufficient. Section 1-585 applies to a different class of notices. *Poindexter v. Call*, 182 N. C. 366, 109 S. E. 26 (1921).

Insufficient Notice.—In an action in summary ejectment under § 42-26 proof of notice given the 14th of the month to quit the premises on or before the first of the following month is insufficient to

terms, evidence that three days had elapsed, between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. *Archibald v. Swaringen*, 192 N. C. 756, 135 S. E. 849 (1926).

Same—Crack in Swimming Pool.—Where a swimming pool is leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use, it was held that a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. *Archibald v. Swaringen*, 192 N. C. 756, 135 S. E. 849 (1926).

show the statutory notice terminating the term, when it appears that the original occupancy was taken on the 18th of the month and plaintiff offers no evidence as to the date of the month the term began or when the monthly rentals became due. *Stafford v. Yale*, 228 N. C. 220, 44 S. E. (2d) 872 (1947).

On May 18, 1897, a landlord gave a tenant from month to month notice "to get out within 30 days." The landlord had received the rent for May. It was held that such notice was invalid as to May, as the rent had been paid, and as to June, because not ending with the month. *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. 332 (1898).

Tenancies at Will.—Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to notice to quit as provided in this section. *Humphries v. Humphries*, 25 N. C. 362 (1843).

Where a tenancy is from year to year, and, after the commencement of a year,

there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time. *Williams v. Bennett*, 26 N. C. 122 (1843).

Where one occupied land as his own and refused to quit when possession was demanded, it was held that he could not afterwards insist upon the statutory notice. *Head v. Head*, 52 N. C. 620 (1860).

Effect of Holding Over.—When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. *Stedman v. McIntosh*, 26 N. C. 291 (1844); *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713 (1896); *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90 (1897); *Holton v. Andrews*, 151 N. C. 340, 66 S. E. 212 (1909); *Murrill v. Palmer*, 164 N. C. 50, 80 S. E. 55 (1913). But it is competent to rebut the presumption that he is a tenant from year to year by proof of a special agreement. *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90 (1897).

Same—Tenant Entitled to Notice.—It

was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days (now seven days) notice to quit. *Branton v. O'Briant*, 93 N. C. 99 (1885).

But the fact that a tenant, who entered into the occupation of premises under an express lease from month to month, continued the occupation for more than two years, is no reason why he should be considered a tenant from year to year, and entitled to the one month's notice to quit. *Jones v. Willis*, 53 N. C. 430 (1862).

Effect of Leaving Premises after Waiver of Notice.—A tenant from a year to year, who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises. *Torrans v. Stricklin*, 52 N. C. 50 (1859).

Different Agreement Not Prohibited.—This section does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy. *Cherry v. Whitehurst*, 216 N. C. 340, 4 S. E. (2d) 900 (1939).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. **Landlord's lien on crops for rents, advances, etc.; enforcement.**—When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article *Agricultural Liens*, in the chapter *Liens*.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (1876-7, c. 283; Code, s. 1754; Rev., s. 1993; 1917, c. 134; C. S., s. 2355; 1933, c. 219.)

- I. In General.
- II. Lien of Lessor.
- III. Possession and Title to Crop.
- IV. Advancements.
- V. Remedy of Lessor to Enforce Lien.

Cross References.

As to agricultural liens for advances, see § 44-52 et seq. As to laborer's crop lien date, see § 44-41. As to short form for lien in certain counties, see § 44-62.

I. IN GENERAL.

Editor's Note.—The 1933 amendment added the last paragraph. For summary of amendment, see 11 N. C. Law Rev. 265.

For article on agricultural tenancies in the Southeastern States, see 26 N. C. Law Rev. 274.

A Statutory Remedy.—In *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173, (1891), the court held that the common-law remedy of lessors by distress does not obtain in this State; and that, except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. *Reynolds v. Taylor*, 144 N. C. 165, 56 S. E. 871 (1907).

Applies Only to Lease for Agricultural Purposes.—This statutory lien is only given when lands are rented or leased for agricultural purposes. *Reynolds v. Taylor*, 144 N. C. 165, 56 S. E. 871 (1907).

What "Crops" Include.—The words "crops raised" mean simply the crops grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding sections, only the word "crops" is used. The legislature had in mind no distinction between *fructus industriales* (products obtained by labor and cultivation) and *fructus naturales* (products which emanate from the power of nature alone), and there was no need of any. *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

The section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut or gathered" in that season from his land. *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

The landlord's lien under this section does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnished to the tenant. *Brooks v. Garrett*, 195 N. C. 452, 142 S. E. 486 (1928).

The operation of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. *Wooten v. Hill*, 98 N. C. 49, 3 S. E. 846 (1887).

Same—Hay.—Hay is ordinarily embraced in the word "crop" as used in this section. But not, it seems, when it is merely a spontaneous growth, as crab grass, which springs up after another crop is housed. *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

What Constitutes One a Cropper.—An agreement by him who cultivates land that the owner who advances "guano, seed wheat," etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. *State v. Burwell*, 63 N. C. 661 (1869).

A cropper has no estate in the land, and his possession is that of the landlord. *State v. Austin*, 123 N. C. 749, 31 S. E. 731 (1898).

When Lessee Has Lien.—When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor, *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169 (1887); and therefore holds a prior lien to a mortgagor of the crops. *Perry v. Perry*, 127 N. C. 23, 37 S. E. 71 (1900). The lien of the original landlord is not, however, impaired. See note under succeeding analysis line, catch-line "Effect of Subrenting."

Agreements between Tenants.—Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant between the parties. *Medlin v. Steele*, 75 N. C. 154 (1876).

Tenant's Liability.—If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135 (1889).

Action against Tenant by Third Party.—In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. *Lee v. Melton*, 173 N. C. 704, 91 S. E. 697 (1917).

Cited in *Jennings v. Keel*, 196 N. C. 675, 146 S. E. 716 (1929); *Never Fail Land Co. v. Cole*, 197 N. C. 452, 149 S. E. 585 (1929).

II. LIEN OF LESSOR.

Landlord's Lien Superior.—The landlord's lien is made superior to all other liens. *Ledbetter v. Quick*, 90 N. C. 276 (1884); *Wooten v. Hill*, 98 N. C. 49, 3 S. E. 846 (1887); *Brewer v. Chappell*, 101 N. C. 251, 7 S. E. 670 (1888); *Reynolds v. Taylor*, 144 N. C. 165, 56 S. E. 871 (1907); *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N. C. 21, 16 S. E. (2d) 408 (1941).

Lien of Third Party for Advances.—The lien of a landlord takes precedence to that of a third party for advances, notwithstanding the priority of the latter in time. *Spruill v. Arrington*, 109 N. C. 192, 13 S. E. 779 (1891); *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669 (1893). And this precedence is to the extent of the advances made. *Wooten v. Hill*, 98 N. C. 49, 3 S. E. 846 (1887). See *Wise Supply Co. v. Davis*, 194 N. C. 328, 139 S. E. 599 (1927).

The statutory landlord's lien under this section is superior to that of one furnishing supplies to the cropper under § 44-52, but where the cropper under a separate contract with the landlord raises a certain crop, the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. *Glover v. Dail*, 199 N. C. 659, 155 S. E. 575 (1930).

A contract expressed and purporting to be a lease of lands for agricultural purposes does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce his lien under this section in priority to the lien, under § 44-52, of one furnishing advancements for the cultivation of the crop. *Wise Supply Co. v. Davis*, 194 N. C. 328, 139 S. E. 599 (1927).

Rights of Purchaser.—The landlord's lien may be enforced as against the purchaser of the crop. *Burwell v. Coopers Co-op. Warehouse Co.*, 172 N. C. 79, 89 S. E. 1064 (1916).

Third Person Charged with Notice.—Every person who makes advancements to a tenant or cropper of another does so with

notice of the rights of the landlord, and that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. *Thigpen v. Leigh*, 93 N. C. 47 (1885); *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 272 (1890).

Same—Caveat Emptor.—This section gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to a judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule caveat emptor applies. *Belcher v. Grimsley*, 83 N. C. 88 (1880).

Liability to Other Lienholders.—A landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of his lien. *Crinkley v. Egerton*, 113 N. C. 142, 18 S. E. 341 (1893).

Liability of Landlord for Marketing of Tenant's Tobacco.—The Landlord and Tenant Act (this section) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. *Tobacco Growers Co-op. Ass'n v. Bissett*, 187 N. C. 180, 121 S. E. 446 (1924). For article discussing effect of landlord's lien upon co-operative marketing, see 2 N. C. Law Rev. 188.

Effect of Subrenting.—The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. *Montague v. Mial*, 89 N. C. 137 (1883); *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169 (1887); *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

Antecedent Debts Not Included.—It was not intended to confer a lien upon the landlord for antecedent debts which the lessee might stipulate to pay, and give them a preference over the agricultural lien, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in

Thigpen v. Maget, 107 N. C. 39, 12 S. E. 272 (1890), and is undoubtedly in harmony with the policy of the law in securing the landlord his rent, and at the same time enabling the tenant to obtain advances from third parties. *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98 (1894).

Although under this section and §§ 44-52 and 44-60 the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98 (1894).

Assignee of Tenant's Rent Note.—The assignee of a note, given by a tenant for rent, has a landlord's lien on the crop. *Avera v. McNeill*, 77 N. C. 50 (1877).

Where a landlord furnishes advancements for the making of crops, the liens for the rent and for advancements are in equal degree, and now attach, since the 1925 amendment of § 44-52, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. *Brooks v. Garrett*, 195 N. C. 452, 142 S. E. 486 (1928).

Lien Conferred upon Mortgagee.—An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. *Cooper v. Kimbell*, 123 N. C. 120, 31 S. E. 346 (1898).

Lien of Vendor after Default.—After default by a vendee of land to pay the purchase money, the vendor may by contract become landlord of the vendee so as to avail himself of the landlord's lien given by this section. *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214 (1895); *Ford v. Green*, 121 N. C. 70, 28 S. E. 132 (1897).

Certain Costs Included.—The landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and, as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption as against such costs. *Slaughter v. Winfrey*, 85 N. C. 159 (1881).

Judgment for Rent.—This section makes a judgment for rent a lien on the crop. *Hargrove v. Harris*, 116 N. C. 413, 21 S. E. 916 (1895).

III. POSSESSION AND TITLE TO CROP.

Common-Law Provision.—Before this section was passed, the title to the whole of the crop was, in contemplation of law,

vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. *Deaver v. Rice*, 20 N. C. 567 (1839); *Gordon v. Armstrong*, 27 N. C. 409 (1845); *Ross v. Swaringer*, 31 N. C. 481 (1849); *Biggs v. Ferrell*, 34 N. C. 1 (1851); *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173 (1891).

Section Applies Only to Landlord and Tenant.—Except in the case of landlord and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third person before the rent is ascertained and set apart conveys a good title. *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173 (1891).

Where the occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under the provisions of this section, is vested in the landlord. *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924 (1893).

Vested in Lessor.—All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. *Durham v. Speeke*, 82 N. C. 87 (1880); *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121 (1890); *State v. Austin*, 123 N. C. 749, 31 S. E. 731 (1898); *State v. Keith*, 126 N. C. 1114, 36 S. E. 169 (1900); *Batts v. Sullivan*, 182 N. C. 129, 108 S. E. 511 (1921); *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N. C. 21, 16 S. E. (2d) 408 (1941).

Assignee of landlord's lien for rent is the owner of the crops raised to the extent of cash rent due and is entitled thereto as against tenant and third party holder of note for rent. *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N. C. 21, 16 S. E. (2d) 408 (1941).

Same—For His Protection.—For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. *State v. Higgins*, 126 N. C. 1112, 36 S. E. 113 (1900).

Lessor May Use Force.—An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. *State v. Austin*, 123 N. C. 749, 31 S. E. 731 (1898).

Actual Possession in Tenant.—Though

the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. *Jordan v. Bryant*, 103 N. C. 59, 9 S. E. 135 (1889).

The whole tenor of this and the following sections contemplates the right of the lessee or cropper to hold the actual possession, until such time as a division shall be made. *State v. Copeland*, 85 N. C. 692 (1882).

Same—May Maintain Action.—As against third parties the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. *Bridgers v. Dill*, 97 N. C. 222, 1 S. E. 767 (1887). And the ownership of the crop is well charged as his in the indictment. *State v. Higgins*, 126 N. C. 1112, 36 S. E. 113 (1900).

Tenant Has Insurable Interest.—That the possession and title to the crop are deemed vested in the landlord does not divest the tenant of an insurable interest in the crops before division. *Batts v. Sullivan*, 182 N. C. 129, 108 S. E. 511 (1921).

When Crop Divided.—Unless otherwise provided by an agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121 (1890).

Crop Left in Field.—A crop cultivated by a tenant and left standing in the field after the expiration of this term, becomes the property of the landlord. And this is so, whether or not the tenant has assigned the crop. *Sanders v. Ellington*, 77 N. C. 255 (1877).

IV. ADVANCEMENTS.

Purchaser Takes with Knowledge.—A purchaser or mortgagee of a crop takes with full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a preferred lien upon the crop, made by reason of such advances, and this preference shall extend to "existing" liens. *Wooten v. Hill*, 98 N. C. 49, 3 S. E. 846 (1887).

What Included.—The "advancements" referred to in this section embrace anything of value supplied by the landlord to the tenant, or cropper, in good faith,

directly or indirectly, for the purpose of making and saving the crop. *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891).

Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances. *Powell v. Perry*, 127 N. C. 22, 37 S. E. 276 (1900).

Supplies necessary to make and save a crop are such articles as are in good faith furnished to and received by the tenant for that purpose. *Ledbetter v. Quick*, 90 N. C. 176 (1884).

Where a landlord advanced certain cottonseed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to retain parts of the undivided cottonseed and crops by way of advancement, it was held that the plaintiff had a landlord's lien on such seed and crops. *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 272 (1890).

Where the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of this section. *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891).

Presumption.—When advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e. g., farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary—e.g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop. *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891).

Question for Jury.—It was proper in the court to leave it to the jury to find whether upon the evidence a mule and wagon, etc., were treated as advancements. *Ledbetter v. Quick*, 90 N. C. 276 (1884).

That the lessee diverts the advancements from the purpose contemplated cannot change their nature and the purpose of them. *Womble v. Leach*, 83 N. C. 84 (1880); *Ledbetter v. Quick*, 90 N. C. 276 (1884); *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891).

Collusion and Fraud.—Where landlord and tenants undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such a transaction will not be sustained. *Ledbetter v. Quick*, 90 N. C. 276 (1884).

Crop of Sublessee.—The original lessor, after his lessee has paid him in full, has no lien under the statute on the crop of the sublessee for advances made by him to the sublessee. *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169 (1887).

V. REMEDY OF LESSOR TO ENFORCE LIEN.

In General.—The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under this section is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. *Livingston v. Farish*, 89 N. C. 140 (1883).

When Action Lies.—The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. *Livingston v. Farish*, 89 N. C. 140 (1883).

The remedy of claim and delivery was designated for the landlord's protection, and it cannot, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the

statute will permit this. *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135 (1889).

Same—When No Time for Division Fixed.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121 (1890); *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931 (1893).

Action for Undivided Portion.—The lessor can maintain an action for recovery of an undivided portion of a crop, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728 (1891).

Denial of Landlord's Title.—Where in his answer in an action of claim and delivery, the defendant tenant denies that the crop, for the possession of which the action is brought, is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the commencement of the action. *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931 (1893).

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee claiming the crop as a part of his personal property exemption. *Durham v. Speeke*, 82 N. C. 87 (1880).

§ 42-16. **Rights of tenant.**—When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in § 42-15, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action. (1876-7, c. 283, s. 2; Code, s. 1755; Rev., s. 1994; C. S., s. 2356.)

In General.—The action allowed to a cropper by this section is given against the lessor or employer, and, also, against any person to whom he may assign, or sell, the crop, or any interest therein as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. *Rouse v. Wooten*, 104 N. C. 229, 10 S. E. 190 (1889).

Purpose of Section.—This section intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, so that he shall certainly reap the just benefit of his toil. *Rouse v. Wooten*, 104 N. C. 229, 10 S. E. 190 (1889).

Creation of Lien.—While one who labors in the cultivation of a crop, under a contract that he shall receive his compen-

sation from the crops when matured and gathered, has no estate or interest in the land, but is simply a laborer—at most, a cropper—his right to receive his share is protected by this section, which for certain purposes creates a lien in his favor, and which will be enforced against the employer or landlord, or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested. *Rouse v. Wooten*, 104 N. C. 229, 10 S. E. 190 (1889).

Lessor Cannot Seize Crop.—The lessor has no right, when there is no agreement to that effect, to take the actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon the removal of the crop by the lessee or cropper. *State v. Copeland*, 86 N. C. 692 (1882).

Lessee Left to Civil Remedy.—When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy under this section for the breach of trust, should the lessor refuse to account. *State v. Keith*, 126 N. C. 1114, 36 S. E. 169 (1900).

§ 42-17. Action to settle disputes between parties.—When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, or in the superior court of the county where the property is situate if the amount so claimed is more than two hundred dollars. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2357.)

In General.—It is quite apparent that this and the following section contemplate an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to the possessory actions authorized in the antecedent sections. *Wilson v. Respass*, 86 N. C. 112 (1882).

Purpose.—The purpose of this and the following section is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered. *Deloatch v. Coman*, 90 N. C. 186 (1884).

No Application Where Occupant a Vendee or Mortgagor.—This and the fol-

Claim and Delivery.—Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery. *Wilson v. Respass*, 86 N. C. 112 (1882).

Trover Not Proper.—Where a landlord took the crop into his sole possession, and refused to divide when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire, it was held that this did not amount to a conversion, and an action in the nature of trover could not be maintained. *Shearin v. Riggsbee*, 97 N. C. 216, 1 S. E. 770 (1887).

Where Lessor Seizes Too Much.—If a lessor seizes more than enough to satisfy his lien, and refuses "to make a fair division of the crop," the lessee or cropper can compel him to do so in the manner prescribed in this section. *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728 (1891).

When a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657 (1904).

lowing section, like § 42-15, are plainly inapplicable where the occupant of land is a vendee or mortgagor. *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924 (1893).

Jurisdiction.—An action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease and cognizable in the court of a justice of the peace. *Deloatch v. Coman*, 90 N. C. 186 (1884).

In an action by a landlord to recover the rent, when neither the sum demanded nor the amount ascertained to be due exceeds two hundred dollars, the superior court has no jurisdiction. *Foster v. Penny*, 76 N. C. 131 (1877).

Same—Tort Actions.—The special jurisdiction of justices of the peace under this section does not extend to torts, but is confined to actions for enforcing contracts. *Montague v. Mial*, 89 N. C. 137 (1883).

Action by Tenant's Widow.—The widow of a tenant cultivating land on

shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord. She is not compelled to resort to the remedy prescribed by this section. She may pursue her remedy by a civil action to recover the value of the crops, subject to

such deductions as the lessor is entitled to by reason of advancements, costs of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract. *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657 (1904).

§ 42-18. Tenant's undertaking on continuance or appeal.—In case there is a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2358.)

§ 42-19. Crops delivered to landlord on his undertaking.—In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in § 42-18, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in § 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (1876-7, c. 283, s. 4; Code, s. 1757; Rev., s. 1996; C. S., s. 2359.)

Court Will Not Restrain Lessor.—Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. In such a case it seems that

the tenant cannot regain possession of the crop under the provisions of § 42-18 since that section contemplates nonintervention on the part of the court and not a removal of possession from one party to another. *Wilson v. Respass*, 86 N. C. 112 (1882).

§ 42-20. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in § 42-18 and § 42-19, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (1876-7, c. 283, s. 5; Code, s. 1758; Rev., s. 1997; C. S., s. 2360.)

§ 42-21. Tenant's crop not subject to execution against landlord.—Whenever servants and laborers in agriculture shall by their contracts, oral or written, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Code, s. 1796; Rev., s. 1998; C. S., s. 2361.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.—If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor.

(1876-7, c. 283, s. 6; 1883, c. 83; Code, s. 1759; Rev., ss. 3664, 3665; C. S., s. 2362.)

- I. In General.
- II. Wrongful Act.
- III. Intent.
- IV. Notice.
- V. Indictment.

IN GENERAL.

The purpose of this section is to render the statutory provisions and regulations of the preceding sections more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. *State v. Ewing*, 108 N. C. 755, 13 S. E. 10 (1891).

The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890).

Applies Only to Specified Liens.—It will be observed that the section does not extend to, and embrace, all liens the lessor may have on any property of the tenants, but only "all the liens held by the lessor or his assigns on the crop." *State v. Turner*, 106 N. C. 691, 19 S. E. 1026 (1890).

Extends to Receivers.—This section extends to and protects receivers charged with the management of lands. *State v. Turner*, 106 N. C. 691, 10 S. E. 1026 (1890).

The lessor's rights cannot be abridged by any subordinate contracts of the lessee. *Montague v. Mial*, 89 N. C. 137 (1883).

Cited in *Never Fail Land Co. v. Cole*, 197 N. C. 452, 149 S. E. 585 (1929).

II. WRONGFUL ACT.

A Misdemeanor Only.—The offense of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. *State v. Powell*, 94 N. C. 921 (1886).

Actual Seizure Unnecessary.—To constitute the offense of an unlawful seizure of crops by the landlord, under this section, it is not essential that the landlord should take forcible or even manual possession of them; the offense will be com-

plete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. *State v. Ewing*, 108 N. C. 755, 13 S. E. 10 (1891).

Possession Important.—An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop, to his own use, even if done with a felonious intent, where he is in the actual possession of the same. *State v. Copeland*, 86 N. C. 692 (1882).

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. *State v. Webb*, 87 N. C. 558 (1882).

If the crop is in the actual possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord. *State v. King*, 98 N. C. 648, 4 S. E. 44 (1887).

Gathering the Crop.—How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. *Varner v. Spencer*, 72 N. C. 381 (1875); *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890).

The gathering and preservation of crops was not the evil intended to be remedied by this section, but the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises, was the evil. *Varner v. Spencer*, 72 N. C. 381 (1875).

Feeding Crop to Stock.—Where a lessee after putting a crop in the crib converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. *Varner v. Spencer*, 72 N. C. 381 (1875).

Removal from Premises.—Where a tenant without the consent of, or notice to, his landlord, and before satisfying the latter's lien, removed a portion of the crop from the land upon which it was produced and stored it in a building upon his (the tenant's) own land, it was held that he was guilty of unlawfully removing crops, notwithstanding he made the removal for the purpose of sheltering the crop, and

kept it separate from others. *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890).

Removal of Turpentine Crop.—See note to § 42-24.

Where Tenant Aids Subtenant.—If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor. *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

Damage by Landlord No Defense.—A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. *State v. Bell*, 136 N. C. 674, 49 S. E. 163 (1904), overruling *State v. Neal*, 129 N. C. 692, 40 S. E. 205 (1901).

III. INTENT.

Intent Is Immaterial.—While the obvious purpose of this section is the protection of the lessor's interest against a fraudulent disposition or appropriation of the property, inconsistent with his right and tending to defeat the lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offense is sufficiently charged in the substantial words of the act. *State v. Pender*, 83 N. C. 651 (1880).

The intent in making the removal is immaterial. *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890); *State v. Crook*, 132 N. C. 1053, 44 S. E. 32 (1903).

Intent Implied from Act.—The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent to commit the offense. *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890).

IV. NOTICE.

Removal of Crops.—If it shall be necessary, in possible cases, to remove crops from the land for their protection, this should be done on notice, or legal steps taken as contemplated and allowed by the statute. *State v. Williams*, 106 N. C. 646, 10 S. E. 901 (1890).

Lack of Notice Part of Offense.—The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days' notice, for if the notice is given, removing the crop is not an of-

fense. *State v. Crowder*, 97 N. C. 432, 1 S. E. 690 (1887).

"Without Any Notice" Sufficient in Indictment.—An averment in an indictment for removing a crop, "without having given any notice of such intended removal", is equivalent to the averment that the removal was made without giving "five days' notice." *State v. Powell*, 94 N. C. 921 (1886).

Burden of Proof.—In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days' previous notice before the crop had been removed. *State v. Harris*, 161 N. C. 267, 76 S. E. 683 (1912).

How Want of Notice Proven.—The want of such notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee. *State v. Crowder*, 97 N. C. 432, 1 S. E. 690 (1887).

V. INDICTMENT.

Statute Must Be Followed.—An indictment under this section charging the defendant with removing the crop "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all liens held by the lessor or his assigns on said crop," should have been followed. *State v. Merritt*, 89 N. C. 506 (1883); *State v. Rose*, 90 N. C. 712 (1884).

Sufficient Averment.—In an indictment under this section, it is sufficient to aver, in the words of the statute, that the act was done, "willfully and unlawfully," leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop. *State v. Pender*, 83 N. C. 651 (1880).

Where an indictment for removing a crop alleged that the defendant did "rent from B," and subsequently, that he did "remove the crop without satisfying all liens held by said B," it was held that this, in effect, sufficiently charged the relation of landlord and tenant, and that the "liens held by the lessor" were unpaid at the time of the alleged unlawful removal. *State v. Turner*, 106 N. C. 691, 10 S. E. 1026 (1890).

In this section the word "crop" includes those ungathered as well as those gathered, and an indictment that the landlord seized the "crop growing and unmaturing in the field," etc., charges an indictable

offense, when it is otherwise sufficient. *State v. Townsend*, 170 N. C. 696, 86 S. E. 718 (1915).

Averment as to Notice.—See *State v. Powell*, 94 N. C. 921 (1886), cited under preceding analysis line.

Allegation as to Lien.—It is not necessary to allege, in an indictment under this section, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. *State v. Smith*, 106 N. C. 653, 11 S. E. 166 (1890), distinguishing *State v. Merritt*, 89 N. C. 506 (1883). See *State v. Rose*, 90 N. C. 712 (1884).

In an indictment for removing a crop, it is not necessary to negative the fact

that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens. *State v. Turner*, 106 N. C. 691, 10 S. E. 1026 (1890).

Variance.—Where an indictment for removal of crops without notice to the landlord charged an agreement by the defendant to raise a crop on the land of G., and on the trial the proof showed the title to be in another, who rented the land to G., it was held that there was no variance. *State v. Foushee*, 117 N. C. 766, 23 S. E. 247 (1895).

Judgment Arrested.—When on the trial it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested. *State v. Sears*, 71 N. C. 295 (1874).

§ 42-22.1. Failure of tenant to account for sales under tobacco marketing cards.—Any tenant or share cropper having possession of a tobacco marketing card issued by any agency of the State or federal government who sells tobacco authorized to be sold thereby and fails to account to his landlord, to the extent of the net proceeds of such sale or sales, for all liens, rents, advances, or other claims held by his landlord against the tobacco or the proceeds of the sale of such tobacco, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court. (1949, c. 193.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 466.

§ 42-23. Terms of agricultural tenancies in certain counties.—All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in § 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Halifax, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Pitt, Robeson, Sampson, and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136.)

Local Modification.—Columbus: 1947, c. 783.

Editor's Note.—The 1945 amendment made this section applicable to Craven,

Edgecombe, Greene, Halifax, Jones, Lenoir, Onslow and Pitt counties; and the 1949 amendment made it applicable to Montgomery County.

§ 42-24. Turpentine and lightwood leases.—This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter. (1876-7, c. 283, s. 7; Code, s. 1762; 1893, c. 517; Rev., s. 1999; C. S., s. 2363.)

Extension of § 42-22.—This section extends § 42-22 to “all leases or contracts to lease turpentine trees,” and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the re-

moval of the crop by an agricultural tenant is made such offense. *State v. Turner*, 106 N. C. 691, 10 S. E. 1026 (1890).

Cited in *Farmville Oil, etc., Co. v. Bourne*, 205 N. C. 337, 171 S. E. 368 (1933).

§ 42-25. Mining and timber land leases.—If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter. (1868-9, c. 156, s. 16; Code, s. 1763; Rev., s. 2000; C. S., s. 2364.)

Not a Lease.—Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be

extended upon payment of a certain sum, this is not a leasehold interest but an estate in fee. *Carolina Timber Co. v. Wills*, 171 N. C. 262, 88 S. E. 327 (1916).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.—Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

1. When a tenant in possession of real estate holds over after his term has expired.
2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
3. When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C. S., s. 2365.)

Local Modification.—Johnston: 1933, c. 390.

ings in ejectment is restricted to those cases expressly provided by this section. *Howell v. Branson*, 226 N. C. 264, 37 S. E. (2d) 687 (1946), citing *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693 (1907).

- I. Application and Scope.
- II. Holding Over.
- III. Breach of Provision of Lease.
- IV. Rights of Parties.
- V. The Action.

I. APPLICATION AND SCOPE.

The basis and scope of summary ejectment in actions between landlord and tenant are established by this section. *Warren v. Breedlove*, 219 N. C. 383, 14 S. E. (2d) 43 (1941).

Remedy Is Restricted to Cases Enumerated.—The remedy by summary proceed-

Jurisdiction Is Statutory.—Jurisdiction of a justice of the peace in summary ejectment proceedings is purely statutory, and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. *Howell v. Branson*, 226 N. C. 264, 37 S. E. (2d) 687 (1946); *Goins v. McLoud*, 228

N. C. 655, 46 S. E. (2d) 712 (1948), holding that the remedy does not extend to a tenant at sufferance or at will. As to concurrent jurisdiction, see cases under analysis line V of this note.

Relation of Landlord and Tenant Necessary.—The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. *McCombs v. Wallace*, 66 N. C. 481 (1872); *Hughes v. Mason*, 84 N. C. 473 (1881); *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693 (1907); *McIver v. Seaboard Airline R. Co.*, 163 N. C. 544, 79 S. E. 1107 (1913); *Prudential Ins. Co. v. Totten*, 203 N. C. 431, 166 S. E. 316 (1932); *Simons v. Lebrun*, 219 N. C. 42, 12 S. E. (2d) 644 (1941).

Remedy Not Coextensive with Doctrine of Estoppel.—The remedy by summary proceedings in ejectment given by this section is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693 (1907); *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627 (1914).

Some Contract or Lease Required.—This section was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. *McCombs v. Wallace*, 66 N. C. 481 (1872).

Definite Term Not Necessary.—Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. *Simons v. Lebrun*, 219 N. C. 42, 12 S. E. (2d) 644 (1941).

Where Purchase Changed to Lease.—Where one unconditionally surrenders his rights under the contract of purchase, and enters into a contract of lease, he may be evicted by summary proceeding under this section; and it is not necessary that he should actually surrender the possession of the land and receive it again at

the hands of the lessor. *Riley v. Jordan*, 75 N. C. 180 (1876).

Two Classes Excluded.—The construction of this section excludes two classes, viz.: vendees in possession under a contract for title and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled. *McCombs v. Wallace*, 66 N. C. 481 (1872).

When Section Does Not Apply.—The remedy by summary ejectment before a justice of the peace, under this and the following sections, is not available when there is a relation of mortgagor and mortgagee, or vendor and vendee. *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627 (1914).

Where a controversy involved the disputed title to real property, out of which certain equities arose, this section does not apply. *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627 (1914).

When title to the property is in issue, the jurisdiction of the justice of the peace is ousted, and the proceeding is properly dismissed as in case of nonsuit upon appeal to the superior court. *Prudential Ins. Co. v. Totten*, 203 N. C. 431, 166 S. E. 316 (1932); *Home Bldg., etc., Ass'n v. Moore*, 207 N. C. 515, 177 S. E. 633 (1935).

Same—Bargainor in Deed of Trust.—A bargainor in a deed of trust containing a stipulation for the retention of the possession of the land conveyed until sold under the terms of the trust, and who holds possession after a sale of the premises by a trustee, is not such a tenant as comes within the purview of this section, and hence proceedings cannot be taken thereunder to evict him. *McCombs v. Wallace*, 66 N. C. 481 (1872).

Same—Entry as Vendee.—Where a party entered land under a contract of purchase, while so possessed a justice of the peace has no jurisdiction to oust him under this section. *McCombs v. Wallace*, 66 N. C. 481 (1872); *McMillan v. Love*, 72 N. C. 18 (1875); *Riley v. Jordan*, 75 N. C. 180 (1876).

Consideration of Equitable Defenses.—A justice of the peace has jurisdiction of a summary action in ejectment, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in a summary ejectment in so far as they relate to the issue of tenancy. *Farmville Oil, etc., Co. v. Bowen*, 204 N. C. 375, 168 S. E. 211 (1933).

As to insufficient notice to quit in action

under this section, see *Stafford v. Yale*, 228 N. C. 220, 44 S. E. (2d) 872 (1947), treated in note under § 42-14.

Applied in *Lassiter v. Stell*, 214 N. C. 391, 199 S. E. 409 (1938).

Cited in *Seligson v. Klyman*, 227 N. C. 347, 42 S. E. (2d) 220 (1947).

II. HOLDING OVER.

Constitutionality.—Paragraph one of this section, as to a tenant holding over, was declared constitutional in *Credle v. Gibbs*, 65 N. C. 192 (1871).

Effect of Recognition.—The landlord may treat his tenant, who holds over, as a trespasser and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. *Murrill v. Palmer*, 164 N. C. 50, 80 S. E. 55 (1913).

When a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. *Stedman v. McIntosh*, 26 N. C. 191 (1843); *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713 (1896); *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90 (1897); *Holton v. Andrews*, 151 N. C. 340, 66 S. E. 212 (1909); *Murrill v. Palmer*, 164 N. C. 50, 80 S. E. 55 (1913).

A mere acceptance of rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery of possession. In an action to recover the possession, as the plaintiff is entitled to damages for the occupation of the premises, the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession. *Vanderford v. Foreman*, 129 N. C. 217, 39 S. E. 839 (1901); *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372 (1920).

When Holding Over Allowed.—It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of the tenant or some member of his family, and of such a character that removal could not be presently made without serious danger to the patient. *Murrill v. Palmer*, 164 N. C. 50, 80 S. E. 55 (1913).

Issue as to Holding Over.—The only question the court can try under paragraph

one in this proceeding is, "Was the defendant the tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677 (1899); *McIver v. Seaboard Airline R. Co.*, 163 N. C. 544, 79 S. E. 1107 (1913).

Applied in *Stadium v. Harvell*, 208 N. C. 103, 179 S. E. 448 (1935).

Cited in *Texas Co. v. Beaufort Oil, etc., Co.*, 199 N. C. 492, 154 S. E. 829 (1930).

III. BREACH OF PROVISION OF LEASE.

Condition Must Be in Lease.—A summary proceeding in ejectment begun during the lessee's term cannot be maintained where the contract of lease contained no condition, the breach of which would authorize a re-entry by the lessor. The mere failure to pay rent upon "a lease atdollars a year, payable monthly," does not warrant such re-entry. *Meroney v. Wright*, 81 N. C. 390 (1879).

Suit for Rescission Cannot Be Substituted on Appeal.—Where a verbal lease does not provide for its termination or reserve the right of re-entry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, and issues of fraud in procuring the lease and willful breach of the conditions are erroneously submitted in the superior court upon appeal in such action, it not being permissible for a party to substitute on appeal a suit for rescission. *Dees v. Apple*, 207 N. C. 763, 178 S. E. 557 (1935).

When Breach Waived.—After the breach of the tenant of his contract, acceptance of rent by the landlord which has accrued thereafter, will prevent the landlord from insisting on the forfeiture. *Winder v. Martin*, 183 N. C. 410, 111 S. E. 708 (1922).

Where defendant has been partially evicted in order for him, in a summary action of ejectment, to retain possession of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. *Blomberg v. Evans*, 194 N. C. 113, 138 S. E. 593 (1927).

IV. RIGHTS OF PARTIES.

Tenant May Dispute Assignment.—Where an action of ejectment is brought by one claiming to be an assignee of the

landlord, the tenant may dispute the assignment. *Steadman v. Jones*, 65 N. C. 388 (1871).

Renewal of Lease.—A tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919).

Same—Consideration.—An option in the original lease to renew would not be without consideration, but landlord's agreement during the lease, and not constituting part of the lease, not to lease the property without first giving the tenant an opportunity to renew the lease was unenforceable, being without consideration. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919).

Estoppel to Deny Landlord's Title.—A tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. *Lawrence v. Eller*, 169 N. C. 211, 85 S. E. 291 (1915). See *Steadman v. Jones*, 65 N. C. 388 (1871).

Neither the tenant nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. *Callendar v. Sherman*, 27 N. C. 711 (1845).

Where the relation of landlord and tenant is established, and the latter is in possession, the tenant will not be permitted to dispute the title of the landlord during the continuance of the lease. *Hobby v. Freeman*, 183 N. C. 240, 111 S. E. 1 (1922). Before disputing his landlord's title, the tenant must restore possession. *Buckhorne Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630 (1920).

Same—Slave at Time of Entry.—See *Wilson v. James*, 79 N. C. 349 (1878).

Subtenant.—Not only the tenant but his sublessee is estopped to deny the title of his immediate landlord. *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322 (1890).

V. THE ACTION.

Landlord Proper Party to Bring.—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment (authorized by this section) to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the pro-

ceedings in ejectment, is untenable. *Shelton v. Clinard*, 187 N. C. 664, 122 S. E. 477 (1924).

Jurisdiction of Justice of the Peace Is Not Exclusive.—Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment under this section but the superior courts have concurrent jurisdiction of such actions as provided by § 7-63. *Stonestreet v. Means*, 228 N. C. 113, 44 S. E. (2d) 600 (1947).

A landlord may institute suit in the superior court to eject his tenant, the remedy of summary ejectment before a justice of the peace not being exclusive, and in such action the superior court acquires jurisdiction where the defendant denies plaintiff's title, controverts the allegations of tenancy, and pleads betterments. *Bryan v. Street*, 209 N. C. 284, 183 S. E. 366 (1936).

Third Party as Defendant.—When, in an action for the recovery of real estate, both the plaintiff and a third party claim to be the landlord of the defendant, the latter has a right, upon affidavit, to be let in as a party defendant to the action. *Rollins v. Rollins*, 76 N. C. 264 (1877).

Estoppel.—In a proceeding before a justice of the peace under this section, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. *Heyer v. Beatty*, 76 N. C. 28 (1877).

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. *Shuford v. Greensboro Joint-Stock Land Bank*, 207 N. C. 428, 177 S. E. 408 (1934).

Provision for Renewal as Defense.—While a provision of renewal of a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. While the court allows this equitable defense to the summary proceedings, the defendants must pay the accrued rent. *McAdoo v. Callum Bros. & Co.*, 86 N. C. 419 (1882).

Burden of Proof.—In an action of ejectment, the burden of proving that the tenancy has terminated is on the plaintiff. *Poindexter v. Call*, 182 N. C. 366, 109 S. E. 26 (1921).

Evidence.—See *Hargrove v. Cox*, 180 N. C. 360, 104 S. E. 757 (1920).

Appeal Where Defendant Has Surrendered Possession.—In a summary ejection proceeding, under this and the following sections of this article, where the subject of the litigation, the right of plain-

tiffs to immediate possession of premises, had been disposed of by the surrender of same by defendants to plaintiffs and no other question was raised in the court below, appeal was dismissed. *Cochran v. Rowe*, 225 N. C. 645, 36 S. E. (2d) 75 (1945).

§ 42-27. **Local: Refusal to perform contract ground for dispossession.**—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alleghany, Anson, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Washington, Wayne, Wilson, Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C. S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459.)

Editor's Note.—The 1931 amendments added Moore, Rutherford, Stokes and Surry to the list of counties in this section. And the 1933 amendments added Pasquotank and Polk, although Pasquotank had

already been added by the 1924 amendment. The 1935 amendment added Guilford, and the 1943 amendments added Hoke, Brunswick and Davidson.

§ 42-28. **Summons issued by justice on verified complaint.**—When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in § 42-26 and § 42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367.)

The "oath in writing" required by this section must allege facts essential to confer jurisdiction. *Howell v. Branson*, 226 N. C. 264, 37 S. E. (2d) 687 (1946).

Question of Jurisdiction.—The question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. *Hahn v. Latham*, 87 N. C. 172 (1882). As to jurisdiction generally, see note under § 42-26.

If the defense involved the title to real estate, a justice of the peace has no jurisdiction thereof, and should dismiss the proceeding. *Forsythe v. Bullock*, 74 N. C. 135 (1876).

Equitable Defense.—The tenant may set up in his answer any equitable defense which he may have to his landlord's claim. *Forsythe v. Bullock*, 74 N. C. 135 (1876).

Effect of Failure to Set Up Defense.—Where a defendant failed to set up the defense that he was not a tenant, but held under an agreement to purchase, and it was decided that he was a tenant he cannot

be heard to question the validity of the judgment nor can he restrain its execution except in a direct proceeding to set it aside for fraud, etc. *Isler v. Hart*, 161 N. C. 499, 77 S. E. 681 (1913).

When Defendant Denies Tenancy.—In a proceeding before a justice of the peace under this section, where the defendant denies the alleged tenancy, it is the duty of the justice to proceed and try the issue of tenancy. *Foster v. Penry*, 77 N. C. 160 (1877).

Effect of Provision for Renewal.—A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. *McAdoo v. Callum Bros. & Co.*, 86 N. C. 419 (1882).

§ 42-29. **Service of summons.**—The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368.)

§ 42-30. **Judgment by default or confession.**—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369.)

Tenant May Hold after Adverse Judgment.—Where both plaintiff and an interpleading third party claim to be landlords of the defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant. *Rollins v. Rollins*, 76 N. C. 264 (1877).

Same—When Evicted.—If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is

Section Not Exception to Requirement of § 1-57.—While this section clearly provides that the agent or attorney of the lessor may make the oath in writing required in actions in summary ejectment, it does not provide an exception to the requirement of § 1-57, that “every action must be prosecuted in the name of the real party in interest.” *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609 (1936).

And the same applies to suits for the collection of rents. *Home Real Estate, etc., Co. v. Locker*, 214 N. C. 1, 197 S. E. 555 (1938).

Applied in *Rogers v. Hall*, 227 N. C. 363, 42 S. E. (2d) 347 (1947).

Cited in *Seligson v. Klyman*, 227 N. C. 347, 42 S. E. (2d) 220 (1947).

entitled to be restored to possession until the determination of the controversy between the plaintiff and the interpleading defendant. *Rollins v. Bishop*, 76 N. C. 268 (1877).

Same—Appeal.—Upon an appeal when the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the justice’s court until the determination of the controversy between the plaintiff and interpleading defendant. *Rollins v. Henry*, 76 N. C. 269 (1877).

Cited in *Seligson v. Klyman*, 227 N. C. 347, 42 S. E. (2d) 220 (1947).

§ 42-31. **Trial by justice; jury trial; judgment; execution.**—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff’s oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and

damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370.)

Cross Reference.—As to jury trial in the court of a justice of the peace, see § 7-150 et seq.

Where Injunction Issues.—Where a person has been enjoined from bringing actions on each installment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease. *Featherstone v. Carr*, 134 N. C. 66, 46 S. E. 15 (1903).

Effect of Judgment.—A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from showing in a subsequent action advancements made prior to

§ 42-32. **Damages assessed to trial.**—On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796.)

Editor's Note.—The 1945 amendment inserted the provision allowing plaintiff to recover double amount of delinquent rent when detention of leased property is wrongful.

Damages upon Appeal.—Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff which he is entitled thereto from the time of the unlawful detention to the time of the trial in the superior court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Same—Liability of Surety.—The surety on a bond to stay execution on appeal from judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date

eviction to which he was entitled. *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (1904).

Same—Matter Is Res Judicata as to Tenancy.—Where in proceedings in summary ejectment on final judgment entered in the superior court it has been adjudicated that A was the tenant of B, which judgment was not appealed from, the matter is res judicata, and A cannot maintain a suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. *Isler v. Hart*, 161 N. C. 499, 77 S. E. 681 (1913).

of the trial in the superior court. *Dunn v. Patrick*, 156 N. C. 248, 72 S. E. 220 (1911).

Effect of Emergency Price Control Act.—Where rental value of premises was fixed by rent control office, local statutes authorizing collection of double rents or other damages did not entitle plaintiff to collect an amount exceeding maximum rent fixed by O. P. A. *McGuinn v. McLain*, 225 N. C. 750, 36 S. E. (2d) 377 (1945).

The fact that landlord obtained permission from rent control office of O. P. A. to institute action under local law for the possession of his property, did not release property from the provisions of the Emergency Price Control Act of 1942. *McGuinn v. McLain*, 225 N. C. 750, 36 S. E. (2d) 377 (1945).

Cited in *Seligson v. Klyman*, 227 N. C. 347, 42 S. E. (2d) 220 (1947).

§ 42-33. **Rent and costs tendered by tenant.**—If, in any action brought to recover the possession of demised premises upon a forfeiture for the non-payment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due,

and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26; Code, s. 1773; Rev., s. 2007; C. S., s. 2372.)

This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and costs before judgment or get out. This section was to protect the tenant from hasty eviction, at the same time the landlord obtained his rent and costs. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Only Rents Due Included.—Under the provisions of this section the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed; and the exception of the lessor that all rents, whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Same—Cannot Demand Other Debts.—Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of this section, as a part of the rental due by him, the contract being construed separately as to the two provisions. *Ryan v. Reynolds*, 190 N. C. 563, 130 S. E. 156 (1925).

Effect of Tender by Tenant.—A tender by the tenant of rent accrued after termi-

nation of the lease does not preclude the landlord from recovering possession. *Vanderford v. Foreman*, 129 N. C. 217, 39 S. E. 839 (1901).

Effect of Tender upon Proceedings for Forfeiture.—Where during the hearing and before judgment on a petition under § 42-3 for the forfeiture of a lease held by an insolvent corporation in the hands of a receiver, the receiver tendered to the petitioner all rents due, together with all costs lawfully incurred, as provided in this section, it was held that petition was properly denied. *Coleman v. Carolina Theatres*, 195 N. C. 607, 143 S. E. 7 (1928).

Effect of Acceptance of Rent.—Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude the landlord from recovery. *Vanderford v. Foreman*, 129 N. C. 217, 39 S. E. 839 (1901).

Where Tender of Rents Does Not Prevent Forfeiture.—Where the lease provides that the landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial. *Tucker v. Arrowood*, 211 N. C. 118, 189 S. E. 180 (1937).

Section Does Not Apply to Actions under § 42-26.—This section applies to actions to recover possession of demised premises "upon a forfeiture for the non-payment of rent" and not to actions to recover possession of property for one of the causes enumerated in § 42-26. *Seligson v. Klyman*, 227 N. C. 347, 42 S. E. (2d) 220 (1947).

§ 42-34. Undertaking on appeal; when to be increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be sus-

pendent until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159.)

Local Modification.—Burke: Pub. Loc. 1927, c. 57; Davie, Granville, Iredell, Mecklenburg, Swain, Watauga.

Editor's Note.—The 1949 amendment inserted the second proviso to the first sentence.

Justice Has Discretion as to Surety.—On an application to a justice of the peace for a suspension of execution after a recovery by a landlord against his tenant, the justice has a discretion as to the sufficiency of the surety, which a judge will not review, in the absence of any suggestion that the justice acted dishonestly or capriciously. *Steadman v. Jones*, 65 N. C. 388 (1871).

Power to Increase Bond.—If the bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under this section the superior court can require additional security. *Featherstone v. Carr*, 132 N. C. 800, 44 S. E. 592 (1903).

Not only is it within the jurisdiction and power of the superior courts to have the bonds increased or strengthened, but un-

der their general powers in equity, outside of that statute or any other statute, they would have the right to take such action. *Featherstone v. Carr*, 132 N. C. 800, 44 S. E. 592 (1903).

Judgment Prior to Action on Bond.—A bond, with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining of such a judgment must be shown by proper averment and proof, or an action against the sureties will be premature. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907).

Precedence in Trial.—An appeal from the judgment of a justice of the peace in a summary ejectment has precedence over all other cases except those involving exceptions to homesteads, and is properly called upon demand at the beginning of the term of the superior court commencing next after the docketing of the appeal. *Roediger v. Sapos*, 217 N. C. 95, 6 S. E. (2d) 801 (1940).

§ 42-35. **Restitution of tenant, if case quashed, etc., on appeal.**—If the proceedings before the justice are brought before a superior court and quashed, or judgment is given against the plaintiff, the superior or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose. (1868-9, c. 156, s. 27; Code, s. 1774; Rev., s. 2009; C. S., s. 2374.)

When Writ Given.—When a party is put out of possession of land, or compelled to pay money, under a judgment which is afterwards reserved or set aside, the court will restore the party to the possession of the land, and give him a remedy for the money thus paid. *Lytle v. Lytle*, 94 N. C. 522 (1886).

The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some

erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment or process therein. *Durham, etc., R. Co. v. North Carolina R. Co.*, 108 N. C. 304, 12 S. E. 983 (1891).

Part of Judgment.—Whenever a party is put out of possession by process of law, and the proceedings are adjudged void,

an order for a writ of restitution is a part of the judgment. *Perry v. Tupper*, 70 N. C. 538 (1874); *Meroney v. Wright*, 84 N. C. 336 (1881).

Where on trial of summary ejectment before a justice of peace, judgment was rendered for the plaintiff, who was put into

possession, and on appeal the superior court decided against the plaintiff, upon the ground that the lease had not terminated, the defendant is entitled to a writ of restitution as a part of the judgment in his favor. *Meroney v. Wright*, 84 N. C. 336 (1881).

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.—If, by order of the justice, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (1868-9, c. 156, s. 30; Code, s. 1776; Rev., s. 2010; C. S., s. 2375.)

Sufficient Allegation.—A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (1904).

section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (1904).

Recovery by Landlord.—Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction. *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (1904).

Assessment of Damages.—Under this

ARTICLE 4.

Forms.

§ 42-37. Forms sufficient.—The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

OATH OF PLAINTIFF

North Carolina, County.

A. B., plaintiff,
 against
C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the....day of....., 19.... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the.... day of....., 19...., to the....day of....., 19...., and alsodollars for the occupation of the premises since the....day of....., 19...., to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this....day of....., 19....

J. K., J. P.

SUMMONS

North Carolina, County.

A. B., plaintiff,
 against
C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the.... day of....., 19...., at....., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this....day of....., 19....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them to the officer, and makes the following entry on his docket, or varies it according to the facts:

DOCKET ENTRIES

A. B., plaintiff, } Summary proceedings in ejectment for
against } (describe the premises.)
C. D., defendant. }

Oath of plaintiff (his agent or attorney) filed on the....day of....., 19....

Plaintiff claims.....dollars for rent from.....to....., and.....dollars for occupation from.....to.....

Summons issued the....day of, 19...., to, constable (or sheriff, as the case may be.)

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

RETURN OF OFFICER

On this day I served the within summons on the defendant, C. D., by delivering to him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and of the oath of A. B., annexed, at the usual place of residence of the defendant, C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed.)

N. M., Constable.

The....day of....., 19....

RECORD TO BE ENTERED ON DOCKET

A. B., plaintiff, } Summary proceedings in ejectment.
against }
C. D., defendant. }

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant.....dollars for rent from the....day of....., 19...., to the....day of....., 19...., and.....dollars for damages for occupation of the premises from the....day of....., 19...., to this day, and.....dollars for his costs; the....day of....., 19....

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial

by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*). If either party demands a jury, the record will proceed from the asterisk (*) as follows:

And whereas the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled), who find (here state the verdict of the jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

RECORD OF APPEAL

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

EXECUTION ON JUDGMENT FOR PLAINTIFF

A. B., plaintiff,
 against
C. D., defendant. } County

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out of the goods and chattels, lands and tenements, of said defendant.....dollars, with interest from the....day of....., 19...., to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of.....dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, this....day of....., 19....
..... (Seal.)

BOND TO STAY EXECUTION

We, the undersigned,.....and....., acknowledge ourselves indebted to.....in the sum of.....dollars:

Witness our hands and seals, this the....day of....., A. D. 19....

Whereas on the....day of....., A. D. 19...., before..... a justice of the peace for.....County, A. B. recovered a judgment against C. D. for.....and for.....dollars damages for the detention of said real estate from the....day of....., A. D. 19...., to the....day of....., A. D. 19....; and whereas the said.....ha....prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said.....shall pay any judgment which, in this or in any other action, the said.....may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

..... (Seal.)
..... (Seal.)
..... (Seal.)

STAY OF EXECUTION

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment signed by

The defendant having given bond to me, as required by law, on his appeal to the superior court of.....County, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this....day of....., 19.....

C. D., defendant....., J. P. (Seal.)

CERTIFICATE ON RETURN OF APPEAL

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant.

....., J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)

(All the papers must be attached.) (Code, s. 1780; Rev., s. 2011; C. S., s. 2376.)

Chapter 43.

Land Registration.

Article 1.

Nature of Proceeding.

Sec.

- 43-1. Jurisdiction in superior court.
- 43-2. Proceedings in rem; vests title.
- 43-3. Rules of practice prescribed by Attorney General.

Article 2.

Officers and Fees.

- 43-4. Examiners appointed by clerk.
- 43-5. Fees of officers.

Article 3.

Procedure for Registration.

- 43-6. Who may institute proceedings.
- 43-7. Land lying in two or more counties.
- 43-8. Petition filed; contents.
- 43-9. Summons issued and served; disclaimer.
- 43-10. Notice of petition published.
- 43-11. Hearing and decree.
- 43-12. Effect of decree; approval of judge.

Article 4.

Registration and Effect.

- 43-13. Manner of registration.
- 43-14. Cross-indexing of lands by registers of deeds.
- 43-15. Certificate issued.
- 43-16. Certificates numbered; entries thereon.
- 43-17. New certificate issued, if original lost.
- 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.
- 43-17.2. Publication of notice; service of process.
- 43-17.3. Answer by person claiming interest.
- 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.
- 43-17.5. Issuance of new certificate validated.
- 43-18. Registered owner's estate free from adverse claims; exceptions.
- 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.

Sec.

- 43-20. Decree and registration run with the land.
- 43-21. No right by adverse possession.
- 43-22. Jurisdiction of courts; registered land affected only by registration.
- 43-23. Priority of right.
- 43-24. Compliance with this chapter due registration.
- 43-25. Release from registration.

Article 5.

Adverse Claims and Corrections after Registration.

- 43-26. Limitations.
- 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation.
- 43-28. Suit to enforce adverse claim; summons and notice necessary.
- 43-29. Judgment in suit to enforce adverse claim; register to file.
- 43-30. Correction of registered title; limitation of adverse claims.

Article 6.

Method of Transfer.

- 43-31. When whole of land conveyed.
- 43-32. Conveyance of part of registered land.
- 43-33. Duty of register of deeds upon part conveyance.
- 43-34. Subdivision of registered estate.
- 43-35. References and cross references entered on register.
- 43-36. When land conveyed as security.
- 43-37. Owner's certificate presented with transfer.
- 43-38. Transfers probated; partitions; contracts.
- 43-39. Certified copy of order of court noted.
- 43-40. Production of owner's certificate required.
- 43-41. Registration notice to all persons.
- 43-42. Conveyance of registered land in trust.
- 43-43. Authorized transfer of equitable interests registered.
- 43-44. Validating conveyance by entry on margin of certificate.

Article 7.

Liens upon Registered Lands.

- 43-45. Docketed judgments.
- 43-46. Notice of delinquent taxes filed.

- Sec.
43-47. Sale of land for taxes; redemption.
43-48. Sale of unredeemed land; application of proceeds.

Article 8.

Assurance Fund.

- 43-49. Assurance fund provided; investment.
43-50. Action for indemnity.
43-51. Satisfaction by third person or by Treasurer.
43-52. Payment by Treasurer, if assurance fund insufficient.

- Sec.
43-53. Treasurer subrogated to right of claimant.
43-54. Assurance fund not liable for breach of trust; limit of recovery.
43-55. Statute of limitation as to assurance fund.

Article 9.

Removal of Land from Operation of Torrens Law.

- 43-56. Proceedings.
43-57. Existing liens unaffected.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. **Jurisdiction in superior court.**—For the purpose of enabling all persons owning real estate within this State to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the State shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1; C. S., s. 2377.)

Editor's Note.—This chapter is known generally as the Torrens Law. The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. For a discussion of the history and development of the law, see *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914); 10 N. C. Law Rev. 329.

Chapter to Be Liberally Construed.—This statute is of a remedial character, and should be liberally construed according to its intent. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914); *Dillon v. Broucker*, 178 N. C. 65, 100 S. E. 191 (1919); *Perry v. Morgan*, 219 N. C. 377, 14 S. E. (2d) 46 (1941).

The judge of the superior court is given authority over the whole proceedings before the clerk, and may require reformation of the process, pleadings or decrees

or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. *Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522 (1915).

Registered land is subject to the jurisdiction of the courts, except as otherwise specially provided in this chapter, in the same manner as if not so registered. *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860 (1943).

Determining Value of Improvements.—There is nothing in this chapter, known as the Torrens Law, which prevents the courts from proceeding to determine the value of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference. *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860 (1943).

§ 43-2. **Proceedings in rem; vests title.**—The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter. (1913, c. 90, s. 2; C. S., s. 2378.)

Proceeding Is in Rem.—A proceeding under the Torrens Law is a proceeding in rem. *Davis v. Morgan*, 228 N. C. 78, 44 S. E. (2d) 593 (1947).

Consolidation of Proceedings.—A proceeding for the purpose of registering ti-

tle and an injunction to prevent trespass, involving the same land and the same parties, may be consolidated. *Blount v. Sawyer*, 189 N. C. 210, 126 S. E. 512 (1925).

Cited in *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928).

§ 43-3. **Rules of practice prescribed by Attorney General.**—The Attorney General, with the approval of the Supreme Court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the Attorney General, who, with the approval of the Supreme Court, shall prescribe a rule covering such case. (1913, c. 90, s. 31; C. S., s. 2379.)

Cited in *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860 (1943).

ARTICLE 2.

Officers and Fees.

§ 43-4. **Examiners appointed by clerk.**—The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the State of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63; C. S., s. 2380.)

§ 43-5. **Fees of officers.**—The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S., s. 2381.)

ARTICLE 3.

Procedure for Registration.

§ 43-6. **Who may institute proceedings.**—Any person, being in the peaceable possession of land within the State and claiming an estate of inheritance

therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the State, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C. S., s. 2382.)

Cited in *Brinson v. Lacy*, 195 N. C. 394,
142 S. E. 317 (1928).

§ 43-7. Land lying in two or more counties.—In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts situated in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this State for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1; C. S., s. 2383.)

§ 43-8. Petition filed; contents.—Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey. (1913, c. 90, s. 5; C. S., s. 2384.)

Attacking Proceedings Because Clerk Did Not Sign Jurat.—Where the petitioner, to have his title to land registered under the provisions of the Torrens Law

has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of this section upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely

void, and thereafter, upon his own motion have them set aside. *Morgan v. Beaufort, etc.*, R. Co., 197 N. C. 568, 150 S. E. 30 (1929).

Cited in *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928).

§ 43-9. Summons issued and served; disclaimer.—The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the State of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C. S., s. 2385.)

Cited in *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914).

§ 43-10. Notice of petition published.—In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the *lis pendens* docket of his office and cross-index same as other notices of *lis pendens* and shall also certify a copy thereof to the superior court of each county in which any part of said land lies, and the clerk thereof shall record and cross-index same in the *lis pendens* records of his office as other notices of *lis pendens* are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; C. S., s. 2386; 1925, c. 287.)

Editor's Note.—The last sentence of the section was added by the 1925 amendment.

Sufficiency of Publication.—Where the summons in proceedings to register lands

has been issued and served under the provisions of § 43-9, it is not requisite to the validity of the proceedings that the publication of notice of filing should have

been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by this section. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914).

Waiver of Objection to Publication.—
In proceedings to register a title to lands,

a party claiming an interest in the lands waives his right to object on the grounds of the irregularity in the publication of notice by appearing and answering the petition. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914).

Cited in *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928).

§ 43-11. Hearing and decree.—1. Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

2. Examiner's Report.—The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

3. Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the Supreme Court, as in other special proceedings.

4. No Judgment by Default.—No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same

for registration, as hereinbefore provided, after approval by the judge of the superior court. (1913, c. 90, s. 8; C. S., s. 2387.)

Evidence Sufficient for Jury.—Defendant's evidence of claim under a prior State grant and parol evidence in explanation of a latent ambiguity as to the location of the land embraced in the grant, was sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants'

exception to the refusal of the court to submit an issue to the jury as to whether petitioners were the owners of the land and entitled to have title thereto registered was properly sustained. *Perry v. Morgan*, 219 N. C. 377, 14 S. E. (2d) 46 (1941).

§ 43-12. **Effect of decree; approval of judge.**—Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decrees shall not be binding on and include the State of North Carolina or the State Board of Education unless notice of said proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education severally and personally. Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; C. S., s. 2388; 1925, c. 263.)

Editor's Note.—The provision requiring service of notice on the Governor and the State Board of Education was added by

the 1925 amendment.

Cited in *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928).

ARTICLE 4.

Registration and Effect.

§ 43-13. **Manner of registration.**—The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinafter provided, the decree of title before mentioned and the copy of the plot contained in the petition, and all subsequent transfers of title, and note all voluntary and involuntary transactions in anywise affecting the title to the land, authorized to be entered thereon. If the title be subject to trust, condition, encumbrance or the like, the words "in trust," "upon condition," "subject to encumbrance," or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction. (1913, c. 90, s. 10; 1919, c. 236, s. 1; C. S., s. 2389.)

§ 43-14. **Cross-indexing of lands by registers of deeds.**—Where any land is brought into the Torrens System and under said system is registered in

the public records of the register's office, said register shall cross-index the registration in the general cross-index for deeds in his office. (1931, c. 286, s. 2.)

§ 43-15. **Certificate issued.**—Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina—County of

The certificate of

I hereby certify that the title is registered in the name of

to and situate in said county and state, described as follows: (Here describe land as in decree.)

Estate (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to incumbrance, and the like).

Under decree of the land court of county, entitled

Registered No., Book No., page

Witness my hand and seal, at office at this day of, A. D. 19.....

(Seal).....
Register of Deeds

(1913, c. 90, s. 10; C. S., s. 2390.)

§ 43-16. **Certificates numbered; entries thereon.**—All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11; C. S., s. 2391.)

§ 43-17. **New certificate issued, if original lost.**—Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be appropriately designated and take the place of the original, but at least thirty full days shall elapse between the filing of the petition and making the decree for such new certificate. (1913, c. 90, s. 24; C. S., s. 2392.)

§ 43-17.1. **Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.**—Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person—whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part

thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified.

Like procedure may be followed as herein set forth upon the dissolution of any corporation which is the registered owner of any estate or interest in the land which has been brought under this chapter.

In the event the registered certificate of title has been lost and after due diligence cannot be found, and this fact is made to appear by allegation in the petition, such registered certificate of title need not be attached to the petition as hereinabove required, but the legal representatives of the deceased registered owner shall be made parties to the proceeding. If such persons are unknown or, if known cannot after due diligence be found within the State, service of summons upon them may be made by publication of the notice prescribed in § 43-17.2. In case the registered owner is a corporation which has been dissolved, service of summons upon such corporation and any others who may have or claim any interest in such land thereunder shall be made by publication of the notice containing appropriate recitals as required by § 43-17.2.

If any registered owner has by writing conveyed or attempted to convey a title to any registered land without the surrender of the certificate of title issued to him, the person claiming title to said lands under and through said registered owner by reason of his or its conveyance may file a petition with the clerk of the superior court of the county in which the land is registered and in the proceeding under which the title was registered praying for the cancellation of the original certificate and the issuance of the new certificate. Upon the filing of such petition notice shall be published as prescribed in § 43-17.2. The clerk of the superior court with whom said petition is filed shall by order determine what additional notice, if any, shall be given to registered owners. If the registered owner is a natural person, deceased, or a corporation dissolved the court may direct what additional notice, if any, shall be given. The clerk shall hear the evidence, make findings of fact, and if found as a fact that the original certificate of the registered owner has been lost and cannot be found, shall enter his order directing the register of deeds to cancel the same and to issue a new certificate to such person or persons as may be entitled thereto, subject to such claims or liens as the court may find to exist.

Any party within ten days from the rendition of such judgment or order by the clerk of superior court of the county in which said land is registered may appeal to the superior court in term time, where the cause shall be heard de novo by the judge, unless a jury trial be demanded, in which event the issues of fact shall be submitted to a jury. From any order or judgment entered by the superior court in term time an appeal may be taken to the Supreme Court in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44.)

Editor's Note.—The 1945 amendment added the last four paragraphs.

§ 43-17.2. Publication of notice; service of process.—Upon the filing of such duly verified petition, the petitioner shall cause to be published once a week for four weeks, in some newspaper having a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified,

which shall be at least thirty days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall cause the summons, with a copy of the petition, to be served upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the State of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.3. Answer by person claiming interest.—Any person asserting a claim or any interest in such registered land may, at any time prior to the hearing provided for in § 43-17.4, file such answer or other pleadings as may be proper, asserting his rights or claims to the property referred to in the petition. (1943, c. 466, s. 1.)

§ 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.—The clerk of the superior court shall hear and determine all matters presented upon the petition and such pleadings as may be filed in this proceeding, and shall make such orders and decrees therein as may be found to be proper from the facts as ascertained and determined by the court. The court is authorized and empowered to order and direct that the outstanding registered certificate of title to the land shall be surrendered and cancelled in the office of the register of deeds, and that a new certificate of title shall be issued, showing therein the owner or owners of the land described in the original certificate and the nature and character of such ownership: Provided, the clerk of the superior court shall not authorize the issuance of the new certificate of title until the fees provided in § 43-49 have been paid. Upon the surrender and cancellation by the register of deeds of the outstanding certificate of title, the new certificate of title shall be registered and cross-indexed in the same manner provided for the registration of the original certificate, and the register of deeds shall issue a new certificate of title in the same manner and form as provided for the original certificate. The said new certificate shall have the same force and effect as the original certificate of title and shall be subject to the same provisions of law with reference thereto. (1943, c. 466, s. 1.)

§ 43-17.5. Issuance of new certificate validated.—Whenever heretofore any registered certificate of title has been surrendered by the heirs or devisees of any deceased registered owner of any registered title and the registered certificate of title of such deceased owner has been surrendered and canceled and a new certificate of title issued to a purchaser or to such heirs or devisees, the same is hereby validated and confirmed and made effectual to the same extent as though such new certificate had been issued in compliance with the provisions of this chapter. (1943, c. 466, s. 1.)

§ 43-18. Registered owner's estate free from adverse claims; exceptions.—Every registered owner of any estate or interest in land bought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except (1) liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of this State cannot require to appear of record under registry laws; (2) taxes and assessments thereon due

the State or any county, city or town therein, but not delinquent; (3) any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25; C. S., s. 2393.)

This section modifies the common-law rule of *lis pendens*. Its purpose is to stabilize titles by requiring recordation of all deeds, mortgages, or other paper-writings which transfer or encumber the title to land. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

§ 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.—Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25; C. S., s. 2394.)

§ 43-20. Decree and registration run with the land.—The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof. (1913, c. 90, s. 26; C. S., s. 2395.)

§ 43-21. No right by adverse possession.—No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27; C. S., s. 2396.)

§ 43-22. Jurisdiction of courts; registered land affected only by registration.—Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28; C. S., s. 2397.)

No Distinction between Original Parties and Purchasers.—The statute draws no distinction between the original parties to deeds or contracts affecting title of

lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the

same footing. *Dillon v. Broeker*, 178 N. C. 65, 100 S. E. 191 (1919).

§ 43-23. **Priority of right.**—In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29; C. S., s. 2398.)

§ 43-24. **Compliance with this chapter due registration.**—When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances. (1913, c. 90, s. 32; C. S., s. 2399.)

§ 43-25. **Release from registration.** — Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, desires to have such estate released from the provisions of said chapter in so far as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we),, being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter forty-three of the General Statutes of North Carolina in so far as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

ARTICLE 5.

Adverse Claims and Corrections after Registration.

§ 43-26. **Limitations.** — No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked

or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree. (1919, c. 236, s. 1; C. S., s. 2400.)

§ 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation.—Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his postoffice address, and, if a nonresident, he shall designate or appoint the said register of deeds to receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1; C. S., s. 2401.)

§ 43-28. Suit to enforce adverse claim; summons and notice necessary.—Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this State.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting

out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this State. (1919, c. 236, s. 1; C. S., s. 2402.)

§ 43-29. Judgment in suit to enforce adverse claim; register to file.—The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner’s certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1; C. S., s. 2403.)

§ 43-30. Correction of registered title; limitation of adverse claims.—Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1; C. S., s. 2404.)

ARTICLE 6.

Method of Transfer.

§ 43-31. When whole of land conveyed.—Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A. B. and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of.....dollars, sell and convey to C. D. (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided; that upon

presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall be canceled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12; C. S., s. 2405.)

Necessity of Affidavit and Notation.— A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. *Dillon v. Broecker*, 178 N. C. 65, 100 S. E. 191 (1919).

§ 43-32. Conveyance of part of registered land.—The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument or transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred. (1919, c. 82, s. 4; C. S., s. 2406.)

§ 43-33. Duty of register of deeds upon part conveyance.— Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached. (1919, c. 82, s. 4; C. S., s. 2407.)

§ 43-34. Subdivision of registered estate.—Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C. S., s. 2408.)

§ 43-35. References and cross references entered on register.— In all cases the register of deeds shall place upon the registry of title books and upon the certificate of title of such registered estate therein, references and cross

references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C. S., s. 2409.)

§ 43-36. When land conveyed as security.—1. Whole land conveyed. Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A. B. and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No..... in registration of titles book for.....County, a certificate for the title for same being hereto attached, to secure a debt of.....dollars, due to....., of.....County and State, on the....day of.....,19...., evidenced by bond (or otherwise as the case may be) dated the....day of....., 19.... In case of default in payment of said debt with accrued interest,..... days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

2. Part of land conveyed. When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

3. Effect of transfer. All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

4. Other encumbrances noted. All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

5. Other forms of conveyance may be used. Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book.

6. Sale under lien; new certification. Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land, so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto;

and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C. S., s. 2410.)

§ 43-37. **Owner's certificate presented with transfer.**—In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15; C. S., s. 2411.)

§ 43-38. **Transfers probated; partitions; contracts.**—All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C. S., s. 2412.)

§ 43-39. **Certified copy of order of court noted.**—In voluntary transactions a certificate from the proper State, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C. S., s. 2413.)

Applied in *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860 (1943).

§ 43-40. **Production of owner's certificate required.**—Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpoena duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17; C. S., s. 2414.)

§ 43-41. **Registration notice to all persons.**—Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon any registered land in the county of such registration. (1913, c. 90, s. 18; C. S., s. 2415.)

§ 43-42. **Conveyance of registered land in trust.**—Whenever a writing, instrument or record is filed for the purpose of transferring registered land

in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C. S., s. 2416.)

§ 43-43. Authorized transfer of equitable interests registered.—No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20; C. S., s. 2417.)

§ 43-44. Validating conveyance by entry on margin of certificate.—In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, has before August 21, 1924, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

ARTICLE 7.

Liens upon Registered Lands.

§ 43-45. Docketed judgments.—Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment,

and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor. (1913, c. 90, s. 22; C. S., s. 2418.)

Cited in *In re Wallace*, 212 N. C. 490, 193 S. E. 819 (1937).

§ 43-46. Notice of delinquent taxes filed.—It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including the penalty therefor, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon. (1913, c. 90, s. 21; C. S., s. 2419.)

§ 43-47. Sale of land for taxes; redemption.—Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the sheriff or other officer making such sale to file forthwith a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after date of such sale; but a note shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed. (1913, c. 90, ss. 22, 23; C. S., s. 2420.)

§ 43-48. Sale of unredeemed land; application of proceeds.—If there be no redemption of land under the preceding section, in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the State, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23; C. S., s. 2421.)

ARTICLE 8.

Assurance Fund.

§ 43-49. **Assurance fund provided; investment.**—Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the State Treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this State, or of counties and other municipalities within the State. Such investment shall be made upon the advice and concurrence of the Governor and Council of State, and he shall make report of such funds and the investment thereof to the General Assembly biennially. (1913, c. 90, s. 33; C. S., s. 2422.)

Cross Reference.—As to investment by State Treasurer in bonds issued or guaranteed by the United States, see § 54-44.

§ 43-50. **Action for indemnity.**—Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the State Treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34; C. S., s. 2423.)

Negligence of Plaintiff Barring Recovery.—A proceeding under this chapter duly commenced prior to the enactment of Public Laws 1919, c. 31 (§ 1-117 and § 1-118), constituted a "lis pendens." Such proceeding while pending was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to pro-

tect himself under the provisions of the statute, and the title to the land was assured by the State, and a holder thereof by proper transfer acquired the title, the negligence of the mortgagee was a complete defense in the mortgagee's action to recover damages against the State thereunder. *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928).

§ 43-51. **Satisfaction by third person or by Treasurer.**—If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Auditor, who shall issue his warrant therefor upon the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C. S., s. 2424.)

§ 43-52. **Payment by Treasurer, if assurance fund insufficient.**—If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the Treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the Treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36; C. S., s. 2425.)

§ 43-53. **Treasurer subrogated to right of claimant.**—In every case of payment by the Treasurer from the assurance funds under the provisions of this chapter the Treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37; C. S., s. 2426.)

§ 43-54. **Assurance fund not liable for breach of trust; limit of recovery.**—The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38; C. S., s. 2427.)

§ 43-55. **Statute of limitation as to assurance fund.**—Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39; C. S., s. 2428.)

ARTICLE 9.

Removal of Land from Operation of Torrens Law.

§ 43-56. **Proceedings.**—Any land brought under the provisions and operation of this chapter before April 16, 1931, may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the clerk of the superior court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said clerk of the superior court may enter a decree in said cause removing and excluding said land from the provisions and operation of this chapter, and transfer and conveyance of said land may be made thereafter as other common-law conveyances. (1931, c. 286, s. 1.)

Editor's Note.—For discussion of section, see 9 N. C. Law Rev. 392.

§ 43-57. **Existing liens unaffected.**—Nothing in § 43-56 shall be construed to impair or remove any lien or encumbrance existing against said land. (1931, c. 286, s. 3.)

Chapter 44.

Liens.

Article 1.

Mechanics', Laborers', and Materialmen's Liens.

Sec.

- 44-1. On buildings and property, real and personal.
- 44-2. On personal property repaired.
- 44-3. Laborer's lien on lumber and its products.
- 44-4. Lien for processing certain goods.
- 44-5. Sale of goods at public auction.

Article 2.

Subcontractors', etc., Liens and Rights against Owners.

- 44-6. Lien given subcontractors, etc., on real estate.
- 44-7. [Repealed.]
- 44-8. Statement of contractor's indebtedness to be furnished to owner; effect.
- 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.
- 44-10. Sums due by statement to constitute lien.
- 44-11. Where sums due contractor from owner insufficient; payment pro rata.
- 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.
- 44-13. Laborer for railroad contractor may sue company; conditions of action.
- 44-14. Contractor on municipal building to give bond; action on bond.

Article 3.

Liens on Vessels.

- 44-15. For towage and for supplies at home port.
- 44-16. For labor in loading and unloading.
- 44-17. Filing lien; laborer's notice to master.
- 44-18. Enforcement of lien.
- 44-19. Judgment against contractor binds master and vessel.
- 44-20. Liens not to exceed amount due contractor.
- 44-21. Owner to see laborers paid.
- 44-22. Owner may refuse to settle with contractor till laborers paid.
- 44-23. Owner may pay orders for wages.

Sec.

- 44-24. Laborer's right of action against owner.
- 44-25. Stevedore's false oath punishable as perjury.
- 44-26. Stevedores to be licensed; omission misdemeanor.
- 44-27. Tax and bond on procuring license.

Article 4.

Warehouse Storage Liens.

- 44-28. Liens on goods stored for charges.
- 44-29. Enforcement by public sale.

Article 5.

Liens of Hotel, Boarding and Lodginghouse Keeper.

- 44-30. Lien on baggage.
- 44-31. Baggage may be sold.
- 44-32. Notice of sale.

Article 6.

Liens of Livery Stable Keepers.

- 44-33. Lien for ninety days' keep on animals in possession.
- 44-34. Enforcement by public sale.
- 44-35. Notice of sale to owner.

Article 7.

Liens on Colts, Calves and Pigs.

- 44-36. Season of sire a lien.
- 44-37. Colts, etc., not exempt from execution for season price.

Article 8.

Perfecting, Recording, Enforcing and Discharging Liens.

- 44-38. Claim of lien to be filed; place of filing.
- 44-38.1. Liens on personal property created in another state.
- 44-39. Time of filing notice.
- 44-40. Date of filing fixes priority.
- 44-41. Laborer's crop lien dates from work begun.
- 44-42. Duly filed claims of prior creditors not affected.
- 44-43. Action to enforce lien.
- 44-44. When attachment available to plaintiff.
- 44-45. Defendant entitled to counterclaim.
- 44-46. Execution.
- 44-47. No justice's execution against land.
- 44-48. Discharge of liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

Sec.

- 44-49. Lien created; applicable to persons non sui juris.
- 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.
- 44-51. Disputed claims to be settled before payments.

Article 10.

Agricultural Liens for Advances.

- 44-52. Lien on crops for advances.
- 44-53. Contract for advances to mortgagor in possession.
- 44-54. Price to be charged for articles advanced limited.
- 44-55. "Cash prices" defined and determined.
- 44-56. Person advanced not estopped by agreement.
- 44-57. Commission in lieu of interest, where advance in money.
- 44-58. Disposition of commission, where advanced by credit union.
- 44-59. Purchasers for value protected.
- 44-60. Crop seized and sold to preserve lien.
- 44-61. Lienor's claim disputed; proceeds of sale held; issue made for trial.
- 44-62. Local: Short form of liens.
- 44-63. Local: Rights on lienee's failure to cultivate.
- 44-64. Local: Commissioners to furnish blank records.

Article 11.

Liens for Internal Revenue.

Sec.

- 44-65. Filing notice of lien.
- 44-66. Duty of register of deeds.
- 44-67. Certificate of discharge.
- 44-68. Purpose of article.

Article 12.

Liens on Leaf Tobacco.

- 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.

Article 13.

Factors' Liens.

- 44-70. Definitions.
- 44-71. Factors' liens; filing notice of lien.
- 44-72. Registration.
- 44-73. Effect of registration.
- 44-74. Satisfaction and discharge.
- 44-75. Common-law lien.
- 44-76. Construction.

Article 14.

Assignment of Accounts Receivable and Liens Thereon.

- 44-77. Definitions.
- 44-78. Filing of notice of assignment; cancellation.
- 44-79. Filing of notices of discontinuance of assignment.
- 44-80. Protected assignments.
- 44-81. Statement of accounts assigned or of balance due.
- 44-82. Rights between debtor and assignee.
- 44-83. Validity as to third person; acts of assignor; dominion and control.
- 44-84. Returned goods.
- 44-85. Short title.

ARTICLE 1.

Mechanics', Laborers' and Materialmen's Liens.

§ 44-1. **On buildings and property, real and personal.**—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. (1869-70, c. 206, s. 1; Code, s. 1781; 1901, c. 617; Rev., s. 2016; C. S., s. 2433.)

- I. General Consideration.
- II. Material and Services Contracted.
- III. Persons Entitled to Lien.
- IV. Property Covered.
- V. Public Buildings, etc.
- VI. Waiver of Lien, Homestead, and Miscellaneous Matters.

I. GENERAL CONSIDERATION.

This and following sections under the topic of Liens are remedial, and their clear

purpose is to give contractors, subcontractors and laborers liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or material supplied on or about the same. To that end their language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions, and, in the absence of them, exceptions and limitations affecting such liens cannot be allowed un-

less by necessary implication. The object is to give a lien on particular property deriving particular benefit in favor of classes of persons whose claims are supposed to have particular merit. *Chadborn v. Williams*, 71 N. C. 444 (1874); *Wooten v. Hill*, 98 N. C. 48, 3 S. E. 846 (1887); *Burr v. Maulsby*, 99 N. C. 263, 6 S. E. 108 (1888); *McNeal Pipe, etc., Co. v. Howland, etc., Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

Lien Is Dependent upon Contract with Owner.—Soon after the enactment of the statute from which this section was derived, it was held in *Wilkie v. Bray*, 71 N. C. 205 (1874), that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor, and, as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of the statute relative to the subcontractor's lien. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914), citing *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888). See § 44-6.

Contractor's Lien Not Superseded by Statute Giving Lien to Subcontractors, etc.—The effect of the ruling in *Wilkie v. Bray*, 71 N. C. 205 (1874) makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract. This ruling was followed by the enactment of the statute giving liens to subcontractors, etc., which was not intended to supersede the lien of the contractor for it in direct terms gives the lien in favor of subcontractors, laborers and materialmen a preference over "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

"Mechanics'" and "Laborers'" Liens Distinguished.—When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" embraces the entire outlay, whether in labor or material, being for "work done on the premises," i. e., for betterments on it. The "laborer's lien" is solely for labor performed. The mechanic's lien is broader and includes the "work done," i. e., the

"building built" or superstructure placed on the premises. *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

Property Subject to the Lien Must Be Sold First.—The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's claim, and hence it must be sold before other property may be resorted to. *McNeal Pipe, etc., Co. v. Howland, etc., Water Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

When Itemized Statement Unnecessary.—Where a materialman's lien under this section is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

Sufficiency of Itemized Statement.—Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material which he has furnished the owner of the building upon which he claims his lien under this section, showing on several specific dates "money advanced for payroll," "furnace contract, etc.," each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

Statement Presumed Correct.—Where a lien filed under the provisions of this section gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

Affidavit.—An affidavit to a lien filed under this section that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract," was held sufficient to show a complete contract for the furnace at the price itemized in the statement. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

Priority of the Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

The lien for labor and material furnished to the owner of a building under the provisions of this section and notice filed as required by § 44-38, and § 44-39, where furnished under an entire or com-

plete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

The lien of a contractor for work or material furnished in the construction of a railroad has precedence over a mortgage registered after the work was commenced. *Dunavant v. Caldwell, etc.*, R. Co., 122 N. C. 999, 29 S. E. 837 (1898).

Jurisdiction.—Where materials of a value in excess of two hundred dollars are furnished under an entire and indivisible contract, and the material furnisher institutes suit in a justice's court to recover for part of the materials furnished and also institutes suit in the superior court on the same cause of action, defendant's motion to dismiss the action instituted in the justice's court for want of jurisdiction should be allowed, since plaintiff may not split up his cause of action for jurisdictional purposes and try it piecemeal in both courts. *Allison v. Steele*, 220 N. C. 318, 17 S. E. (2d) 339 (1941).

Finding That Contract Entire.—Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" was interpreted to mean that the contract referred to was entire. *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

Estoppel.—By electing to assert a lien as a subcontractor under § 44-6, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under this section and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher. *Doggett Lbr. Co. v. Perry*, 212 N. C. 713, 194 S. E. 475 (1938).

When plaintiff is estopped, by its election in asserting a lien under § 44-6, from asserting a lien under this section, and its action brought solely under this section is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under § 44-6. *Doggett Lbr. Co. v. Perry*, 213 N. C. 533, 196 S. E. 831 (1938).

Cited in *Atlas Supply Co. v. McCurry*, 199 N. C. 799, 156 S. E. 91 (1930); *First*,

etc., *Nat. Bank v. Sawyer*, 218 N. C. 142, 10 S. E. (2d) 656 (1940).

II. MATERIAL AND SERVICES CONTRACTED.

Meaning of "Material Furnished."—The lien arises in favor of and to secure the payment of "all debts contracted for work done on the same or material furnished." By the term "material furnished" is meant something furnished to be appropriated, used and pertinently applied on the land, devoted to some purpose no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for material furnished on or about or connected with the land in connection with the purpose to which it is devoted in whole or in part. *McNeal Pipe, etc., Co. v. Howland, etc., Water Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

Engine Furnished Vessel as "Material Furnished."—Under this section, one who furnished an engine to be installed in a vessel, relying on the credit of the vessel, is entitled to a lien therefor as "material furnished," on compliance with the requirement as to recording; and it is immaterial that by the contract title to the engine was reserved until paid for. *The Pearl*, 189 F. 540 (1911).

No Lien upon Material as Distinct from Building.—No lien can be acquired upon materials furnished for a building, etc., as distinct from the building, etc., but only upon the building, etc., in the construction or repairing of which they are used. *Lanier v. Bell*, 81 N. C. 337 (1879).

Under this section the "material furnished," must be such material as enters into and becomes a part of the property and adds to its value. *Pocahontas Coal Co. v. Henderson Elect. Light, etc., Co.*, 118 N. C. 232, 24 S. E. 22 (1896).

Plans and specifications of an architect are not "material" within the meaning of this section. *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

Supervision by an architect of work done upon a building is not the character of work which falls within the intent of this section. *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

Service or Labor Must Have Bettered the Property.—This section is construed in *Tedder v. Wilmington, etc., R. Co.*, 124 N. C. 342, 32 S. E. 714 (1899), as meaning that the "legislature has provided a lien only when the service or labor is for the betterment of property on which it is bestowed, leaving the laborer in all other cases to secure himself as at common law"—i.e., by retaining in his possession any property on which he makes

repairs until paid for the same. *Glazener v. Gloucester Lumber Co.*, 167 N. C. 676, 83 S. E. 696 (1914).

The existence of a debt arising out of contract, due by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. *Brown v. Ward*, 221 N. C. 344, 20 S. E. (2d) 324 (1942).

Meaning of Term "Contracted."—The lien is given for the amount due upon debts contracted. But in this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410 (1905).

Work Done and Materials Furnished under Same Contract.—Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount. *Isler v. Dixon*, 140 N. C. 529, 53 S. E. 348 (1906).

III. PERSONS ENTITLED TO LIEN.

Contractor Need Not Himself Perform the Labor.—The constitutional provision for giving to mechanics' and laborers' liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors, who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others. *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

Mechanics and Laborers.—The provision of the Constitution requiring the General Assembly to provide liens for mechanics and laborers, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers. *Whitaker v. Smith*, 81 N. C. 340 (1879). See *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888), where it is held that the contractor or materialmen need not themselves furnish the labor or the materials.

A mechanic or laborer, within the meaning of the lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. *Whitaker v. Smith*, 81 N. C. 340 (1879); *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

Overseer—Superintending Installation of Machinery.—In *Whitaker v. Smith*, 81 N. C. 340 (1879), it was held that an overseer is not a mechanic or laborer under the lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed, for the price or value of his services. See *Tommey v. Spartanburg, etc., R. Co.*, 7 F. 429 (1881). The case of *Cook v. Ross*, 117 N. C. 193, 23 S. E. 252 (1895), is also to the same effect. There it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute, a mechanic or laborer. *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

Architect Not a Laborer or Mechanic.—An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of this article and he has no lien thereon for the same. *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

IV. PROPERTY COVERED.

Any Real Property.—The phraseology of this section and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated "a lot or farm," or a storehouse site, a mill site, a water reservoir site, or the like. *McNeal Pipe, etc., Co. v. Howland, etc., Water Co.*, 111 N. C. 615, 16 S. E. 857 (1898).

Ownership of Land.—The debt contracted becomes a lien, a charge upon the land, and that land may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by and constituting the ground of the lien. It makes no difference as to the ownership of the land if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the costs of the benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures or any "material furnished" for such purpose. This is a just and reasonable interpretation of the statute. *McNeal Pipe, etc., Co. v. Howland,*

etc., *Water Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

House and Lot.—Where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the country, the mechanic's lien attaches to the whole tract, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value. The fact that a house and improvements, built by a contractor upon a tract of 80 acres belonging to the owner, are enclosed by a fence including about three acres is not a segregation or division of the house from the tract so as to confine the mechanic's lien to the enclosure. In such case, though the lien is upon the whole tract, it should be divided, if practicable and desired by the defendant, in making the sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be discharged without exhausting the entire tract. *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

Railroad Property.—The provision that "any kind of property, real or personal, not herein enumerated shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished," is broad enough to confer upon a contractor the right to file a lien against the property of a railroad company for the construction of its road-bed and for laying crossties and rails thereon. *Dunavant v. Caldwell, etc.*, R. Co., 122 N. C. 999, 29 S. E. 837 (1898). For contrary intimation, see *Tommev v. Spartanburg, etc.*, R. Co., 7 F. 429 (1881), citing *Whitaker v. Smith*, 81 N. C. 340 (1879). For remedy of laborer for railroad contractor, see § 44-13.

Lien on Personalty Is Dependent upon Possession.—While this section provides for a lien not only upon buildings and lots, but also upon "any kind of property, real or personal," other sections of the lien law provide the conditions upon which the lien is to come into existence and continue; and in case of personal property the lien is dependent upon possession and cannot be obtained by the filing of notice. *Elk Creek Lbr. Co. v. Hamby*, 84 F. (2d) 144 (1936).

V. PUBLIC BUILDINGS, ETC.

Not Applicable to Public Buildings, etc.—The lien laws were not intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the State or any public or quasi public corporation in the exercise of its delegated sov-

ereign powers. *McNeal Pipe, etc., Co. v. Howland, etc.*, *Water Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien, such as public buildings, etc., no duty or obligation is imposed upon the owner in respect to such claimants. *Noland Co. v. Board*, 190 N. C. 250, 129 S. E. 577 (1925).

Same—Courthouse.—A courthouse cannot be made subject to any lien for labor materials. *Snow v. Board*, 112 N. C. 335, 17 S. E. 176 (1893), cited in *Pratt Lumber Co. v. Gill Co.*, 278 F. 783 (1922).

A building used for graded school purposes is a public building upon which no lien can be acquired, except with legislative sanction. *Snow v. Board*, 112 N. C. 335, 17 S. E. 176 (1893); *Gastonia v. McEntee-Peterson, etc., Co.*, 131 N. C. 363, 42 S. E. 858 (1902); *Morgantown Hardware Co. v. Morgantown Graded Schools*, 151 N. C. 507, 66 S. E. 583 (1909).

Highways.—One contracting to construct a highway has, under this section, no lien on the highway; nor have the subcontractors, laborers or materialmen. *Pratt Lumber Co. v. Gill Co.*, 278 F. 783 (1922).

Reason of Rule.—The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, cannot be sold under execution or other final process, and this reason applies with peculiar force to materials furnished or labor performed in the construction or repair of public highways. *Pratt Lumber Co. v. Gill Co.*, 278 F. 783 (1922).

VI. WAIVER OF LIEN, HOMESTEAD, AND MISCELLANEOUS MATTERS.

Waiver of Lien.—In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties and agreed to accept three notes secured by a second mortgage on the vessel as security. It was held that such agreement

was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. *Kornegay v. Styron*, 105 N. C. 14, 11 S. E. 153 (1890).

It is doubtful whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim a lien under the provisions of this section. But his failure to enforce his asserted lien under the provisions of § 44-43, deprives him of whatever right thereto he may have had. *Norfleet v. Tarboro Cotton Factory*, 172 N. C. 833, 89 S. E. 785 (1916).

The homestead right is not affected by a lien for materials furnished and used in improvements upon land covered by homestead, and a statute which gives such lien is unconstitutional. *Cumming v. Bloodworth*, 87 N. C. 83 (1882). See also, *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

Priority of Homestead over Material Lien.—The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption. *Cumming v. Bloodworth*, 87 N. C. 83 (1882); *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

Contractor Agent of Owner—Rights of Materialman.—Where one has furnished the owner at the request of the contractor materials to be used in his building, and

by the terms of the written contract the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of this section and §§ 44-38 and 44-39. *North Carolina Lumber Co. v. Spear Motor Co.*, 192 N. C. 377, 135 S. E. 115 (1926).

Claim of Contractor to Proceeds of Insurance Policy.—The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee. *Healey Ice Mach. Co. v. Green*, 181 F. 890 (1910).

Fraudulent Misrepresentation That All Bills Paid.—In a prosecution for obtaining a mortgage loan by misrepresenting that bills for all labor and materials for the renovation of the building on the premises had been paid, such misrepresentation is material in view of the statutory liens of laborers and materials furnishers, and the fact that the mortgagee had the property appraised and obtained an attorney's certificate of title does not show that the mortgagee did not rely upon the misrepresentation, there being no notice of any unpaid bills for labor and materials on file of public record and there being testimony of the president of the mortgagee that it relied upon the misrepresentation. *State v. Hawley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941).

§ 44-2. On personal property repaired.—Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Provided, that in selling any motor vehicle under the provisions of this section, a twenty day notice in advance of such sale shall be given the commissioner of motor vehicles. (1869-70, c. 206, s. 3; Code, s. 1783; Rev., s. 2017; C. S., s. 2435; 1945, c. 224.)

Cross Reference.—As to requirement that commissioner of revenue be given thirty days' notice of sale of motor vehicle under mechanic's or storage lien, see §§ 20-77, subsec. (c) and 20-114, subsec. (c).

Editor's Note.—The 1945 amendment added the proviso.

This section is within the police power of the State. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603 (1922).

To Whom Section Applies.—The re-

quirement of this section, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where such repairs are made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603 (1922).

Same—Vendee of Car with Mortgage to Vendor.—Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at the vendee's instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 630 (1922).

Retention of Possession Essential.—The lien on personal property given by this section applies when possession is retained by the mechanic or artisan. If he surrenders possession of the property, he loses his lien. *McDougall v. Crapon*, 95 N. C. 292 (1886); *Block v. Dowd*, 120 N. C. 402, 27 S. E. 129 (1897); *Tedder v. Wilmington, etc., R. Co.*, 124 N. C. 342, 32 S. E. 714 (1899); *Glazener v. Gloucester Lbr. Co.*, 167 N. C. 676, 83 S. E. 696 (1914); *Elk Creek Lbr. Co. v. Hamby*, 84 F. (2d) 144 (1936).

And the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since these rights are incident to and dependent on possession. *McDougall v. Crapon*, 95 N. C. 292 (1886).

Thus, where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, it was held that the laborer had no lien on the wagon for his work done and materials furnished in making the repairs. *McDougall v. Crapon*, 95 N. C. 292 (1886).

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable

for the reasonable value of the repairs, this section being applicable only where the mechanic retains possession of the property. *Broadfoot Iron Works v. Bugg*, 208 N. C. 284, 180 S. E. 62 (1935).

A laborer who engages in the manufacture of lumber has a lien thereon under this section for his just and reasonable charges so long as he retains possession of the lumber. *Elk Creek Lbr. Co. v. Hamby*, 84 F. (2d) 144 (1936).

Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, the second lienor is not the owner or legal possessor of the car within the intent and meaning of this section, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor. *Willis v. Taylor*, 201 N. C. 467, 160 S. E. 487 (1931).

Possession of Automobile Obtained from Mechanic by Fraudulent Representations.—Under the common law and the provisions of this section, one who repairs personal property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him. *Reich v. Triplett*, 199 N. C. 678, 155 S. E. 573 (1930).

Filing Notice Not Required.—This section is a self-executing enactment, conferring upon the mechanic or artisan the means of making his debt out of the property by his own act, in selling after thirty days' retention without the intervention of judicial proceeding, either in the superior court or that of a justice of the peace; and § 44-39, which, for the preservation of the lien, requires notice of it to be filed within six months after completing the labor, cannot have been intended for a case in which as under this section a resort to any court is unnecessary, and a complete and efficient measure

of relief is committed to, and may be obtained by, the party's own act. *McDougall v. Crapon*, 95 N. C. 292 (1886).

The enactments as to filing notice must have been intended for cases where possession is not in the mechanic or artisan, and where an action is necessary for his relief. *McDougall v. Crapon*, 95 N. C. 292 (1886).

Lien on Timber Manufactured into Lumber, etc.—Under this section, one who cuts timber and manufactures it into lumber for a corporation before a receiver is appointed therefor has the right to retain the possession of such lumber until his lien is discharged by payment. *Huntsman Bros. & Co. v. Linville River Lumber Co.*, 122 N. C. 583, 29 S. E. 838 (1898). See § 44-3.

One who enters into a contract to cut, haul and raft logs after the standing timber upon lands has been felled for the purpose, has, while the logs are in his possession, a lien thereon for the services thus performed, under the provisions of this section, the timber after its severance from the land being regarded as person-

alty. *Thomas v. Merrill*, 169 N. C. 623, 86 S. E. 593 (1915). See § 44-3.

Sale Restrained Where Mechanic's Claim Controverted.—Where one, who has the right under this section to retain possession of and to sell personal property for the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner in which the nature and amount of claimant's debt are in dispute, he will be restrained from making a sale of the property until such contentions are settled. *Huntsman Bros. & Co. v. Linville River Lumber Co.*, 122 N. C. 583, 29 S. E. 838 (1898).

Priority of Lien.—The lien created by this section is superior to a vendor's lien, or to a mortgage lien. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603 (1922).

A mechanic's lien is given preference under this section to a mortgage lien though the latter be prior in point of time. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603 (1922). See 1 N. C. Law Rev. 127.

Cited in *Goodrich Silvertown Stores v. Caesar*, 214 N. C. 85, 197 S. E. 698 (1938).

§ 44-3. Laborer's lien on lumber and its products.—Every person doing the work of logging or of cutting or sawing logs into lumber, or of getting out wood pulp, acid wood or tan bark, has a lien upon the said logs or lumber for the amount of wages due him, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof: Provided, any such laborer whose wages for thirty or less number of days performed are due and unpaid shall file notice of such claim before the nearest justice of the peace in the county in which said work has been done, stating the number of days of labor performed, the price per day, and the place where the lumber is situate, and the person for whom said labor was performed, which said statement shall be signed by the said laborer or his attorney and the said laborer shall also give to the owner thereof, within five days after the lien has been filed with the justice of the peace, as aforesaid, a copy of said notice as filed with the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said lumber or logs, wood pulp, acid wood or tan bark after such notice has been filed with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided. (1913, c. 150, s. 6; C. S., s. 2436; 1929, c. 69.)

Local Modification.—*Avery, Mitchell*, (1931).
Yancey: 1941, c. 129.

Editor's Note.—The 1929 amendment made this section applicable to logging. Prior to the amendment, persons who cut and logged timber to a mill under a contract to do so at a fixed price were not entitled to a lien for such services. *Graves v. Dockery*, 200 N. C. 317, 156 S. E. 506

Reason for Enactment of Section.—It was because a lien could not be obtained for labor performed in the manufacture of lumber unless the party claiming it retained possession, that the Legislature enacted this section. *Elk Creek Lbr. Co. v. Hamby*, 84 F. (2d) 144 (1936).

Work Done Directly by Claimant and in

Betterment of Property.—Under this section the work must have been done directly by the claimant in betterment of the property upon which the lien is alleged to rest, thus one who aided in making the lumber by taking the boards from the saw as they were cut is entitled to a lien, but one who is employed in the blacksmith shop as repairer of cars used as part of the plant, and one who worked on the car track and repaired the bridges, are not so entitled. *Thomas v. Merrill*, 169 N. C. 623, 86 S. E. 593 (1915).

Compliance with Statutory Requirements Necessary.—In an action to establish a laborer's lien upon manufactured lumber, under the provisions of this section, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found. *Bryson v. Gennett Lumber Co.*, 171 N. C. 700, 89 S. E. 26 (1916).

This section gives to laborers engaged in logging, sawing, etc., a lien on the lumber of their manufacture, which is superior to all other claims thereon, except that of a purchaser for value without notice. It gives this preferred lien, however, only on condition that the provisions of this section be strictly complied with. A laborer, even though he does not retain possession, is entitled to the lien for wages if he gives the notice required by this section. *Elk Creek Lbr. Co. v. Hamby*, 84 F. (2d) 144 (1936).

§ 44-4. **Lien for processing certain goods.**—All persons, firms, partnerships and corporations engaged in the business of finishing, bleaching, mercerizing, manufacturing, dyeing, weighing and printing or otherwise processing cotton, wool, silk, artificial silk or goods of which cotton, wool, silk, or artificial silk forms a component part, shall be entitled to a lien upon the property and goods of others, which may come into their possession for work, labor, and materials furnished in any of said processing and said lien shall extend to any unpaid balance on account for work, labor and materials furnished in the course of any of said processing in respect to any of said goods of the same owner whereof the lienor's possession is terminated. The word "owner", as used in this and the following sections shall include a factor, consignee, or other agent entrusted with the possession of the goods held under said lien or with the bill of lading consigning the same to him with authority to sell the same or to deliver them to the lienor for the purpose of being processed. (1931, c. 48, s. 1.)

§ 44-5. **Sale of goods at public auction.**—If any part of the amount for which goods are held under said lien remains unpaid for a period of sixty days after the earliest item of said amount became due and payable the lienor may sell such

Right of Employee of Contractor against the Owner.—Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by this section, for the value of the work he has done, it must be made to appear that the owner owed his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a bona fide purchaser for value, without notice of the lien. *Bryson v. Gennett Lumber Co.*, 171 N. C. 700, 89 S. E. 26 (1916).

Repairing Railroad Track or Equipment.—Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. It was held that work done in repairing the track, equipment, etc., was not in contemplation of this section, so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor was a lien upon the plant held, for the material had not been used in its construction as betterments. *Glazener v. Gloucester Lumber Co.*, 167 N. C. 676, 83 S. E. 696 (1914).

Priority of Lien.—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by this section is superior to the lien given to the contractor therefor, or any other person. *Glazener v. Gloucester Lumber Co.*, 167 N. C. 676, 83 S. E. 696 (1914).

goods at public auction first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the town, if any, otherwise in the county, in which the said goods are situated, or if no newspaper is published in said county then in a newspaper published in an adjoining county and having general circulation in the county where the sale is to take place, and at the courthouse door, the last publication not to be less than five days prior to the sale, and also giving five days' notice of said sale by posting in five or more public places in said county, one whereof shall be in the town or city ward in which said goods are situated, and, if the residence or past address of owner of said goods is known or can be established, sending by registered mail a copy of said notice to said owner at said address at least five days before the date of sale: Provided, that if said goods are readily divisible no more thereof shall be so sold than is necessary to discharge the underlying indebtedness and to cover the expenses of the sale. The proceeds of sale shall be applied to payment of said indebtedness and said expenses, and the balance, if any, shall be paid to the owner or person entitled thereto. The remedy herein provided to enforce said lien shall be in addition to any other provided by law. (1931, c. 48, s. 2; 1943, c. 543.)

Editor's Note.—The 1943 amendment inserted the provision as to a newspaper published in an adjoining county.

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ 44-6. **Lien given subcontractors, etc., on real estate.**—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given. (1880, c. 44, ss. 1, 3; Code, ss. 1801, 1803; Rev., s. 2019; C. S., s. 2437.)

In General.—Soon after the enactment of § 44-1 et seq., it was held in *Wilkie v. Bray*, 71 N. C. 205 (1874), that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor, and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of this and the following sections relative to the subcontractor's lien. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914).

The injustice of permitting the labor and material of one man to be used to enhance the value of the property of another without compensation, and also that the owner ought not to be required to pay the contractor and then have to pay for labor and material when he had not agreed to

do so, led to the enactment of this and the following sections in an effort to adjust the rights of the parties along lines that would be just to both. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

Definition of Subcontractor.—A subcontractor is one who has entered into a contract for the performance of an act with the person who has already contracted for its performance. *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

Persons employed by an agent of the principal contractor to perform certain work on the premises may not under this section recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. *Price v. Asheville Gas Co.*, 207 N. C. 796, 178 S. E. 567 (1935).

The lien given by this section was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and

materialmen a preference over "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enables them to secure the payment of what is due them, indebtedness due from the debtor to the contractor. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914), citing *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

The Contractor's Lien though Subordinated Is Not Lost.—It is quite manifest that our statute gives to the contractor, under whom his employees and agents work, the lien provided in § 44-1 and though subordinated to the lien of the latter under this section, and only displaced when its enforcement would be prejudicial to them, when these are paid the contractor's lien becomes absolute and unconditional. *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

No privity of contract between the owner and the subcontractor is established by this section, so as to enable the former to sue the latter for a debt; but it merely confers upon the materialman a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to him when he fails to protect his own interests in the way prescribed by the statute. *Morganton Hdw. Co. v. Morganton Graded Schools*, 151 N. C. 507, 66 S. E. 583 (1909).

Statute Furnishes Double Security.—The statute (this section and § 44-11) furnishes a double security to those furnishing material, etc., to the contractor, and who give the statutory notice to the owner in giving them a lien upon the property if enforced by suit within six months, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among the claimants thereto entitled, the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

Subcontractor Substituted to the Rights of Contractor.—Where the lien arises un-

der the provisions of this section, it does so by substituting the claimant to the rights of the contractor, enforceable against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment pro tanto of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant. *Atlas Powder Co. v. Denton*, 176 N. C. 426, 97 S. E. 372 (1918).

Lien Enforceable though Principal Contractor's Contract Not Completed.—A subcontractor may enforce his lien for labor or materials against the owner of the property though the contract with the principal contractor has not been completed, or even if it has been abandoned. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

Lien Enforceable Regardless of State of Accounts between Contractor and Subcontractor.—Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by this section, and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's demand regardless of the state of accounts between the contractor and the subcontractor. *Borden Brick, etc., Co. v. Pulley*, 168 N. C. 371, 84 S. E. 513 (1915); *Powell v. King Lumber Co.*, 168 N. C. 632, 84 S. E. 1032 (1915).

Time and How Subcontractor's Right Determined.—The right of one, who furnishes materials to a subcontractor, to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required. *Atlas Powder Co. v. Denton*, 176 N. C. 426, 97 S. E. 372 (1918).

Amount Due from Owner a Trust Fund for Subcontractor.—The amount due the contractor and subject to the claims of materialmen who have filed their statutory notice is not a debt due by the owner to the materialmen in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the

materialmen have not filed the required notice or acquired their lien accordingly. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

Priority over Subsequent Liens.—The lien of the subcontractor, when duly filed, has precedence over all other liens attaching to the property subsequent to the time the work was commenced or the material furnished. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

As to priority of subcontractor's lien over railroad mortgages registered after work commenced on roadbed, see *Dunavant v. Caldwell, etc., R. Co.*, 122 N. C. 999, 29 S. E. 837 (1898).

Elements Essential to Recovery.—To recover under this section, plaintiff must prove: (1) his subcontract; (2) work done and labor performed in fulfillment thereof; (3) a balance due; (4) notice to the owner as required by statute prior to payment of the contract price to the principal contractor; and (5) a balance due the contractor. Upon such showing the law requires the owner to apply the unexpended contract price due the contractor to the payment of amounts due subcontractors and materialmen of whose claims the owner has received notice, pro rata if necessary. *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

The principal contractor is a necessary party to an action to enforce the lien of a subcontractor, but a trustee in a conveyance subject to the lien is not an essential party. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

No Lien on Public School Buildings.—Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of the legislature

§ 44-7: Repealed by Session Laws 1943, c. 543.

Editor's Note.—The provisions of the repealed section are now included in § 44-9.

§ 44-8. Statement of contractor's indebtedness to be furnished to owner; effect.—When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be

to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes. *Morganton Hdw. Co. v. Morganton Graded Schools*, 151 N. C. 507, 63 S. E. 583 (1909).

No Lien on Highway.—Under this section subcontractors and materialmen have no lien upon a highway they have constructed. *Pratt Lumber Co. v. Gill Co.*, 278 F. 783 (1922).

Liability of Municipality—No Lien against It.—Though no lien can be filed against a municipality, yet it will be liable to laborers and materialmen, and for labor done and material furnished to the extent of any balance due the contractor and unpaid at the time of the notice. *Schefflow v. Pierce*, 176 N. C. 91, 97 S. E. 167 (1918). See § 44-14.

Estoppel to Assert Lien under § 44-1.—By electing to assert a lien as a subcontractor under this section, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under § 44-1, and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher. *Doggett Lbr. Co. v. Perry*, 212 N. C. 713, 194 S. E. 475 (1938).

When plaintiff is estopped by its election in asserting a lien under this section, from asserting a lien under § 44-1, and its action brought solely under § 44-1 is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under this section. *Doggett Lbr. Co. v. Perry*, 212 N. C. 533, 196 S. E. 831 (1938).

Cited in *Piedmont Electric Co. v. Vance, etc., Electric Co.*, 197 N. C. 495, 149 S. E. 858 (1929).

sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. (1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478; Rev., s. 2021; C. S., s. 2439.)

Purpose of Section—Owner Cannot Force Contractor to Supply Statement.—

The purpose of this section is to compel the contractor to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. There is no liability created on the part of the owner if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. *Pinkston v. Young*, 104 N. C. 102, 10 S. E. 133 (1889).

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N. C. 417, 100 S. E. 597 (1919).

Statement of Contractor Inures to Benefit of Materialmen, etc.—When the contractor furnishes the owner with statements of the amounts due the materialmen, according to this section, a direct obligation of the owner to the materialmen may be created, upon which the latter may sue in their own names. *Perry v. Swanner*, 150 N. C. 141, 63 S. E. 611 (1909). See note to § 44-9.

Owner Liable to Materialmen for Paying Contractor after Receipt of Statement.—Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon, his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N. C. 417, 100 S. E. 597 (1919).

In order for a material furnisher to hold the owner liable he must show that the owner was notified by him or by the con-

tractor of his claim before the owner completed payment to the contractor. *Economy Pumps v. F. W. Woolworth Co.*, 220 N. C. 499, 17 S. E. (2d) 639 (1941).

Personal Action by Mechanic, Materialmen, etc., against Owner.—A personal action against the debtor for not retaining a sum to pay the subcontractor, when the contractor has furnished him a statement of indebtedness, can be maintained against the owner, where the lien acquired has been lost by delay to enforce it. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916). See *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

Duty of Owner to Reserve Funds to Pay Materialmen, etc.—The requirement of this section that the contractor furnish the owner of the building a statement of the persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the amounts due by the latter to the materialmen, and pay it to them, and under § 44-9, no payment to the contractor after such notice shall be a credit on or discharge of the lien provided for the materialmen. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N. C. 417, 100 S. E. 597 (1919).

Remedy of Subcontractors and Materialmen.—The subcontractor and material furnisher, having given the owner an itemized statement of material furnished by them, acquire a lien for the payment of their claims and may maintain a civil action thereon against the owner under the provisions of this section and §§ 44-9 and 44-10 without being required to file their liens within six months, etc., under the provisions of § 44-39 or bring suit within six months thereafter, under those of § 44-43. *Campbell v. Hall*, 187 N. C. 464, 121 S. E. 761 (1924).

Section Not Repealed by Later nor in Conflict with § 44-13.—This and the following two sections are not repealed by c. 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict that will fall within the re-

pealing clause of that act; nor is there conflict between this section, and § 44-13, as amended. It is the legislative intent to extend their provisions to those who furnish materials to the subcontractors of railroads, and, construing the above sections in connection with § 44-39 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months thereafter. *Atlas Powder Co. v. Denton*, 176 N. C. 426, 97 S. E. 372 (1918).

Effect of Mortgages Subsequent to Notice.—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor

has filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take cum onere, and subject to the contractor's or subcontractor's lien so acquired. *Porter v. Case*, 187 N. C. 629, 122 S. E. 483 (1924).

Cited in *Piedmont Electric Co. v. Vance*, etc., *Electric Co.*, 197 N. C. 495, 149 S. E. 858 (1929); *Schnepp v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

§ 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.—Any subcontractor, laborer, mechanic, artisan, or person furnishing materials, who claims the lien provided for in this article for labor on, or materials furnished for, any building, vessel, railroad, or real estate, may give notice to the owner, agent or lessee who makes the contract for the labor or materials, of the amount due by the contractor to such claimant. The notice shall be in the form of an itemized statement of the amount due, except where the contract is entire for a gross sum and cannot be itemized. Upon the delivery of the notice to the owner, agent, or lessee, the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor. If the said owner, agent or lessee refuses or neglects to retain, out of the amount due the contractor under the contract, a sum not exceeding the price contracted for which will be sufficient to pay such claimant, then the claimant may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on or a discharge of the lien herein provided for. (1891, c. 203; 1899, c. 335; 1903, c. 478; Rev., s. 2021; 1913, c. 150, s. 4; C. S., s. 2440; 1943, c. 543.)

Editor's Note.—The 1943 amendment rewrote this section, incorporating therein the provisions formerly contained in § 44-7 (C. S. 2438).

The portion of this note beginning with the catchline "Notice to Be Given before Settlement with Contractor" formerly appeared under § 44-7, now repealed, and should be read with that fact in mind.

Construction with Other Sections.—Manifestly §§ 44-8 through 44-11 must be construed together. *Huske Hardware House v. Percival*, 203 N. C. 6, 164 S. E. 334 (1932).

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N. C. 417, 100 S. E. 597 (1919).

There is no lien until the statutory notice has been given either under this or under the preceding section. *Economy*

Pumps v. F. W. Woolworth Co., 220 N. C. 499, 17 S. E. (2d) 639 (1941).

If the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. If he fails to do so, then the laborer may give the owner of the property notice, and thus create the lien in his favor. *Pinkston v. Young*, 104 N. C. 102, 10 S. E. 133 (1889); *Norfolk Bldg. Supplies Co. v. Elizabeth City Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918).

A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized statement upon request, is not a sufficient notice upon which to base a materialman's lien. Such notice or itemized statement must show substantial compliance with the statute. However, if it is an entire contract for a gross sum the particularity otherwise required is not essential. *Huske Hardware House v. Percival*, 203 N. C. 6, 164 S. E. 334 (1932).

Notice to Be Given before Settlement with Contractor.—It is necessary, to enforce a lien on a building for materials furnished the contractor, that the materialman file with the owner an itemized statement of the amounts due for materials, or that he give notice to the owner of the amount due him before the owner settles with the contractor, but the lien exists only to the extent of the amount then due. *Orinoco Supply Co. v. Masonic, etc.*, Home, 163 N. C. 513, 79 S. E. 964 (1913); *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

Same—Rule Not Affected by § 44-8.—This rule is not affected by § 44-8. That section is directed against the contractor, and is intended to compel him to furnish to the owner of the premises the statement necessary to give notice of claims of subcontractors and others. But if the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. *Pinkston v. Young*, 104 N. C. 102, 10 S. E. 133 (1889).

Same—Otherwise No Lien Attaches.—When the required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. *Orinoco Supply Co. v. Masonic, etc.*, Home, 163 N. C. 513, 79 S. E. 964 (1913). And the owner is justified in making payment to the contractor. *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896).

Same—Even though Payment in Full Is Made in Advance.—In *Rose v. Davis*, 188 N. C. 355, 124 S. E. 576 (1924), it was held that a furnisher of material, used in the building by a contractor, acquired no lien on the building, under former § 44-7, by notice to the owner filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor. *North Carolina Lumber Co. v. Spear Motor Co.*, 192 N. C. 377, 135 S. E. 115 (1926).

Same—Right Statutory and Dependent upon Notice.—To share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

The liens given the furnisher of material on the building of the owner to the con-

tractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given, nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. *Rose v. Davis*, 188 N. C. 355, 124 S. E. 576 (1924).

Purpose of Notice—Liability of Owner for Disregarding It.—The notice required by former § 44-7 was intended to charge the owner or lessee of the land to withhold so much of the money due to the contractor as would pay the subcontractor's claim. If he failed to do so, he could not avoid his liability by paying the contractor. *Lookout Lumber Co. v. Mansion Hotel, etc.*, R. Co., 109 N. C. 658, 14 S. E. 35 (1891).

Where the owner of a building being erected pays, according to the contract, his contractor a sum of money in excess of the amount due a materialman after he has received notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to the building as an obligation of the owner. *Blue Pearl Granite Co. v. Merchants' Bank*, 172 N. C. 354, 90 S. E. 312 (1916), applied; *Piedmont Electric Co. v. Vance, etc.*, *Electric Co.*, 197 N. C. 495, 149 S. E. 858 (1929), distinguished. *Beeson Hardware Co. v. Burtner*, 199 N. C. 743, 155 S. E. 733 (1930).

That Laborers Are Working on Building Is Not of Itself Notice.—The mere fact that laborers and subcontractors are working on a building is not notice to the owner not to pay out to the contractor until it is ascertained how much is due by the latter to each and every subcontractor, laborer, materialman, etc. *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896).

Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under this section, of any claim of lien thereon. *Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918).

Notice to Owner's Architect Not Notice to Owner.—The object of the notice required by the statute to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprise the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the

architect upon which the former is to be allowed a payment of a certain per cent under the terms of the contract as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien. *Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918).

Unpaid Balance at Time of Notice Subject to Lien.—Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. *Blue Pearl Granite Co. v. Merchants' Bank*, 172 N. C. 354, 90 S. E. 312 (1916).

A subcontractor can enforce his right of lien against the owner of property only to the extent of any unpaid sums due the contractor at the date of giving notice to the owner of the subcontractor's claim. *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896).

Notice of Lien to Justice or Clerk Not Necessary.—The lien of the subcontractor

§ 44-10. **Sums due by statement to constitute lien.**—The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court. (1887, c. 67, s. 2; Rev., s. 2022; C. S., s. 2441.)

Acquisition of Lien without Filing Notice.—By virtue of section 44-39, the lien of a contractor must be filed in six months, but by this section, the lien of the laborer, mechanic or artisan can be acquired without filing if a statement of the amount due is rendered the owner. [See note to § 44-9.] However acquired, the lien is lost under § 44-43 if action thereon is not begun in six months. *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

§ 44-11. **Where sums due contractor from owner insufficient; payment pro rata.**—If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant. (1887, c. 67, s. 3; Rev., s. 2023; 1913, c. 150, s. 5; C. S., s. 2442.)

Provisions of § 44-40 Do Not Affect Distribution under This Section.—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of this section; and

is acquired by notice to the owner, and a filing of the notice of the lien with a justice or a clerk is not necessary, this being expressly provided by § 44-10. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914); *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916); *Porter v. Case*, 187 N. C. 629, 122 S. E. 483 (1924).

As to personal action against owner when lien lost by delay to enforce, see *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908); *Charlotte Pipe, etc., Co., v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916), cited in note to § 44-43.

Assignment of Lien.—The statutory lien of a laborer or materialman, under the provisions of this section, is assignable as in case of ordinary business contracts. *Horne-Wilson v. Wiggins Bros.*, 203 N. C. 85, 164 S. E. 365 (1932).

Cited in *Dixon v. Ipock*, 212 N. C. 363, 193 S. E. 392 (1937); *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

Same—Personal Action When Lien Lost.—But when the lien acquired is lost by not bringing suit within six months, an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

Cited in *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

construing this section with other relevant sections, it is held that it does not conflict with § 44-40 requiring that liens shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk, for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by

notice to the owner. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914).

A right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor, are incidents of the rights given the subcontractor by the provisions of this section. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

Priority of Claims.—One who has furnished material to a contractor, and who, with others, has given the statutory no-

tice to the owner by enforcing his lien by action within the six months, acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916).

Cited in *Piedmont Electric Co. v. Vance, etc., Electric Co.*, 197 N. C. 495, 149 S. E. 858 (1929); *Dixon v. Ipock*, 212 N. C. 363, 193 S. E. 392 (1937); *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942).

§ 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.—If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1887, c. 67, s. 4; Rev., s. 3663; 1913, c. 150, s. 8; C. S., s. 2443.)

§ 44-13. Laborer for railroad contractor may sue company; conditions of action.—As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or materialman may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or materialman the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given by the materialman to said company within thirty days after the materials have been furnished. Such notice to be given by the laborer shall be in writing and shall state the amount and the number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney; and such notice of the materialman shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such materialman or his attorney. The notice shall be served on an engineer, agent or superintendent employed by said company having charge of the section of road on which such labor was performed or material furnished, personally or by leaving the same at the office or usual place of business of said engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within ninety days after notice is given to the company by such laborer or materialman as above provided. (1871-2, c. 138, s. 12; Code, s. 1942; Rev., s. 2018; 1913, c. 150, s. 1; C. S., s. 2444.)

There is no conflict between § 44-8 and this section as amended. It is the legislative intent to extend the provisions of law relative to materialmen and subcontractors

of railroads. *Atlas Powder Co. v. Denton*, 176 N. C. 426, 97 S. E. 372 (1918).

Application to Laborers Constructing Railroads.—This section applies only to

laborers "constructing railroads," *Glazener v. Gloucester Lumber Co.*, 167 N. C. 676, 83 S. E. 696 (1914).

Logging Railroad Is within Section.—A logging road operated by the use of steam is a railroad within the meaning of this section, and by following the requirements of the section a lien may be obtained for work done in its construction, though done under an independent contractor. *Carter v. Coharie Lumber Co.*, 160 N. C. 8, 75 S. E. 1074 (1912).

Substantial Compliance with Statute Necessary.—The right to look beyond the contract of employment to an artificial responsibility that may be thrust upon the company under the provisions of this section is a creature of the statute, and one who claims the benefit of it must, like a mechanic seeking to enforce a lien, and upon the same principle, show a substantial compliance with the requirements of this section. *Wray v. Harris*, 77 N. C. 77 (1877); *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888); *Moore v. Cape Fear, etc.*, R. Co., 112 N. C. 236, 17 S. E. 152 (1893).

Where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account, it was held that a demurrer to the complaint was properly sustained. *Moore v. Cape Fear, etc.*, R. Co., 112 N. C. 236, 17 S. E. 152 (1893).

§ 44-14. Contractor on municipal building to give bond; action on bond.—Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work under a contract or agreement made directly with the principal contractor or subcontractor. The amount of the said bond to be given by said contractor shall be equal to the contract price up to two thousand dollars, and when the contract price is between two and ten thousand dollars the amount of said bond shall be two thousand dollars plus thirty-five per cent of the excess of the contract price over two thousand dollars and under ten thousand; when the contract is over ten thousand dollars, the amount of the said bond shall be two thousand dollars plus twenty-five per cent of the excess of the contract price over the sum of two thousand dollars. If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor. Any laborer doing work on said building and materialman furnishing material therefor and used therein, under a contract or agreement between said laborer or materialman and the principal contractor or subcontractor has the right to sue on said bond, the principal and sureties thereof, in the courts of

Assignment of Claim after Compliance with Statute.—After complying with the requirements of this section a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor. *Moore v. Cape Fear, etc.*, R. Co., 112 N. C. 236, 17 S. E. 152 (1893).

Time of Filing Lien and Its Precedence.—A contractor or subcontractor who does work or furnishes material for the construction of a railroad is entitled to file a lien on the property of the company within six months from the time of doing such work or furnishing materials, and when filed the lien has precedence over a mortgage registered after the work has been commenced. *Dunavant v. Caldwell, etc.*, R. Co., 122 N. C. 999, 29 S. E. 837 (1898).

Misjoinder of Parties Not Fatal.—Where there were intermediate contractors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor, it was held that conceding that the plaintiff could in no event recover from any but the railroad company itself, under this section, yet the addition of the first contractor as a party would not be a fatal misjoinder. *Moore v. Cape Fear, etc.*, R. Co., 112 N. C. 236, 17 S. E. 152 (1893).

this State having jurisdiction of the amount of said bond, and any number of laborers or materialmen whose claims are unpaid for work done and material furnished in said building have the right to join in one suit upon said bond for the recovery of the amounts due them respectively. Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given. Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the building, road, or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant pro rata of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amount of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability. (1913, c. 150, s. 2; 1915, c. 191, s. 1; C. S., s. 2445; 1923, c. 100; 1927, c. 151; 1935, c. 55.)

I. General Consideration.

II. Protection Afforded by Bond.

III. Rights and Liabilities of Sureties.

A. In General.

B. Instances of Liability.

C. Instances of Nonliability.

IV. Liability of Officials.

I. GENERAL CONSIDERATION.

Editor's Note.—The 1923 amendment added that portion of this section including and following the sentence beginning "Every bond given by any contractor," etc. As to effect of amendment, see 1 N. C. Law Rev. 270. The 1927 amendment inserted the phrase "under a contract or agreement made directly with the principal contractor or sub-contractor" at the end of the first sentence, and the phrase "under a contract or agreement between said laborer or materialman and the principal contractor or sub-contractor" near the middle of the fourth sentence. And the 1935 amendment changed "twelve" in the third from the last sentence to "six". See 13 N. C. Law Rev. 368. As to relation of section to law of contracts, see 13 N. C. Law Rev. 99.

Section Applies Only to Municipal Corporations.—This section applies only to

bonds given to a county, city, town or other municipal corporation as required therein. *Independence Trust Co. v. Porter*, 190 N. C. 680, 130 S. E. 547 (1925).

Section Not Applicable to Highway Commission.—This section does not apply to the State Highway Commission. *John L. Roper Lumber Co. v. Lawson*, 195 N. C. 840, 143 S. E. 847 (1928).

This section does not apply to a bond given by a contractor to the State Highway Commission. *Independence Trust Co. v. Porter*, 190 N. C. 680, 130 S. E. 547 (1925).

Section Not Applicable to East Carolina Teachers' College.—While the board of trustees of the East Carolina Teachers' College is made a body corporate, it is not a municipal corporation within the meaning of this section. *Hunt Mfg. Co. v. Hudson*, 200 N. C. 541, 157 S. E. 799 (1931).

A local statute providing that this section should be read into private construction bonds is invalid. *Plott Co. v. Ferguson Co.*, 202 N. C. 446, 163 S. E. 688 (1932).

Material Furnisher Can Acquire No Lien on Public Building.—A material furnisher to a subcontractor, who has used the material in the construction of a public

school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the school board in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used. *Griffin Mfg. Co. v. Bray*, 193 N. C. 350, 137 S. E. 151 (1927).

Bond Is in Lieu of Lien on Public Building.—Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of this section, is given for their benefit in lieu of the right to acquire a lien thereon. *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926).

Section Gives Municipality No Right to Withhold Funds of Contractor.—Under this section the municipality cannot withhold funds belonging to the contractor upon notice from a laborer or materialman that the work done or material furnished by him to the contractor has not been paid for. The contract of the laborer or materialman is with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even pro tanto, of its obligation to the contractor by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in *Schefflow v. Pierce*, 176 N. C. 91, 97 S. E. 167 (1918), was disapproved in *Noland Co. v. Board*, 190 N. C. 250, 129 S. E. 577 (1925); *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926).

Limitation of Action upon Bond.—Under this section the legislative intent was not to bar the rights of materialmen after three years from the time the materials were furnished, but from the time of the completion of the entire contract. *Chappell v. National Surety Co.*, 191 N. C. 703, 133 S. E. 21 (1926).

Provision That Action Be Brought within Reasonable Time.—Under this section the provision in a bond for public construction that action thereon should be brought within a reasonable time is valid. *Horne-Wilson v. National Surety Co.*, 202 N. C. 73, 161 S. E. 726 (1932).

Cited in Asheville Supply & Foundry Co. v. Catawba Construction Co., 198 N. C. 177, 151 S. E. 93 (1930); *Becker, etc., Supply Co. v. Board of Education*, 199 N. C. 575, 155 S. E. 252 (1930).

II. PROTECTION AFFORDED BY BOND.

Cross Reference.—See cases cited under next following analysis line.

This section was intended to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction. *Owsley v. Henderson*, 228 N. C. 224, 45 S. E. (2d) 263 (1947). See *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926).

Provisions of Section Are Incorporated in Bond.—The bond required by this section must provide the protection required by law. To that end the provisions of the section, if not actually included in the written agreement, are incorporated therein by operation of law. *Owsley v. Henderson*, 228 N. C. 224, 45 S. E. (2d) 263 (1947).

Liability of Bond to Materialmen, etc., Conclusive Regardless of Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. *Standard Elect. Time Co. v. Fidelity, etc., Co.*, 191 N. C. 653, 132 S. E. 808 (1926). See *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928), holding that the amendment was passed to meet the decisions in *Warner v. Halyburton*, 187 N. C. 414, 121 S. E. 756 (1924), and *Ideal Brick Co. v. Gentry*, 191 N. C. 636, 132 S. E. 800 (1926).

Prior to 1923 Amendment a Contrary Rule Prevailed.—Where the contractor's bond for the erection of a public building does not create a liability on the surety to pay for the materials furnished for the erection of the building, but only imposes the duty to prevent loss to the municipality, there is no presumption that the bond which was executed prior to the 1923 amendment incorporated this provision, and no liability to the surety will be thereunder created. *Page Trust Co. v. Carolina Const. Co.*, 191 N. C. 664, 132 S. E. 804 (1926).

This section before the 1923 amendment imposed no liability upon the surety in favor of those furnishing material, etc., unless that could be construed from the terms expressed in the bond, and in the building contract to which the bond referred. *Ideal Brick Co. v. Gentry*, 191 N. C. 636, 132 S. E. 800 (1926).

Provision Taking Away Right of Indem-

nification Is Void.—The policy of law with respect to mechanics' and laborers' liens, as evidenced by this section and decisions thereon, is to give protection to creditors of this class by expressly providing for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building; and hence any provision incorporated in bonds of this character that takes away this right is contrary to our public policy and the express provisions of this section and void. *Ingold v. Hickory*, 178 N. C. 614, 101 S. E. 525 (1919). See *Guilford Lumber Mfg. Co. v. Johnson*, 177 N. C. 44, 97 S. E. 732 (1919).

Provision Limiting Right of Action to Obligee Is Void.—In *Maryland Casualty Co. v. Fowler*, 31 F. (2d) 881 (1929), affirming 27 F. (2d) 421 (1928), it was held that under this section a school building contractor's bond, which provided that no right of action thereon should accrue to any person other than the obligee, was void in so far as it affected the claims of laborers and materialmen protected by the bond.

Parties May Contract for Protection in Addition to Statutory Minimum.—This section prescribes the minimum protection that must be furnished, but does not undertake to stipulate the maximum. The indemnity company will not be permitted to afford protection less than that required by law. On the other hand it may assume any additional liability and provide any additional protection it and the assured may agree upon. *Owsley v. Henderson*, 228 N. C. 224, 45 S. E. (2d) 263 (1947).

Effect of Taking Note of Contractor.—The bond required by this section inures to the benefit of a materialman, even though he took the note of the contractor for the materials he furnished. *Standard Elect. Time Co. v. Fidelity, etc., Co.*, 191 N. C. 653, 132 S. E. 808 (1926); *Moore v. Builders Material Co.*, 192 N. C. 418, 135 S. E. 113 (1926).

III. RIGHTS AND LIABILITIES OF SURETIES.

A. In General.

Liability of Surety.—Under this section the surety on a contractor's bond for the erection of a municipal building is liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, except the surety is not liable for an amount in excess of the penalty of the bond. *Standard Supply Co. v. Vance Plumbing, etc.,*

Co., 195 N. C. 629, 143 S. E. 248 (1928).

Same—Determined in Light of Contract and Bond.—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose. *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926).

Same—Limited to Penalty of Bond.—The surety on the contractor's bond for the erection of a public building is only liable for the amount of the penalty of the bond. *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926); *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928).

A judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution. *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928).

When Surety Takes Over Contract.—A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit, changes its liability as a surety on the bond and this section is not applicable. *Hunt Mfg. Co. v. Hudson*, 200 N. C. 541, 157 S. E. 799 (1931).

Surety's Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has reserved under the terms of the building contract a certain portion of the cost of construction, and the surety bond, given in accordance with this section, construed with the contract, provides that the surety will be subrogated to the rights of the principal in the event of the contractor's default, the surety is entitled to the money thus reserved as against the laborers and materialmen, whose claims remain unpaid after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into court under the statutory provision. *Robinson Mfg. Co. v. Blaylock*, 192 N. C. 407, 135 S. E. 136 (1926).

B. Instances of Liability.

Materials Not Actually Used.—The materialmen have a claim against the surety on the bond required by this section, whether the materials were actually used in the building or not. *Standard*

Land, etc., Co. v. Fidelity, etc., Co., 191 N. C. 313, 131 S. E. 754. (1926). See Moore v. Builders Material Co., 192 N. C. 418, 135 S. E. 113 (1926).

Material Furnished Subcontractor.—When according to the terms of its undertaking the surety on a contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, this liability not only extends to such as may have furnished the material directly to the original contractor, but to those who have done so to his subcontractors. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808 (1926).

Feed for teams working on a public highway comes within the contemplation of this section as material furnished, making a surety upon the contractor's bond for the building of a county highway liable. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21 (1926).

Compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety of the contractor's bond where the bond is given in conformity with the statute. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135 (1929).

Rental Charges for Equipment.—A bond for public construction, conditioned upon the satisfaction of all claims and demands incurred in the performance of the contract and payment for labor and material, is held to include rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract. And the liability for rental charges is not limited to the time such equipment was in actual operation. Owsley v. Henderson, 228 N. C. 224, 45 S. E. (2d) 263 (1947).

C. Instances of Nonliability.

Money Loaned to Contractors.—A bank loaning money to a contractor to build a public highway may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the

loan was for this purpose. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135 (1929).

And money advanced by a foreman to the "petty cash account" of the contractor to build a public highway, and used in making repairs to the machinery from time to time, purchasing materials, and paying freight thereon, where the foreman took no assignments for the purchase made from said account, was held not covered by the contractor's bond. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135 (1929).

Payments for Machinery Parts Used to Replace Borrowed Parts.—Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135 (1929).

IV. LIABILITY OF OFFICIALS.

No civil liability will attach to municipal and county officers in their official capacity for failure to take the bond required by this section. Warner v. Halyburton, 187 N. C. 414, 121 S. E. 756 (1924).

County Officers Subject to Indictment.

—A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under this section, the remedy prescribed being by indictment of the latter in their individual capacity. Fore v. Feimster, 171 N. C. 551, 88 S. E. 977, L. R. A. 1916F, 481 (1916); Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577 (1925); Hunter v. Allman, 192 N. C. 483, 135 S. E. 291 (1926).

Misdemeanor Provision Still Applicable.

—The provision making it a misdemeanor to fail to require the bond as fixed by this section is still applicable notwithstanding the amendment of 1923. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248 (1928).

ARTICLE 3.

Liens on Vessels.

§ 44-15. **For towage and for supplies at home port.**—Every vessel, boat, scow, lighter, flat, raft or other watercraft is subject to a lien for the payment of towage done by any steamboat or tugboat; and every vessel and boat is

subject to a lien for debts due for materials and supplies furnished to such vessel or boat in her home port. These liens shall be filed and enforced as is provided for other liens. (1893, c. 357; Rev., s. 2040; 1909, c. 147; C. S., s. 2446.)

Cross Reference.—For lien on vessel for work on same or material furnished, see § 44-1 and note.

§ 44-16. **For labor in loading and unloading.**—Every vessel, her tackle, apparel and furniture, is subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (1881, c. 356, s. 1; Code, s. 1804; Rev., s. 2041; C. S., s. 2447.)

§ 44-17. **Filing lien; laborer's notice to master.**—The liens provided for in the preceding sections shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided. (1881, c. 356, s. 2; Code, s. 1805; Rev., s. 2042; C. S., s. 2448.)

§ 44-18. **Enforcement of lien.**—The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace. (1881, c. 356, s. 3; Code, s. 1806; Rev., s. 2043; C. S., s. 2449.)

In Court of Admiralty.—A lien given is enforceable in a court of admiralty by a state statute for supplies furnished to a vessel in her home port in the State The Pearl, 189 F. 540 (1911).

§ 44-19. **Judgment against contractor binds master and vessel.**—The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment. (1881, c. 356, s. 4; Code, s. 1807; Rev., s. 2044; C. S., s. 2450.)

§ 44-20. **Liens not to exceed amount due contractor.**—The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given. (1881, c. 356, s. 5; Code, s. 1808; Rev., s. 2045; C. S., s. 2451.)

§ 44-21. **Owner to see laborers paid.**—In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or boss stevedore are fully paid the wages that may be due such laborer before he makes final

settlement with the contractor, stevedore or boss stevedore. (1887, c. 145, s. 1; Rev., s. 2046; C. S., s. 2452.)

§ 44-22. **Owner may refuse to settle with contractor till laborers paid.**—Any owner or agent referred to in the preceding section may refuse final settlement with the boss stevedore or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done. (1887, c. 145, s. 2; Rev., s. 2047; C. S., s. 2453.)

§ 44-23. **Owner may pay orders for wages.**—It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price. (1887, c. 145, s. 3; Rev., s. 2048; C. S., s. 2454.)

§ 44-24. **Laborer's right of action against owner.**—Any owner or agent of such vessel who neglects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or boss stevedore. (1887, c. 145, s. 4; Rev., s. 2049; C. S., s. 2455.)

§ 44-25. **Stevedore's false oath punishable as perjury.**—If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, he shall be guilty of a felony and on conviction thereof shall be punished as is now prescribed by law for perjury. (1887, c. 145, s. 5; Rev., s. 3613; C. S., s. 2456; 1943, c. 543.)

Cross Reference.—As to punishment for perjury, see § 14-209.

Editor's Note.—The 1943 amendment substituted "felony" for "misdemeanor".

§ 44-26. **Stevedores to be licensed; omission misdemeanor.**—No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1891, c. 450; 1899, c. 595; Rev., ss. 2050, 3791; C. S., s. 2457.)

§ 44-27. **Tax and bond on procuring license.**—Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the State of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained. (1891, c. 450; Rev., s. 2051; C. S., s. 2458.)

ARTICLE 4.

Warehouse Storage Liens.

§ 44-28. **Liens on goods stored for charges.**—Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise

until such storage charges are paid. (1913, c. 192, s. 1; 1915, c. 190, s. 1; C. S., s. 2459.)

Cross Reference.—As to effective period for lien on leaf tobacco, see § 44-64.1.

Application of Section.—This section applies to such persons, firms or corporations as operate warehouses as a business

for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. *Champion Shoe Machinery Co. v. Sellers*, 197 N. C. 30, 147 S. E. 674 (1929).

§ 44-29. **Enforcement by public sale.**—If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the county courthouse door, after first advertising such sale for ten days at said courthouse door, and three other public places in said county, or in some newspaper published in said county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, pay to the owner of such furniture, tobacco, goods, wares or merchandise. (1913, c. 192, s. 2; 1915, c. 190, s. 2; C. S., s. 2460.)

Cross Reference.—As to requirement that Commissioner of Revenue be given thirty days' notice of sale of motor vehicle under mechanic's or storage lien, see §§

20-77, subsec. (c) and 20-114, subsec. (c).

Cited in *Champion Shoe Machinery Co. v. Sellers*, 197 N. C. 30, 147 S. E. 674 (1929).

ARTICLE 5.

Liens of Hotel, Boarding and Lodginghouse Keeper.

§ 44-30. **Lien on baggage.**—Every hotel, boardinghouse keeper and lodginghouse keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boardinghouse or lodginghouse, until all reasonable charges for such room, bed and board are paid. (1899, c. 645, s. 1; Rev., s. 2037; 1917, c. 26, s. 1; C. S., s. 2461.)

Cross Reference.—As to hotels, inns, etc., generally, see § 72-1 et seq.

Property of Third Party.—An innkeeper has a lien even upon the goods of a third person held by the guest and brought to the inn, with the qualification however, that if he knew that they belonged to such third person he has no lien upon them. *Covington v. Newberger*, 99 N. C. 523, 6 S. E. 205 (1888).

A hotel keeper's lien for charges, under this section, was held not to attach to an automobile belonging to a third person which is brought to the hotel by the guest under given circumstances. *Pate Hotel Co. v. Blair*, 207 N. C. 464, 177 S. E. 330 (1934).

Occasional Entertainment of Strangers Not Innkeeping.—One who entertains strangers only occasionally, although he receives compensation for it, is not an inn-

keeper. *State v. Mathews*, 19 N. C. 424 (1837).

The principles of the law of bailment, as they apply to an action for negligent breach of duty arising under the implied contract of bailment, are not affected by the statutory lien given by this section. *Wells v. West*, 212 N. C. 656, 194 S. E. 313 (1937).

A proprietor of a lodginghouse is not a bailee of personal property left in the room rented by the owner of the personality, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personality necessary to establish the relationship, and this result is not affected by the statutory lien given by this section. *Wells v. West*, 212 N. C. 656, 194 S. E. 313 (1937).

§ 44-31. **Baggage may be sold.**—If such charges are not paid within ten days after they become due, then the hotel, boardinghouse or lodginghouse keeper is authorized to sell said baggage or other property at the courthouse door, or in front of any public building in the town in which the lien attaches, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any,

pay to the owner of said baggage or other property. (1899, c. 645, s. 2; Rev., s. 2038; 1917, c. 26, s. 2; C. S., s. 2462; 1935, c. 364.)

Editor's Note.—The 1935 amendment added the provision permitting sale in the front of a public building.

§ **44-32. Notice of sale.**—Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a resident of the State; but if he is a nonresident of the State, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same. (1887, c. 645, s. 3; Rev., s. 2039; C. S., s. 2463.)

ARTICLE 6.

Liens of Livery Stable Keepers.

§ **44-33. Lien for ninety days' keep on animals in possession.**—Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable. (1911, c. 141, s. 1; C. S., s. 2464.)

§ **44-34. Enforcement by public sale.**—If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, pay to the owner of said animal. (1911, c. 141, s. 2; C. S., s. 2465.)

§ **44-35. Notice of sale to owner.**—Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the State; but if he be a nonresident of the State, or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same. (1911, c. 141, s. 3; C. S., s. 2466.)

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§ **44-36. Season of sire a lien.**—In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet, cow or sow, turns the same to a studhorse, jack, bull, or boar, for the purpose of raising colts, calves, or pigs, the price charged for the season of the studhorse, jack, bull, or boar constitutes a lien on the colt, calf, or pigs until the price so charged for the season is paid. (1872-3, c. 94, s. 1; Code, s. 1797; 1885, c. 72; 1887, c. 14; Rev., s. 2024; 1915, c. 18, s. 1; C. S., s. 2467.)

§ **44-37. Colts, etc., not exempt from execution for season price.**—The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the

pigs. (1872-3, c. 94, s. 2; 1879, c. 47; Code, s. 1798; 1885, c. 72; Rev., s. 2025; 1915, c. 18; 1917, c. 229; C. S., s. 2468.)

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. **Claim of lien to be filed; place of filing.**—All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; Code, s. 1784; Rev., s. 2026; C. S., s. 2469.)

Cross Reference.—As to when statement constitutes a lien without filing, see § 44-10.

The purpose of filing claims for liens, under this section, is to give public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888); *Fulp v. Kernersville Light, etc., Co.*, 157 N. C. 157, 72 S. E. 867 (1911).

As to place of filing under former law, see *Chadborn v. Williams*, 71 N. C. 444 (1874).

Particularity Required of Claim Filed.—A claim of lien, filed under the provisions of the section, must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and labor performed, or the time when the material was furnished and the labor performed, it was irregular and void. *Wray v. Harris*, 77 N. C. 77 (1877).

The claimant must comply strictly, certainly substantially, in all material respects, with the requirements of the statute, and it is but reasonable and just that he should do so. *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888), wherein claim of lien was held insufficient in failing to comply with the requirements.

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a build-

ing which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. *Jefferson & Bros. v. Bryant*, 161 N. C. 404, 77 S. E. 341 (1913).

Instances of Sufficiency.—When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with this section. *Fulp v. Kernersville Light, etc., Co.*, 157 N. C. 157, 72 S. E. 867 (1911).

The claim for a laborer's lien was as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, \$127.24. (Signed) D. A. C., claimant," which was sworn to. It was held that the claim as filed was a reasonable and substantial compliance with the statute. *Cameron v. Consolidated Lumber Co.*, 118 N. C. 266, 24 S. E. 7 (1896).

The lien of a plaintiff who furnished materials for a building is not avoided because in the notice thereof filed with the clerk it is made to attach on two distinct lots separated by a street. *Chadborn v. Williams*, 71 N. C. 444 (1874).

When Defect Not Cured by Amendment.—Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a

single sum, and when the claim as filed is defective, as filed with the clerk, in not stating the time the house was completed, as required by this section, it cannot be cured by amendment allowed in the superior court at the trial. *Jefferson & Bros. v. Bryant*, 161 N. C. 404, 77 S. E. 341 (1913).

Defects Not Cured by Pleadings.—Where a laborer's claim of lien as filed was defective in failing to specify the

time of his labor and that it was done on a particular crop, these defects were not cured by alleging the necessary facts in the pleadings in an action to enforce the lien. *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888).

Applied in *Gainey v. Gainey*, 203 N. C. 190, 165 S. E. 547 (1932).

Cited in *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929).

§ 44-38.1. Liens on personal property created in another state.—No mortgage, deed of trust, or other encumbrance created upon personal property while such property is located in another state is or shall be a valid encumbrance upon said property which has been, or may be, removed into this State as to purchasers for valuable consideration without notice to creditors, unless and until such mortgage, deed of trust, or other encumbrance is or was actually registered or filed for registration in the proper office in the state from which same was removed. (1949, c. 1129.)

Editor's Note.—This section is apparently designed to get away from the rule laid down by the Supreme Court in *Gen-*

eral Finance, etc., Corp. v. Guthrie, 227 N. C. 431, 42 S. E. (2d) 601 (1947). See 27 N. C. Law Rev. 440.

§ 44-39. Time of filing notice.—Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops. (1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; Code, s. 1789; Rev., s. 2028; 1909, c. 32; 1913, c. 150, s. 7; C. S., s. 2470.)

Validity of Section.—This section was held valid in *McNeal Pipe, etc., Co. v. Howland, etc., Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

thus relating back. *McNeal Pipe, etc., Co. v. Howland, etc., Co.*, 111 N. C. 615, 16 S. E. 857 (1892).

Lien Relates Back.—When the notice is filed the lien is at once established, and relates back to and is effective from the time at which the work was commenced or the materials were furnished. *Chadborn v. Williams*, 71 N. C. 444 (1874); *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891); *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896); *Atlas Supply Co. v. McCurry*, 199 N. C. 799, 156 S. E. 91 (1930); *Bankers' Trust Co. v. Gillespie Co.*, 181 F. 448 (1910).

Claim against Railroad Company.—

When a contractor or subcontractor, who does work on, or furnishes material for, the construction of a railroad, files a lien on the property of the company within the time required, the lien has precedence over a mortgage registered after the work has been commenced. *Dunavant v. Caldwell, etc., R. Co.*, 122 N. C. 999, 29 S. E. 837 (1898).

Filing in Six Months after Moneys Are Due.—In *Porter v. Case*, 187 N. C. 629, 122 S. E. 483 (1924), it was held that the notice must be filed within six months from the time the moneys are due the contractor, under the terms of the contract.

The purpose is to protect the subcontractor or laborer as to his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, not simply subsequently to the filing of the notice of claim in the office of the superior court clerk, but as well subsequently to the time when the work was commenced or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

And this is so, although the subsequent encumbrancer had no notice of the lien

The "shorter time" referred to in this section evidently refers to the notice required to be given by § 44-13. *Atlas Supply Co. v. McCurry*, 199 N. C. 799, 156 S. E. 91 (1930). And this section was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the "final furnishing" of the materials. *Atlas Powder Co. v. Denton*, 176 N. C. 426, 97 S. E. 372 (1918).

Notice Filed Too Late.—Notice of lien held not to have been filed within the time required by this section. *Atlas Supply Co. v. McCurry*, 199 N. C. 799, 156 S. E. 91 (1930).

A materialman does not waive his right of lien by accepting a note for the amount due him for the material furnished, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require. *Raeform Lumber Co. v. Rockfish Trading Co.*, 163 N. C. 314, 79 S. E. 627 (1913).

§ 44-40. **Date of filing fixes priority.**—The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk. (1868-9, c. 117, s. 11; Code, s. 1792; Rev., s. 2035; C. S., s. 2471.)

Section Relates to Liens Filed with Officers.—This section applies only to liens required to be filed with the proper officers. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914); *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930).

Liens of materialmen and laborers are statutory, and by the clear provisions of this section and § 44-42 the liens of parties furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk. *Boykin v. Logan*, 203 N.

Question for Jury.—Whether the notice of claim of a lien was filed within the time prescribed by this section is a question for the jury where it appears from the evidence that later work was done under the original contract. *Beaman v. Elizabeth City Hotel Corp.*, 202 N. C. 418, 163 S. E. 117 (1932).

Cited in *King v. Elliott*, 197 N. C. 93, 147 S. E. 701 (1929); *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930); *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941).

C. 196, 165 S. E. 680 (1932).

This section does not affect the provisions as to subcontractors who acquire a lien only by notice to the owner. *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914).

The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, § 44-11, no notice of lien being required to be filed with the justice of the peace or clerk in the case of subcontractors, notice to owner being sufficient under the statute. *Boykin v. Logan*, 203 N. C. 196, 165 S. E. 680 (1932).

§ 44-41. **Laborer's crop lien dates from work begun.**—The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrance which attached to the crops subsequent to the time at which the work was commenced. (1869-70, c. 206, s. 2; Code, s. 1782; Rev., s. 2034; C. S., s. 2472.)

Cross Reference.—As to landlord's lien on crops for rents, advances, etc., see § 42-15 et seq.

Lien Prior to Other Subsequent Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel, etc., R. Co.*, 109 N. C. 658, 14 S. E. 35 (1891).

Breach of Contract—Lien for Claim.—The liens provided for by this section arise out of the simple relation of debtor and creditor for labor done or materials

furnished, and where there is no other security than the personal obligation of the debtor. Therefore, where the plaintiff, having abandoned a contract made with the defendant to cultivate a crop upon shares, upon the ground that the defendant had failed to furnish the necessary stock, etc., as agreed, and attempted to assert a lien for the labor he had bestowed upon the crop, it was held that the statute did not embrace his case. *Grissom v. Pickett*, 98 N. C. 54, 3 S. E. 921 (1887).

Cited in *Warren v. Woodard*, 70 N. C. 382 (1874); *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930).

§ 44-42. **Duly filed claims of prior creditors not affected.**—Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the

proper officer. (1869-70, c. 206, s. 6; Code, s. 1786; Rev., s. 2036; C. S., s. 2473.)

Cross Reference.—As to priority of claims for labor over mortgages of a corporation, see § 55-44.

Priority in Accordance with Time of Filing.—By the clear provisions of this section and § 44-40 the liens of parties

furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk. *Boykin v. Logan*, 203 N. C. 196, 165 S. E. 680 (1932).

§ 44-43. **Action to enforce lien.**—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. (1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, cc. 250, 251; Code, ss. 1785, 1790; Rev., s. 2027; C. S., s. 2474.)

When Section Not Applicable.—This section cannot have been intended for a case in which a resort to any court is unnecessary, and a complete and efficient measure of relief is committed to and may be obtained by the parties' own act. *McDougall v. Crapon*, 95 N. C. 292 (1886).

Jurisdiction of Justice.—A proceeding under this section must be brought before a justice of the peace, if the amount claimed is under \$200. *Smaw v. Cohen*, 95 N. C. 85 (1886); *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890 (1902).

Jurisdiction of Federal Court.—While this section gives a right of action at law for the enforcement of a mechanic's lien, it has been held that a federal court sitting in equity has jurisdiction to entertain a bill for that purpose, especially where there are conflicting liens to be adjusted. *Healey Ice Mach. Co. v. Green*, 181 F. 890 (1910).

Possession by Justice of Notice of Lien.—It is not necessary that the justice of the peace before whom application is made to enforce the lien should be in possession of the original notice of the lien; a copy from the magistrate with whom it was filed must be sufficient. There can be no reason why a copy of a notice properly filed with the clerk will not also suffice. The only reason why the justice who is to enforce the lien must have a copy of the notice is because he is required to state in his judgment the date of the lien and also what property it binds. *Boyle v. Robbins*, 71 N. C. 130 (1874).

Waiver of Lien by Failure to Enforce.—Failure to enforce the lien under this section within the time prescribed constitutes a waiver of the lien. *Norfleet v. Tarboro Cotton Factory*, 172 N. C. 833, 89 S. E. 785 (1916).

Personal Action against Owner after Loss of Lien by Delay to Enforce.—If

the plaintiff does not begin his action within the time prescribed by this section after giving the statement of his claim to the owner, he loses his lien; but having acquired and lost the lien he can maintain an action against the owner, personally, under the statute which makes it the duty of the owner to retain from the money due the contractor a sum not exceeding the price contracted for, to be paid to the laborer, mechanic, or materialman whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor. *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908); *Charlotte Pipe, etc., Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916). See §§ 44-8, 44-9.

Same—Owner's Liability Pro Rata to Extent of Sum Due.—The laborer or materialman can only recover of the owner his pro rata part of that sum which the owner is required to retain from the contractor. This pro rata share is to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc.; and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

Limitation of Actions Pleaded by Owner for Contractor.—When the owner is sued by a laborer or materialman in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea be-

ing personal to the contractor. *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

Defects in Claim Filed Not Cured by Pleading.—It is not sufficient to allege in the pleadings the time of the labor, and that it was done on a particular crop

which the plaintiff seeks to charge with a lien. This must appear substantially in some way in the claim filed. *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888).

Cited in *Atlas Supply Co. v. McCurry*, 199 N. C. 799, 156 S. E. 91 (1930).

§ 44-44. **When attachment available to plaintiff.**—In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lienor of his lien, the claimant may have a remedy by attachment. (1868-9, c. 117, s. 14; Code, s. 1795; Rev., s. 2031; C. S., s. 2475.)

Sufficiency of Affidavit for Attachment.—An affidavit that defendant has removed and is removing and disposing of a cotton crop without regard to the lien, was held insufficient to justify the issuing of

the warrant of attachment under this section, in the absence or allegation that the removal is with the intent to defraud the laborer. *Brogden v. Privett*, 67 N. C. 45 (1872).

§ 44-45. **Defendant entitled to counterclaim.**—The defendant in any suit to enforce the lien is entitled to any setoff arising between the contractors during the performance of the contract, or counterclaim allowed by law. (1869-70, c. 206, s. 8; Code, s. 1788; Rev., s. 2032; C. S., s. 2476.)

§ 44-46. **Execution.**—Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant. (1868-9, c. 117, s. 9; Code, s. 1791; Rev., s. 2029; C. S., s. 2477.)

Descriptions in the Judgment.—In *Boyle v. Robbins*, 71 N. C. 130 (1874), this section was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be bound by the lien, the justice must insert in his execution a requirement that the specific property, subject to the lien, shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the superior court, and the clerk must incorporate in the execution similar direction as to the order of selling. So the judgment cannot be enforced in strict compliance with the law unless the officer, whose duty it is to issue execution, has

gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien and consequently to a primary liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it, is to embody it in the judgment, which will constitute a part of the record in either court, no matter which officer may find it necessary to insert the date and description in the execution. *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764 (1891).

A judgment to enforce a mechanic's lien upon specific property for its satisfaction, must contain a general description of such property, and execution thereon must direct that such property shall first be sold to satisfy the judgment. *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764 (1891).

§ 44-47. **No justice's execution against land.**—No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of the superior court for the purpose of selling such estate or any interest therein. (1868-9, c. 117, s. 13; Code, s. 1794; Rev., s. 2030; C. S., s. 2478.)

§ 44-48. **Discharge of liens.**—All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.
2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.
3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.
4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (1868-9, c. 117, s. 12; Code, s. 1793; Rev., s. 2033; C. S., s. 2479.)

Failure to Enforce as Discharge.—Failure of claimant to enforce his lien within six months as prescribed by § 44-43 operates as a discharge of the lien. *Norfleet v. Tarboro Cotton Factory*, 172 N. C. 833, 89 S. E. 785 (1916).

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. **Lien created; applicable to persons non sui juris.**—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided for shall be valid with respect to any claims arising with respect to any future actions unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action.

No liens of the character provided for in the first paragraph of this section shall hereafter be valid with respect to money that may be recovered in any pending civil actions in this State unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after the ratification of the 1947 amendment.

No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created by the first paragraph of this section when recovery has heretofore been had by the person injured, and no claims against such recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in such action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027.)

Editor's Note.—The 1947 amendment, ratified and effective April 5, 1947, added the last three paragraphs. The amendatory act provides that nothing in the act shall be construed as affecting §§ 44-50 and 44-51 of the General Statutes, except to fix the time within which claims must be filed. For discussion of amendment, see 25 N. C. Law Rev. 450.

§ 44-50. **Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.**—A like lien shall attach to all funds paid to any person in compensation for or settlement of the said

injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty per cent of the amount of damages recovered. (1935, c. 121, s. 2.)

Cross Reference.—See note to § 44-49.

44-51. Disputed claims to be settled before payments.—Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3; 1943, c. 543.)

Cross Reference.—See note to § 44-44.

Editor's Note.—The 1943 amendment rewrote the proviso.

ARTICLE 10.

Agricultural Liens for Advances.

§ 44-52. Lien on crops for advances.—If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown. Provided, that where a county line divides a farm the crop lien may be recorded in the county where the owner of said farm resides: Provided, he resides on said farm; Provided, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, and referred to in the said lien. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205.)

Local Modification.—Bertie: Pub. Loc. 1927, c. 173.

As to effective period for lien on leaf tobacco sold in auction warehouse, see § 44-69.

I. In General.

II. Priority of Liens.

III. The Written Agreement.

A. Form and Execution.

B. Registration.

IV. Description of Land.

V. Evidence.

Cross References.

As to landlord's lien on crops for rents, advances, etc., see § 42-15. As to laborer's lien, see § 44-1 et seq. and § 44-41.

I. IN GENERAL.

Editor's Note.—The 1925 amendment substituted the phrase "within one year from the date of the agreement in writing herein required" for the words "during the year," and added the proviso at the end of the section. Prior to the amendment the registration of the writing was required to be effected within thirty days after date. For discussion of amendment, see 4 N. C. Law Rev. 4.

In lieu of the words "where the person advanced resides" the 1935 amendment inserted the clause "or counties where the land is situated on which the crops of the person advanced are to be grown." The amendment also added the two provisos which immediately follow the quoted clause.

For discussion of liens given by members of the Co-operative Marketing Association, see 2 N. C. Law Rev. 191.

Conditions Rendering Lien Effectual.—The prescribed conditions upon which the lien of this section becomes effectual are the previous reduction of the contract for it to writing, setting out its terms, and registration; these provisions are manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrances upon the crop. *Reese & Co. v. Cole*, 93 N. C. 87 (1885).

Compliance with Requirements Prerequisite.—The lien can only be by force of the statute and by a compliance with its requirements. Where the section has not been followed, to sustain the agreement as an agricultural lien would utterly defeat the letter and the public policy embraced by the statute. *Clark v. Farrar*, 74 N. C. 686 (1876), wherein requirements are enumerated.

Strict Construction—Lienor Not Bound to See That Property Used on Farm.—This section was not intended simply to permit a person to give a lien upon his crop for advances, but also to give such a lien a preference to all other liens existing or otherwise to the extent of such advance. Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the lienee must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the lienor was not bound to see that the property was used on the farm, his duty being discharged by furnishing it. *Nichols & Bros. v. Speller*, 120 N. C. 75, 26 S. E. 632 (1897); *Collins v. Bass*, 198 N. C. 99, 150 S. E. 706 (1929).

Lien Covering Articles Not Actually Used in Making Crop.—An instrument which gives a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien, and, as between the parties, in the absence of fraud and

compulsion, the lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without a showing that such articles were actually used in making the crop. *Nichols & Bros. v. Speller*, 120 N. C. 75, 26 S. E. 632 (1897).

Estopped to Deny Articles Received as "Supplies."—One who gives a lien on a crop to obtain supplies, under the provisions of this section, is estopped from asserting that articles which he receives as a compliance with the contract are not "supplies" within the meaning of the statute; and a second mortgagee, who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission. *Womble v. Leach*, 83 N. C. 84 (1880).

Crops Covered by Lien.—The operations of a mortgage or agricultural lien in respect to crops are confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. *Wooten v. Hill*, 98 N. C. 48, 3 S. E. 846 (1887).

Power of Sale in Instrument Does Not Invalidate It.—A power of sale upon default in paying advances, inserted in an instrument, giving a lien upon crops, does not invalidate the instrument, though prescribing a different remedy from that allowed by the statute. *Crinkley v. Egerston*, 113 N. C. 142, 18 S. E. 341 (1893).

Mortgage on Crops as Agricultural Lien.—A mortgagee, under a mortgage on a crop not expressed to be for advances to be made and not recorded after its execution, has no rights as an agricultural lienor by virtue of this section. *Cooper v. Kimball*, 123 N. C. 120, 31 S. E. 346 (1898).

Cited in *Warren v. Woodward*, 70 N. C. 382 (1874); *Brooks v. Garrett*, 195 N. C. 452, 142 S. E. 486 (1928); *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930).

II. PRIORITY OF LIENS.

Lien Preferred to All Others Save the Exceptions Specified.—An agricultural lien, given by this section, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by this section to all others, the only exception being that in favor of the landlord or laborer contained in § 44-60, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed of trust on the same crop to the extent of the amount advanced thereunder. *Williams v. Davis*, 183 N. C.

90, 110 S. E. 577 (1922). See Rhodes v. Smith-Douglass Fertilizer Co., 220 N. C. 21, 16 S. E. (2d) 408 (1941).

Not Subordinate to Marketing Agreement.—In view of the policy of the State as manifested in the statutes to favor agricultural liens, such a lien for advances will not be held subordinate to a marketing agreement. Tobacco Growers' Co-Op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545 (1925).

Precedence over Prior Mortgage Lien.—An agricultural lien duly executed and registered takes precedence over a mortgage of prior date and registrations upon the "crops" therein subjected to the extent of the advances made. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846 (1887); Killbrew v. Hines, 104 N. C. 182, 10 S. E. 159, 251 (1889). But see Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670 (1888).

A statutory agricultural lien for supplies and advancements during the current crop year, conforming to the requirements of this section both as to context and registration, is superior to a prior registered chattel mortgage given to secure an antecedent debt, the chattel mortgage not being in the required form to constitute a crop lien for supplies as contemplated by the section. Eastern Cotton Oil Co. v. Powell, 201 N. C. 351, 160 S. E. 292 (1931).

Priority of Lien of Landlord.—The lien of the landlord for rents and advancements is the lien first preferred above all others. Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670 (1888).

Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, under this section, and the lienor knew of the surrender at the time he made the advancements, his lien is secondary to that of the landlord's for rent, and a paperwriting of the agreement of surrender between the landlord and tenant was not necessary. Section 44-53 is not applicable to such case. Montague v. Thorpe, 196 N. C. 163, 144 S. E. 691 (1928). See note to § 42-15.

Same—Extent of Priority.—Although under this section the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard & Co. v. Johnson, 114 N. C. 141, 19 S. E. 98 (1894).

III. THE WRITTEN AGREEMENT.

A. Form and Execution.

No Particular Form Required.—To create an agricultural lien under this section no particular form of agreement is required. If the requisites prescribed by the statute are embodied in the agreement, and the intent of the parties to create the lien is apparent, the agreement will be upheld as a valid agricultural lien though it be in the form of a chattel mortgage. Meekins v. Walker, 119 N. C. 46, 25 S. E. 706 (1896).

Furnishing Supplies and Providing Security Contemporaneously.—When furnishing the supplies and making the securing instruments are contemporaneous, constituting one transaction of which these acts are parts, it is not material which precedes in actual time, for in contemplation of law both are done at one and the same time. This view is suggested in Womble v. Leach, 83 N. C. 84 (1880), as a reasonable construction which accomplishes the substantial purposes intended. Reese & Co. v. Cole, 93 N. C. 87 (1885).

B. Registration.

Registration Not Necessary Inter Partes.—A crop lien to secure agricultural advances executed under this section was held valid inter partes, although not registered within thirty days as was required by the section prior to the 1925 amendment. Gay v. Nash, 78 N. C. 100 (1878). See Reese & Co. v. Cole, 93 N. C. 87 (1885).

Registration Necessary as to Third Parties.—It was said that the lien mentioned in the preceding paragraph was void as to third persons. Gay v. Nash, 78 N. C. 100 (1878).

It has been held that a mortgage on a crop, not expressed to be for advances, and not registered within the thirty days formerly required, had no rights as an agricultural lien under the former wording of this section. Cooper v. Kimball, 123 N. C. 120, 31 S. E. 346 (1898).

Priority of First Lien Registered.—The statute fails to require registration within any specified time before the harvesting of the crop. What would be the effect of two persons making advances on the same crop, when the latter advance, in point of time, was the first registered? It would seem that the first lien registered should prevail. It would be a race for the register's office. See 4 N. C. Law Rev. 5.

IV. DESCRIPTION OF LAND.

Identification of Land.—The land on

which the crops are to be grown must be sufficiently identified at the time the lien is executed. Within this ruling, land is sufficiently identified when described as "a field or farm in possession of the mortgagor or seller." *Weil v. Flowers*, 109 N. C. 212, 13 S. E. 761 (1891). See *Gwathney v. Etheridge*, 99 N. C. 571, 6 S. E. 411 (1888).

An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate during the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but

void as to those raised on "any other lands." *Crinkley v. Egerton*, 113 N. C. 142, 18 S. E. 341 (1893).

V. EVIDENCE.

Extraneous Evidence to Show Time of Furnishing Supplies.—Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, dehors such instrument, that the supplies were furnished after the making of the agreement. Such evidence would not contradict the written instrument. *Meekins v. Walker*, 119 N. C. 46, 25 S. E. 706 (1896).

§ 44-53. **Contract for advances to mortgagor in possession.**—The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors, their tenants, lessees or croppers, who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not. (1889, c. 476; Rev., s. 2053; C. S., s. 2481; 1931, c. 173, ss. 2, 3.)

Cross Reference.—See note to § 44-52.

Editor's Note.—The 1931 amendment inserted the words "their tenants, lessees

or croppers."

Cited in *Slade Rhodes & Co. v. James*, 194 N. C. 240, 139 S. E. 240 (1927).

§ 44-54. **Price to be charged for articles advanced limited.**—In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price or prices of not more than ten per cent over the retail cash price or prices of the article or articles advanced, and the said ten per cent shall be in lieu of interest on the debt for such advances: Provided, however, that coupon books and trade checks commonly used by time merchants shall be considered as supplies advanced, when sold by merchants to customers, and charged for in the same manner. If more than ten per cent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void as to the article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced. (1917, c. 134, s. 1; C. S., s. 2482; 1921, c. 89.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20.

Editor's Note.—The proviso to the first sentence was added by the 1921 amendment.

Session Laws 1945, c. 694, by repealing Public Laws 1929, c. 262, made §§ 44-54 to 44-59 fully applicable to Lenoir County.

Evidence Insufficient to Sustain Finding as to Price Charged.—In an action to recover the balance due from a cropper for advancements made for the cultivation of

the crop and to establish the lien provided by § 44-52, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 per cent above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of this section. It was held that the action of the trial judge in confirming the report of the referee was erroneous, in the absence of evidence that such advance price had been charged for the fertilizer, and

that even if it were proved that an advance price was charged for the fertilizer, the lien would not be void as to the other merchandise sold. *Slade Rhodes & Co. v. James*, 194 N. C. 240, 139 S. E. 240 (1927).

§ 44-55. "**Cash prices**" defined and determined.—In the case of retail merchants, the retail cash price or prices shall be the regular cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made. (1917, c. 134, s. 2; C. S., s. 2483.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20.

§ 44-56. **Person advanced not estopped by agreement.**—No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten per cent over the average retail cash price or prices in that locality at the time the advance or advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten per cent, then the lien shall be null and void as to the article or articles upon which such overcharge is made. (1917, c. 134, s. 2; C. S., s. 2484.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20.

§ 44-57. **Commission in lieu of interest, where advance in money.**—Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten per cent of the amount of money actually advanced: Provided, that money advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten per cent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced. (1917, c. 134, s. 3; C. S., s. 2485.)

Local Modification.—Robeson: 1929, *Oil Co.*, 203 N. C. 193, 165 S. E. 350 c. 20. (1932).

Applied in *Ransom v. Eastern Cotton*

§ 44-58. **Disposition of commission, where advanced by credit union.**—In case the money is advanced by a credit union, the funds derived from the ten per cent commission allowed in the preceding section shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year. (1917, c. 134, s. 4; C. S., s. 2486.)

Local Modification.—Robeson: 1929, c. 20.

§ 44-59. **Purchasers for value protected.**—All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such cases the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article. (1917, c. 134, ss. 5, 6; C. S., s. 2487.)

Local Modification.—Robeson: 1929, c. 20.

§ 44-60. **Crop seized and sold to preserve lien.**—If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of this State, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2488.)

Summary Remedy and Procedure.—The purpose of the statute is to give a summary remedy. *Thomas v. Campbell*, 74 N. C. 787 (1876), discussing the procedure under the statute. See also *Gay v. Nash*, 84 N. C. 334 (1881); *Cottingham & Bros. v. McKay*, 86 N. C. 241 (1882).

No Summons to Defendant Is Necessary.—It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien under the statute that a summons should be issued to the defendant. *Thomas v. Campbell*, 74 N. C. 787 (1876).

Effect of Verdict Failing to Assess Damages.—Where in a proceeding to enforce an agricultural lien the crop was sold by the sheriff, and on trial before a jury the defendant admitted the execution of the lien, but denied that anything was due for advances thereunder, there was a general verdict for the plaintiff, and the court refused judgment because the jury failed to assess the damages. It was held error; the verdict established the "lien debt" in excess of the proceeds of sale, entitling the plaintiff to judgment. *Gay v. Nash*, 84 N. C. 334 (1881).

Return of Moneys in Court's Custody to Defendant.—Where, in a proceeding under this and the following section, the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and filed an affidavit that the defendant is insolvent. *Cottingham & Bro. v. McKay*, 86 N. C. 241 (1882).

Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. *Cottingham & Bro. v. McKay*, 86 N. C. 241 (1882).

Priorities.—An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens, to the extent of advances made thereunder. *Rhodes v. Smith-Douglas Fertilizer Co.*, 220 N. C. 21, 16 S. E. (2d) 408 (1941). See § 44-52.

Cited in *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930).

§ 44-61. **Lienor's claim disputed; proceeds of sale held; issue made for trial.**—If the person to whom the advances have been made, or who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made up and set for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides.

(1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2489.)

Cross Reference.—See note to § 44-60.

§ 44-62. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pender, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Washington, Watauga, Wayne and Wilson: North Carolina, County.

Whereas, ha..... agreed to make advances to for the purpose of enabling said to cultivate the lands hereinafter described during the year 19....., the amount of said advances not to exceed dollars; and,

Whereas, said is indebted to said in the further sum of dollars now due; now, therefore, in order to secure the payment of the same the said do..... hereby convey to said all the crops of every description which may be raised during the year 19... on the following lands in County, North Carolina, Township, adjoining the lands of and also the following other property, viz.: And if by the day of, 19....., said fail..... to pay said indebtedness, then said may foreclose this lien as provided in § 44-60 of the North Carolina Code or otherwise, and may sell said crops and other property after ten days' notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said, and the said hereby represents that said crops and other property are the absolute property of and free from encumbrance...

Witness hand..... and seal....., this the day of, 19.....

Witness.....

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do..... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said

This the day of, 19.....

Witness:

..... (Seal)

North Carolina, County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of, the subscribing witness thereto.

This the day of, 19.....

..... (Seal)

North Carolina, County.

The foregoing certificate of, a of County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the day of, 19.....

....., Clerk Superior Court.

(1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s.

2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6.)

Local Modification.—Beaufort: 1933, c. 101; Johnston: 1943, c. 653.

Editor's Note.—By the 1925 and 1931 amendments Randolph and Franklin counties were brought within the scope of this section.

No Particular Form Required.—This section requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that prescribed. And the courts in construing it will look to the substance rather than the form and re-

gard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien, and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. *Jones-Phillips Co. v. McCormick*, 174 N. C. 82, 93 S. E. 449 (1917).

§ 44-63. **Local: Rights on lienee's failure to cultivate.**—If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days' notice published at the courthouse door and three other public places in said county. (1899, c. 17, s. 3; 1901, c. 329, s. 3; Rev., s. 2056; C. S., s. 2491.)

§ 44-64. **Local: Commissioners to furnish blank records.**—The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds. (1899, c. 17, s. 4; 1901, c. 329, s. 4; Rev., s. 2057; C. S., s. 2492.)

ARTICLE 11.

Liens for Internal Revenue.

§ 44-65. **Filing notice of lien.**—Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (Ex. Sess. 1924, c. 44, s. 1.)

§ 44-66. **Duty of register of deeds.**—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order in a file or files to be provided by the board of county commissioners and designated federal tax lien notices. This service shall be performed without fee. (Ex. Sess. 1924, c. 44, s. 2.)

§ 44-67. **Certificate of discharge.**—When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said

register of deeds shall enter the same with date of filing in said federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. This service shall be performed without fee. (Ex. Sess. 1924, c. 44, s. 3.)

§ 44-68. **Purpose of article.**—This article is passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of section three thousand one hundred eighty-six of the Revised Statutes of the United States, as amended by the act of March fourth, one thousand nine hundred thirteen, thirty-seven Statutes at Large, page one thousand sixteen. (Ex. Sess. 1924, c. 44, s. 4.)

ARTICLE 12.

Liens on Leaf Tobacco.

§ 44-69. **Effective period for lien on leaf tobacco sold in auction warehouse.**—No chattel mortgage, agricultural lien, or other lien of any nature upon leaf tobacco shall be effective for any purpose for a longer period than six months after the sale of such tobacco at a regular sale in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This section shall not absolve any person from prosecution and punishment for crime. (1943, c. 642, s. 1.)

ARTICLE 13.

Factors' Liens.

§ 44-70. **Definitions.**—The terms "factor" and "factors" wherever used in this article means persons, firms, banks, and corporations, and their successors in interest, who advance money to manufacturers or processors on the security of materials, goods in process, or merchandise, whether or not they are employed to sell such materials, goods in process, or merchandise. (1945, c. 182, s. 1.)

§ 44-71. **Factors' liens; filing notice of lien.**—If so provided by any written agreement, all factors shall have a continuing general lien upon all materials, goods in process, and merchandise from time to time consigned to or pledged with them, whether in their constructive, actual or exclusive occupancy or possession or not, for all their loans and advances to or for the account of the person creating the lien (hereinafter called the borrower), together with interest thereon and also for the commissions, obligations, indebtedness, charges, and expenses properly chargeable against or due from said borrower and for the amounts due or owing upon any notes or other obligations given to or received by them for or upon account of any such loans or advances, interest, commissions, obligations, indebtedness, charges, and expenses and such lien shall be valid from the time of filing the notice hereinafter referred to, whether such materials, goods in process, or merchandise shall be in existence at the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower; provided there shall be placed and maintained on the door of, or in a conspicuous place at, one of the principal entrances of the place of business or other premises in or at which such materials, goods in process, and merchandise, shall be located, kept or stored, the name of the factor in legible lettering and a designation of said factor as factor; and provided further, that a notice of the lien is filed stating:

1. The name of the factor, the name under which the factor does business, if an assumed name; the principal place of business of the factor within the State, or if he has no place of business within the State, his principal place of business outside

of the State; and if the factor is a partnership or association, the name of the partners, and if a corporation, the state under whose laws it was organized.

2. The name of the borrower, and the interest of such person in the materials, goods in process, and merchandise, as far as known to the factor.

3. The general character of materials, goods in process, and merchandise subject to the lien, or which may become subject thereto, the date of the agreement and the period of time during which such loans or advances may be made under the terms of the agreement providing for such loans or advances and for such lien. Amendments of the notice may be filed from time to time to record any changes in the information contained in the original, subsequent or amended notices. (1945, c. 182, s. 2.)

§ 44-72. **Registration.**—Such notice shall be acknowledged or proven by the factor or his duly authorized representative in the form of acknowledgments to deeds. The notice so acknowledged shall be filed for registration in the office of the register of deeds in the county wherein the property referred to in the notice is located and shall be recorded and cross indexed in the same manner as chattel mortgages. The fees for acknowledging and recording shall be the same as those provided for by law for acknowledging and recording chattel mortgages. (1945, c. 182, s. 3.)

§ 44-73. **Effect of registration.**—Such notice may be filed at any time after the making of the agreement and shall be effectual from the time of the filing thereof as against all claims of unsecured creditors of the borrower and as against subsequent liens of creditors, except that if, pursuant to the laws of this State, a lien should subsequently attach to the materials, goods in process, or merchandise in favor of a processor, dyer, mechanic, or other artisan, or in favor of a landlord, then the lien of the factor on such materials, goods in process, or merchandise shall be subject to such subsequent lien. When materials, goods in process, or merchandise subject to the lien provided for by this article are sold in the ordinary course of the business of the borrower, such lien, whether or not the purchaser has knowledge of the existence thereof, shall terminate as to the materials, goods in process, or merchandise. (1945, c. 182, s. 4.)

§ 44-74. **Satisfaction and discharge.**—Upon payment or satisfaction of the indebtedness secured by any lien specified in this article the factor, his assignee or duly authorized representative, attorney or attorney in fact, may in the presence of the register of deeds or his deputy acknowledge the satisfaction of the provisions of such lien, whereupon the register of deeds or his deputy shall forthwith make upon the margin of the record of such lien an entry of such acknowledgment of satisfaction, which shall be signed by the factor, his assignee or duly authorized representative, attorney or attorney in fact and witnessed by the register of deeds or his deputy, who shall affix his name thereto.

Upon the exhibition of the original notice to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the factor, his duly authorized representative, attorney or attorney in fact, the register of deeds or his deputy shall cancel the lien by entry of "satisfaction" on the margin of the record.

Such satisfaction as hereinabove set forth shall operate as a release of all claims of the factor set forth in the said notice. All notices of liens filed pursuant to this article and not satisfied as hereinabove set forth shall be and remain in full force and effect under this article without further or other filing. (1945, c. 182, s. 5.)

§ 44-75. **Common-law lien.**—When any factor, or any third party for the account of any such factor, shall have possession of materials, goods in process, or merchandise, such factor shall have a continuing general lien, as set forth in

§ 44-71, without filing the notice and posting the sign provided for in this article. (1945, c. 182, s. 6.)

§ 44-76. **Construction.**—This article is to be construed liberally to secure the beneficial interest and purpose thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. Nothing in this article shall be construed as affecting or limiting any existing or future lien at common law or any rights at common law, or any right given by any other statute, and as to any transaction falling within the provisions both of this article and of any other statute of this State requiring or permitting filing, registering, consent, publication, notices, or formalities of execution, the factor shall not be required to comply with the provisions of any such other statute. (1945, c. 182, s. 7.)

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§ 44-77. **Definitions.**—In this article, unless otherwise clearly indicated by the context:

(1) "Account" or "account receivable" means a presently subsisting right to the present or future payment of money—

(a) Under an existing contract,

(b) Not including a building or construction contract,

(c) The assignment of which right is not subject to special statutory provisions not contained in this article,

(d) Which right to payment is not secured under a chattel mortgage, deed of trust, conditional sale, or other instrument, which is required to be recorded in order that no assignee from the assignor and no creditor of the assignor can after such recordation acquire any rights in the account assigned, or in the proceeds thereof in any form, superior to the rights of the beneficiary of such recorded instrument, and,

(e) Which right to payment is not represented by a judgment, negotiable instrument, or other instrument, the surrender, presentation, possession or indorsement of which customarily gives to the owner, holder or indorsee the right to payment thereon.

(2) "Assignee," "assignment," "assignor," and "debtor" are limited respectively to assignee, assignment, and assignor of, and a debtor on, an account receivable.

(3) "Assignment" includes an assignment for value as security and the creation by agreement of a lien on an account.

(4) "Assignee" and "assignor" shall include persons, firms, partnerships, associations and corporations. "Assignee" and "assignor" in § 44-78 shall include prospective assignees and assignors.

(5) "Filing assignee" or "filing assignor" means a person, firm, partnership, association or corporation designated as assignee or assignor in a recorded notice of assignment.

(6) "Value" means any consideration, other than a seal, sufficient to support a simple contract. An antecedent claim of any kind against any person, firm, partnership, association or corporation constitutes value when an account or other property is taken in satisfaction thereof or as security therefor. (1945, c. 196, s. 1.)

§ 44-78. **Filing of notice of assignment; cancellation.**—(1) The assignment of accounts receivable may be protected by the filing of a statement to be known as a "notice of assignment" which shall be signed by the assignor and the

assignee and acknowledged by the assignor before an officer authorized to take acknowledgments, and probated as other instruments are now probated, which shall contain:

(a) The name and mailing address within this State of both assignor and assignee, or if either the assignor or the assignee has no mailing address within the State, the mailing address outside the State,

(b) A statement that the assignor has assigned or intends to assign, or has assigned and intends to assign one or more accounts to the named assignee.

(2) It shall not be necessary to describe the account or accounts in any manner in the notice of assignment.

(3) The place for filing the notice of assignment shall be the office of the register of deeds of the county wherein the assignor, if an individual, resides; or if a domestic or domesticated corporation, in the county wherein said corporation has its statutory principal place of business in this State. If the assignor is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the notice of assignment shall be filed in the office of the register of deeds of any county wherein the assignor has a place of business.

(4) The notice of assignment shall be for a definite period of time stated therein, but may be extended for a definite period of time by a statement containing the book and page where the original notice of assignment is recorded, and signed, probated and recorded in the same manner as the notice of assignment. Any such extension statement must be filed within the period of time prescribed in the original notice of assignment or last extension thereof and when filed shall be effective as of the time of the filing of the original notice of assignment.

(5) An account shall be deemed located in this State:

(a) If the transaction out of which the account arose occurred in this State, or if payment is to be made in this State, or

(b) If the account has been transferred to this State so that the place of payment of the account is in this State, or

(c) In all other cases where an account is deemed located in this State under general rules of law.

(6) The register of deeds shall index and record each notice of assignment, or extension statement, in the same manner as chattel mortgages; and for indexing and recording the same the register of deeds shall receive the same fee as is provided by law for the recording and indexing of short form chattel mortgages.

(7) The notice of assignment may be cancelled of record at any time by the assignee or by his duly authorized attorney in fact, or upon presentation by the assignor or the assignee of the original notice of assignment marked satisfied in full by the assignee, but such cancellation shall not affect the protection afforded to accounts already assigned under a protected assignment. The cancellation of the original notice of assignment shall operate as a cancellation of all extension statements. (1945, c. 196, s. 2.)

§ 44-79. Filing of notices of discontinuance of assignment.—(1) A filing assignor may at any time file a "notice of discontinuance of assignment," signed by him and designating the book and page where the original notice of assignment to be discontinued is recorded, stating that he will not make any further assignments to the designated assignee after a specified date. Such notice, to be effective, shall be receipted for by the assignee or accompanied by an affidavit that a copy has been forwarded to the assignee by registered mail and such affidavit shall state the registration number. The filing of such notice of discontinuance shall not affect the protection afforded to accounts already assigned under a protected assignment.

(2) The register of deeds shall record such notices of discontinuance and index same as required for chattel mortgages, and shall make an entry of the filing thereof upon the recorded notice of assignment to which it relates. For recording a notice of discontinuance of assignment and making the entry, the register of deeds shall receive the fee allowed by law for the recording and indexing of short form chattel mortgages. (1945, c. 196, s. 3.)

§ 44-80. **Protected assignments.**—(1) An assignment becomes protected:

(a) At the time of the filing of a notice of assignment contemporaneously with, or subsequently to, such assignment, or

(b) At the time of the filing of the notice of assignment, as to an assignment made after the filing of the notice of assignment, if the assignment is taken within the period specified in the notice of assignment or in any extension statement or on or before the date specified in the notice of discontinuance of assignment, or

(c) If no notice of assignment is on file in accordance with the provisions of § 44-78, then upon the giving of written notice to the debtor that the account has been assigned to the named assignee.

(2) When an assignment becomes protected, it shall be deemed to have been fully perfected at that time, and no bona fide purchaser from the assignor, no creditor of any kind of the assignor, and no other assignee or transferee of the assignor, in any event shall have, or be deemed to have, acquired any right in the account so transferred or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights of the protected assignee therein.

(3) As between protected assignees the one who first protects his assignment has the superior right. (1945, c. 196, s. 4.)

§ 44-81. **Statement of accounts assigned or of balance due.**—The assignee shall, upon written demand of the assignor, furnish the assignor with a statement in writing of the balance due by the assignor to the assignee and a list of all accounts assigned as security thereof. Any third person who in good faith acts upon said information and furnishes valuable consideration in reliance thereon shall be protected. (1945, c. 196, s. 5.)

§ 44-82. **Rights between debtor and assignee.**—In any case where, acting without actual knowledge of an assignment of an account to a protected assignee, the debtor in good faith pays all or part of the account to the assignor, or to a creditor, subsequent purchaser, or other assignee or transferee, or other person holding a lien upon, or interest or right in or to such account, such payment shall be an acquittance and release to the debtor to the extent of such payment, and such person so receiving payment shall be a trustee of any sums so paid and shall be accountable and liable therefor to the assignee who, under the provisions of this article, has superior rights and is entitled to such sums so paid by the debtor. (1945, c. 196, s. 6.)

§ 44-83. **Validity as to third person; acts of assignor; dominion and control.**—The validity, effect, and relative priority or lien of a protected assignment of an account as to third persons shall not be affected by failure to notify the debtor thereof or by any act or omission of the assignor with respect to the assigned account or the proceeds thereof.

Any permission by the assignee to the assignor to exercise dominion and control over a protected assigned account or the proceeds thereof shall not invalidate the assignment as to third persons. (1945, c. 196, s. 7.)

§ 44-84. **Returned goods.**—(1) Where the assignor has possession of goods which gave rise to an assigned account, the interest of a protected assignee therein shall be superior to those of the general or judgment creditors of the

assignor but subject to the rights of purchasers and lienees, who, in good faith, acquired their interest in the specific goods for value and without actual notice of the assignee's interest.

(2) The assignor shall hold in trust for the assignee:

(a) The proceeds of an assigned account in any form,

(b) Goods which gave rise to the account in the assignor's possession, and

(c) The proceeds of the sale or lien referred to in (1) above.

(3) The assignment of an account includes the assignment of an account arising from a resale of the goods which gave rise to the assigned account. (1945, c. 196, s. 8.)

§ 44-85. **Short title.**—This article may be cited as the Assignment of Accounts Receivable Act. (1945, c. 196, s. 10.)

Chapter 45.

Mortgages and Deeds of Trust.

Article 1.

Chattel Mortgages: Form and Sufficiency.

- Sec.
 45-1. Form of chattel mortgage.
 45-2. Registration.
 45-3. Mortgage of household and kitchen furniture.

Article 2.

Right to Foreclose or Sell under Power.

- 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.
 45-5. Foreclosures by representatives validated.
 45-6. Renunciation by representative; clerk appoints trustee.
 45-7. Agent to sell under power may be appointed by parol.
 45-8. Survivorship among donees of power of sale.
 45-9. Clerk appoints successor to incompetent trustee.
 45-10. Substitution of trustees in mortgages and deeds of trust.
 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.
 45-12. Certificate by clerk of superior court.
 45-13. Right of appeal by any person interested; judge to review findings of clerk de novo.
 45-14. Acts of trustee prior to removal not invalidated.
 45-15. Registration of substitution constructive notice.
 45-16. Register of deeds to make marginal entry of substituted trustee.
 45-17. Substitution made as often as justifiable.
 45-18. Validation of certain acts of substituted trustees.
 45-19. Mortgage to guardian; powers pass to succeeding guardian.
 45-20. Sales by mortgagees and trustees confirmed.
 45-20.1. Validation of trustees' deeds where seals omitted.
 45-21. Validation of appointment of and conveyances to corporations as trustees.

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

- 45-21.1. Definitions.

Sec.

- 45-21.2. Article not applicable to foreclosure by court action.
 45-21.3. Days on which sale may be held.
 45-21.4. Place of sale of real property.
 45-21.5. Place of sale of personal property.
 45-21.6. Presence of personal property at sale required.
 45-21.7. Sale of separate tracts in different counties.
 45-21.8. Sale as a whole or in parts.
 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.
 45-21.10. Requirement of cash deposit at sale.
 45-21.11. Application of statute of limitations to serial notes.
 45-21.12. Power of sale barred when foreclosure barred.
 45-21.13. Conditional sale contract; mortgage or deed of trust of personal property; statutory power of sale.
 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.
 45-21.15. Trustee's fees.

Part 2. Procedure for Sale.

- 45-21.16. Contents of notice of sale.
 45-21.17. Posting and publishing notice of sale of real property.
 45-21.18. Posting notice of sale of personal property; mailing notice when statutory power of sale exercised.
 45-21.19. Exception; perishable property.
 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.
 45-21.21. Postponement of sale.
 45-21.22. Procedure upon dissolution of order restraining or enjoining sale.
 45-21.23. Time of sale.
 45-21.24. Continuance of uncompleted sale.
 45-21.25. Delivery of personal property; bill of sale.
 45-21.26. Preliminary report of sale of real property.
 45-21.27. Upset bid on real property; compliance bonds.
 45-21.28. Separate upset bids when real property sold in parts; subsequent procedure.

Sec.

- 45-21.29. Resale of real property; jurisdiction; procedure.
- 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.
- 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.
- 45-21.32. Special proceeding to determine ownership of surplus.
- 45-21.33. Final report of sale of real property.

Article 2B.

Injunctions; Deficiency Judgments.

- 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.
- 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.
- 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.
- 45-21.37. Certain sections not applicable to tax suits.
- 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price; deficiency judgment under conditional sale contract.

Article 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

- 45-21.39. Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.
- 45-21.40. Real property; validation of deeds made after expiration of statute

Sec.

- of limitations where sales made prior thereto.
- 45-21.41. Orders signed on days other than first and third Mondays validated; force and effect of deeds.
- 45-21.42. Validation of deeds where no order or record of confirmation can be found.

Article 3.

Mortgage Sales.

- 45-22. [Transferred.]
- 45-23 to 45-26. [Repealed.]
- 45-26.1. [Transferred.]
- 45-27 to 45-30. [Repealed.]
- 45-31 to 45-36.1. [Transferred.]

Article 4.

Discharge and Release.

- 45-37. Discharge of record of mortgages and deeds of trust.
- 45-37.1. Validation of certain entries of cancellation made by beneficiary or assignee instead of trustee.
- 45-38. Entry of foreclosure.
- 45-39. [Repealed.]
- 45-40. Register to enter satisfaction on index.
- 45-41. Recorded deed of release of mortgagee's representative.
- 45-42. Release of corporate mortgages by corporate officers.
- 45-42.1. Corporate cancellation of lost mortgages by register of deeds.

Article 5.

Real Estate Mortgage Loans.

- 45-43. Real estate mortgage loans; commissions.

ARTICLE 1.

Chattel Mortgages: Form and Sufficiency.

§ 45-1. **Form of chattel mortgage.**—Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I,, of the county of in the State of North Carolina, am indebted to, of county, in said State, in the sum of dollars, for which he holds my note to be due the of, A. D. 19., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: but on this special trust, that if I fail to pay said debt and interest on or before the day of, A. D. 19., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days' notice at three public places, and apply the proceeds of

such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this day of, A. D. 19..... (Seal.)

(1870-1, c. 277; Code, s. 1273; Rev., s. 1039; 1911, c. 69, s. 1; C. S., s. 2575.)

Local Modification.—New Hanover: 1945, c. 859.

No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. *Comron v. Standland*, 103 N. C. 207, 9 S. E. 317 (1889).

What Mortgage Must Show.—While no particular form is necessary to constitute

a mortgage, yet the words must clearly indicate the creation of a lien, specify the debts to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect. The statement that the creditor is to have a lien, and that on default he may take possession and sell, sufficiently discloses the intent. *Harris v. Jones*, 83 N. C. 318 (1880); *Britt v. Harrell*, 105 N. C. 10, 10 S. E. 902 (1890).

If a security for money is intended, that security is a mortgage, though not having on its face the form of a mortgage. *McCoy v. Lassiter*, 95 N. C. 88 (1886).

§ 45-2. Registration.—Chattel mortgages substantially in the form provided in § 45-1 are good to all intents and purposes when the same are duly registered according to law. (1870-1, c. 277, ss. 1, 2; Code, ss. 1273, 1274; Rev., s. 1040; C. S., s. 2576.)

Cross References.—As to place of registration, see § 47-20. As to fee to register of deeds for registering chattel mortgage, etc., see § 161-10. As to offense of disposing of mortgaged or otherwise incumbered property and punishment therefor, see § 14-114.

Purpose of Section.—The purpose of the legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarrass trade and tend to encourage fraud. *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941 (1892).

The lien of the chattel mortgage is created by registering the original instrument, and such registration is notice to the world of the existence of the lien. It is not material to the public whether the debt and property were transferred by the mortgagee. *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941 (1892).

Registration is not essential between the parties to the mortgage. *Williams v. Jones*, 95 N. C. 504 (1886); *Thomas v. Cooksey*, 130 N. C. 148, 41 S. E. 2 (1902).

Assignment of Mortgage Not Required to Be Registered.—There is no provision which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often it is

assigned, it is still good to protect the interest of the holder of the debt. *Hodges v. Atkinson*, 111 N. C. 56, 15 S. E. 941 (1892).

No Special Statutory Mode of Registration.—There is no special statutory mode presented for the registration of a chattel mortgage. If it is actually registered and indexed, that is sufficient. This section does not determine the mode. *Williamson v. Bitting*, 159 N. C. 321, 74 S. E. 808 (1912).

Delivery to Register in His Office Necessary.—It is required for a valid filing of a mortgage that it be delivered at the office of the register of deeds, and until then it can acquire no priority over one theretofore executed. *McHan v. Dorsey*, 173 N. C. 694, 92 S. E. 598 (1917).

When Two Mortgages Registered Simultaneously.—Where two mortgages given to different persons on the same subject matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien. *McHan v. Dorsey*, 173 N. C. 694, 92 S. E. 598 (1917).

Registration Prior to Attachment Gives Priority.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was reg-

istered. *Williamson v. Bitting*, 159 N. C. 321, 74 S. E. 808 (1912).

Registry after Death of Mortgagor.—A mortgage both of land and personal property may be registered after the death of

the mortgagor. *Williams v. Jones*, 95 N. C. 504 (1886).

Cited in *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348 (1949).

§ 45-3. Mortgage of household and kitchen furniture.—All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other things of value, are void, unless the wife joins therein and her acknowledgment is taken in the manner prescribed by law in conveyances of real estate, except when said mortgage or conveyance is executed for the purchase money thereof. (1891, c. 91; Rev., s. 1041; C. S., s. 2577; 1931, c. 211; 1945, c. 73, s. 8.)

Cross References.—As to conveyance of home site, see § 30-8. As to forms of acknowledgment, see §§ 47-38, 47-39, 47-40.

Editor's Note.—The 1931 amendment added the exception as to purchase-money mortgage. The amendment does not contravene the policy of the law designed for the protection of the home. *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81 (1893); *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028 (1917). It is also consistent with the law which permits the husband to execute a purchase-money mortgage or deed of trust on his real estate that will be valid as against his wife without her joinder in the instrument. See § 39-13; 9 N. C. Law Rev. 392.

The 1945 amendment substituted "acknowledgment" for "privity examination".

Provisions within Police Power of State.—The provisions of this section are in exercise of the police power of the State and promotive of its economic welfare and public convenience and comfort, and designed for the protection of the home, and the section is a constitutional and valid enactment. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028 (1917).

Section as Declaration of Public Policy.—The requirements that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty are all of a piece as a declaration of public policy. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028 (1917).

The evident mischief sought to be overcome by this section is the facility with which these necessary articles for the comfort and convenience of every household, however humble—the household and kitchen furniture—may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least, during the life of the husband, by the chattel mort-

gage, or other lien, now almost the only basis of credit for the poor man. *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81 (1893).

Section 30-8 Distinguished.—A distinction between this section and § 30-8 should be noted. In this section the conveyance without the joinder of the wife is declared to be void, while in the latter statute such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

Section Applies to Liens Conferred by Writing, Whether Property Belongs to Wife or Husband.—This section could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privity examination [required by this section before the 1945 amendment] of the wife would have been impracticable. Nor could the section apply to the sale by the husband of the personal property of which he was the sole owner, because in this instance it was not necessary that the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privity examination of the wife, as in sale of real estate; and this may be applicable to such property whether it belongs to the husband or to the wife. *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81 (1893).

The word "convey," in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities.

A conveyance is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson*, 100 N. C. 52, 6 S. E. 71 (1888); *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81 (1893).

Application to Joint Note of Husband and Wife to Bind Separate Estate.—This section does not apply to a note signed by husband and wife binding her separate personal estate. *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644 (1903).

Applies Only to Conveyances of Furniture—Privy Examination.—This section applies only to conveyances by the husband of the household and kitchen furniture, and the former requirement of the privy examination of the wife in giving her assent thereto was within the power of the General Assembly and was in line with the same requirement in the Constitution, as to the joinder of the wife in the convey-

ance of the allotted homestead—the only instance in which the Constitution recognizes such a requirement. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028 (1917).

Goods for Sale in Shop Not Covered.—The words “household and kitchen furniture” may comprise not only that species of property which is in actual use, but also that which is on sale in shops, yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81 (1893).

Phrase “Household Furniture” Covers Piano.—A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms “Household and kitchen furniture” as used in this section, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028 (1917).

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-4. **Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.**—When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this State as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (1887, c. 147; 1895, c. 431; 1901, c. 186; 1905, c. 425; Rev., s. 1031; C. S., s. 2578; 1933, c. 199.)

Editor’s Note.—The 1933 amendment inserted the words “or collector” following the words “executor or administrator.”

Power of Sale Vests in Executor of Mortgagee.—When a power of sale in a mortgage is given to the mortgagee, “his executors,” etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of this section and the contract in the mortgage. *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548 (1907).

Same—Even in the Absence of Stipula-

tion to That Effect.—The executor of a mortgagee may exercise the power of sale contained in the mortgage, when the deed in terms confers such power upon the mortgagee and his executors. This section was intended to confer the power of sale upon executors and administrators when such power is not given in the deed. *Yount v. Morrison*, 109 N. C. 520, 13 S. E. 892 (1891).

Cited in *Allred v. Trexler Lumber Co.*, 194 N. C. 547, 140 S. E. 157 (1927); *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210 (1937).

§ 45-5. **Foreclosures by representatives validated.**—In all actions which were brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of fore-

closure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (1905, c. 425, s. 2; Rev., s. 1032; C. S., s. 2579.)

§ 45-6. Renunciation by representative; clerk appoints trustee.—The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county. (1905, c. 128; Rev., s. 1038; C. S., s. 2580.)

Cross Reference.—As to appointment of successor to trustee, etc., see § 36-17. **Cited in** *Spain v. Hines*, 214 N. C. 432, 200 S. E. 25 (1938). See also § 45-9 and note.

§ 45-7. Agent to sell under power may be appointed by parol.—All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C. S., s. 2581.)

Recitals in Deed Prima Facie Correct.—Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct. *Hayes v. Ferguson*, 206 N. C. 414, 174 S. E. 121 (1934).

§ 45-8. Survivorship among donees of power of sale.—In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C. S., s. 2582.)

Editor's Note.—See 13 N. C. Law Rev. 93. **tees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust coupled with an interest.** *Cawfield v. Owens*, 129 N. C. 286, 40 S. E. 62 (1901).

§ 45-9. Clerk appoints successor to incompetent trustee.—When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the State, or in any way becomes incompetent to execute the said

trust, or is a nonresident of this State, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the State, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (1869-70, c. 188; 1873-4, c. 126; Code, s. 1276; 1901, c. 576; Rev., s. 1037; C. S., s. 2583; 1933, c. 493.)

Editor's Note.—The 1933 amendment inserted the words “and/or recorded” following the word “executed” in two places in the section. It also inserted the clause relating to instances where the trustee has disappeared.

Appointment of New Trustee upon the Death of the Old.—Upon the death of a trustee, the clerk of the superior court may appoint another under this section, who may proceed to execute the trust according to the terms of the deed. *Wright v. Fort*, 126 N. C. 615, 36 S. E. 113 (1900).

Appointment of Trustees upon the Death of Last Survivor of Board.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a “Baptist church and for the education of the youths of the colored race,” it was held that their successors would be appointed under this section, by the clerk of the court. *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

Appointment upon Appeal.—Where the clerk of the superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518 (1900).

Section Inapplicable to Active Express Trust.—The provisions of this section may not be held applicable to an active express trust. *Cheshire v. First Presbyterian Church*, 221 N. C. 205, 19 S. E. (2d) 855 (1942).

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under this section; and a deed made by the

substitute trustee passes the title to the purchaser at a foreclosure sale. *Thompson v. State*, 223 N. C. 340, 26 S. E. (2d) 902 (1943).

Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method expressed for this purpose is contractual and does not arise under this section requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale. *Raleigh Real Estate, etc., Co. v. Padgett*, 194 N. C. 727, 140 S. E. 714 (1927).

Administrator c. t. a. Taking Place of Executor Trustee.—Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds to the trusteeship, and hence an appointment by the clerk of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no power. *State v. Peebles*, 120 N. C. 31, 26 S. E. 924 (1897).

Petition for Appointment of New Trustee—Title of New Trustee.—Under this section, when a trustee dies, all of the parties in interest may join in a petition to the superior court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee, so far as it is competent for the court to confer them. *McAfee v. Green*, 143 N. C. 411, 55 S. E. 828 (1906).

All Persons Interested Must Be Made Parties.—The appointment of a trustee in cases where the former trustee has died, removed from the county, or become incompetent, cannot be done on an ex parte motion or petition. The application for such appointment is in the nature of a civil action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims. *Guion v. Melvin*, 69 N. C. 242 (1873).

“**All persons interested**” include, in a proceeding for the removal of a trustee and the appointment of a substitute trustee under this section, only the trustor, the trustee or trustees, and all of the cestuis que trustent whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted. *Thompson v. State*, 223 N. C. 340, 26 S. E. (2d) 902 (1943).

Personal Powers of Old Trustee Cannot Be Transferred to New.—Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. See *Young v. Young*, 97 N. C. 132, 2 S. E. 78 (1887).

Bond for Substituted Trustee Unnecessary.—It is not necessary in substituting one trustee for another in pursuance of this section, to require a bond of the substituted trustee. *Strayhorn v. Green*, 92 N. C. 119 (1885).

Cited in *New York Life Ins. Co. v. Lassiter*, 209 N. C. 156, 183 S. E. 616 (1936); *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210 (1937); *Cheshire v. First Presbyterian Church*, 222 N. C. 280, 22 S. E. (2d) 566 (1942).

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real or personal property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper-writing whenever it appears:

(1) In the case of individual trustees: That the trustee then named in such mortgage, deed of trust, or other instrument securing the payment of money, has died, or has removed from the State, or is not a resident of this State or cannot be found in this State, or has disappeared from the community of his residence so that his whereabouts remains unknown in such community for a period of three months or more; or that he has become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy or conviction of a criminal offense; or that he has refused to accept such appointment as trustee or refuses to act or has been declared a bankrupt; or that a petition in involuntary bankruptcy has been filed against him, or that a suit has been instituted in any court of this State asking relief against him on account of insolvency; or that a cause of action has been asserted against him on account of fraud against his creditors.

(2) In the case of corporate trustees: That the trustee is a foreign corporation or has ceased to do business, or has ceased to exercise trust powers, or has excluded from its regular business the performance of such trusts; or that the corporation has been declared bankrupt, or has been placed in the hands of a receiver; or that insolvency proceedings have been instituted in any court of this State or in any court of the United States against it, or that any action has been instituted in either of said courts against it in which relief is asked on the ground of insolvency or fraud against its creditors; or that any officer or commission of this State, or any employee of such commission or officer, has taken charge of its affairs for the purpose of liquidation pursuant to any statute.

The powers recited in this section shall be cumulative and optional. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543.)

Editor's Note.—The 1943 amendment rewrote this section. See 9 N. C. Law Rev. 402.

Section Becomes Part of Contract.—

Where a deed of trust is executed after the effective date of this section the provisions of the section enter into and become a part of the contract, and a later

statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the cestui que trust, are not injuriously affected, does not violate the constitutional provisions. *Bateman v. Sterrett*, 201 N. C. 59, 159 S. E. 14 (1931).

A substituted trustee succeeds to all the rights, titles and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. *Pearce v. Watkins*, 219 N. C. 636, 14 S. E. (2d) 653 (1941).

A sale of the property by the substituted trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a convey-

ance of any interest in land. *North Carolina Mtg. Corp. v. Morgan*, 208 N. C. 743, 182 S. E. 450 (1935).

Substitute Trustee May Execute Deed to Purchaser.—A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute a deed to the purchaser at a sale duly conducted by the original trustee. *Pendergrast v. Home Mtg. Co.*, 211 N. C. 126, 189 S. E. 118 (1937); *Pearce v. Watkins*, 219 N. C. 636, 14 S. E. (2d) 653 (1941).

Cited in *New York Life Ins. Co. v. Lassiter*, 209 N. C. 156, 183 S. E. 616 (1936); *Thompson v. State*, 223 N. C. 340, 26 S. E. (2d) 902 (1943).

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real or personal property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1.)

Editor's Note.—For comment on this section, see 19 N. C. Law Rev. 507.

§ 45-12. Certificate by clerk of superior court.—Whenever the powers set out in § 45-10 shall be exercised the clerk of the superior court shall certify that the instrument has been executed by the owner or owners of a majority in amount of the indebtedness, notes, bonds or other instruments secured therein, have executed the same, and that it has been made to appear to him that the cause of substitution as set forth therein is true and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust, and unless such certificate is attached to said instrument before registration and registered therewith the same shall be invalid and of no effect. (1931, c. 78, s. 3.)

§ 45-13. Right of appeal by any person interested; judge to review findings of clerk de novo.—Whenever the power contained in § 45-10 or in § 45-11 is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to March 4, 1931, then, at any time within twelve months from the registration of the instrument designating the new trustee but within thirty days from actual knowledge of the same, any person interested therein may appeal from the findings of the clerk of the superior court pursuant to § 45-12, and such appeal shall be duly constituted when a written

notice signed by, or on behalf of such person, shall have been served in any of the methods of service of summons provided by law on all other parties interested therein, including the said substituted trustee. The notice shall state that a motion will be made before the judge of the superior court of the county of the clerk who made such certificate at the next regular term of such superior court beginning more than ten days after the service of said notice on all interested parties, and the docketing of such notices on the civil issue docket of said county. On the hearing of said motion it shall be open to all parties to contest and defend the findings of said clerk, and the judge shall review said findings de novo and make such findings in respect thereof as shall appear to him from the evidence to be true, and if the said substituted trustee shall be removed at said hearing another trustee shall be substituted in his stead by the court upon a finding that he or it is a proper person or corporation to perform the functions of said trusteeship, but only one such appeal shall be allowed as to each appointment. (1931, c. 78, s. 4; 1941, c. 115, s. 2.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-14. Acts of trustee prior to removal not invalidated.—If any such trustee who has been substituted as provided in § 45-10 or in § 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in §§ 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts in so far as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-15. Registration of substitution constructive notice.—The registration of such paper-writing designating a new trustee under § 45-10 or under § 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-16. Register of deeds to make marginal entry of substituted trustee.—Whenever any substituted trustee shall be appointed as provided in §§ 45-10 to 45-17 and such designation of such substituted trustee shall have been registered, together with the certificates required in §§ 45-10 to 45-17, then it shall be the duty of the register of deeds to make an appropriate notation on the margin of the registration of the said mortgage, deed of trust, or other instrument securing the payment of money, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in § 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17, and in which cases the register of deeds shall make, as to each recited instrument,

mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7.)

§ 45-17. Substitution made as often as justifiable.—The powers set out in § 45-10 and in § 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in §§ 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before February 3, 1939, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substituted trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13.)

Editor's Note.—The act from which this section was codified, Laws 1939, c. 13, provided that it should not be construed to affect any litigation pending on February 3, 1939, nor to divest vested rights.

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian.—When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian. (1905, c. 433; Rev., s. 1034; C. S., s. 2584.)

§ 45-20. Sales by mortgagees and trustees confirmed.—All sales of real property made prior to February tenth, nineteen hundred and five, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed. (Ex. Sess. 1920, c. 27; C. S., s. 2584(a).)

§ 45-20.1. Validation of trustees' deeds where seals omitted.—All deeds executed prior to the first day of January, one thousand nine hundred and forty, by any trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee has omitted to affix his seal after his signature, shall be good and valid: Provided, however, that this section shall not apply to actions instituted and pending prior to the fifteenth day of May, one thousand nine hundred and forty-three. (1943, c. 171.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.—In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by

said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

Editor's Note.—This section, which became effective March 15, 1941, did not apply to or affect pending litigation. For comment on section, see 19 N. C. Law Rev. 507.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. **Definitions.**—As used in this article, “sale” means only a sale of real or personal property pursuant to—

(1) An express power of sale contained in a mortgage, deed of trust, or conditional sale contract, or

(2) A power of sale provided by statute with respect to a mortgage or deed of trust of personal property, or conditional sale contract, which does not contain an express power of sale. (1949, c. 720, s. 1.)

Editor's Note.—The act inserting this and the two following articles, and transferring and repealing certain sections under article 3, is effective as of Jan. 1, 1950. See Laws 1949, c. 720, s. 7. Section 6 of the act provides that it does not apply to any sale commenced prior to such effective date, and that a sale has been commenced

if a notice of sale has been posted or published. And § 5 provides: “The present law shall remain in effect for the completion of sales under power of sale to which this act, under section 6, does not apply.”

For discussion of this article, see 27 N. C. Law Rev. 479.

§ 45-21.2. **Article not applicable to foreclosure by court action.**—This article does not affect any right to foreclosure by action in court, and is not applicable to any such action. (1949, c. 720, s. 1.)

§ 45-21.3. **Days on which sale may be held.**—A sale may be held on any day except Sunday. (1949, c. 720, s. 1.)

§ 45-21.4. **Place of sale of real property.**—(a) Every 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 sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. 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) When a mortgage or deed of trust with power of sale of real property designates the place of sale within the county, the sale shall be held at the place so designated.

(d) When a mortgage or deed of trust with power of sale of real property confers upon the mortgagee or trustee the right to designate the place of sale, the sale shall be held at the place within the county designated by the mortgagee or trustee in the notice of sale.

(e) When a mortgage or deed of trust with power of sale of real property does not designate, or confer upon the mortgagee or trustee the right to designate, the place of sale, or when it designates as the place of sale some county in which no part of the property is situated, such real property shall be sold as follows:

(1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated.

(2) A single tract of property situated in two or more counties may be sold

at the courthouse door of any one of the counties in which some part of the real property is situated. (1949, c. 720, s. 1.)

§ 45-21.5. **Place of sale of personal property.**—(a) When a mortgage, deed of trust or conditional sale contract designates the county in which a sale of personal property shall be held or the place of sale within the county, the terms of the instrument shall be complied with.

(b) When the instrument does not designate the county in which a sale of personal property shall be held, the sale may be held in any county—

(1) When such instrument is recorded, if it has been recorded as provided by G. S. § 47-20 or G. S. § 47-23; or

(2) Where the property, or any part thereof, is located when the mortgagee, trustee or vendor takes possession of, or repossesses, it.

(c) When the instrument does not designate the particular place of sale within the county, the sale shall be held at such place therein as is designated in the notice of sale by the mortgagee, trustee or vendor. (1949, c. 720, s. 1.)

§ 45-21.6. **Presence of personal property at sale required.**—The person holding a sale of personal property shall have the property present at the place of sale unless—

(1) The instrument containing the power of sale specifically provides otherwise, or

(2) Prior to the sale, the clerk of the superior court in his discretion, upon application of any interested party, and upon notice being given, as provided by article 48 of chapter 1, to all parties in interest, issues an order authorizing the sale to be held without the property being present because the nature, condition or use of the property is such that the clerk 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 be set out in the notice of sale. (1949, c. 720, s. 1.)

§ 45-21.7. **Sale of separate tracts in different counties.**—(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale, and each subsequent resale, of each such tract shall be subject to a separate upset bid. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to resale of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1.)

§ 45-21.8. **Sale as a whole or in parts.**—(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G. S. § 45-21.9, sell the property as a whole or in such parts or parcels thereof as are

separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1.)

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.—(a) When a person exercising a power of sale sells property in parts pursuant to G. S. § 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation, and the costs and expenses of the sale. The readvertisement of such sale shall be made as provided by G. S. § 45-21.17 in the case of real property or G. S. § 45-21.18 in the case of personal property.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1.)

§ 45-21.10. Requirement of cash deposit at sale.—(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee holding the sale of real property may require the highest bidder immediately to make a cash deposit not to exceed ten per cent (10%) of the amount of the bid up to and including \$1,000, plus five per cent (5%) of any excess over \$1,000.

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1.)

§ 45-21.11. Application of statute of limitations to serial notes.—When a series of notes maturing at different times is secured by a mortgage, deed of trust or conditional sale contract and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1.)

§ 45-21.12. Power of sale barred when foreclosure barred.—(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage, deed of trust or conditional sale contract, or provided by statute, when an action to foreclose the mortgage or deed of trust, or to enforce the conditional sale contract, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage, deed of trust or conditional sale contract, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, or to enforce such conditional sale contract, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section,

a sale is commenced when the notice of the sale is first posted or published as provided by this article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1.)

Cross Reference.—As to statute of limitations on foreclosure, see § 1-47, paragraph 3.

Editor's Note.—All of the cases in the following note were decided under repealed § 45-26, which was somewhat similar to this section.

Section 45-26 was not a mere statute of limitation, and was not required to be pleaded by a party whose rights might be affected. It simply destroyed, by direct prohibition, the authority of any power of sale made in the mortgage contract or conveyance. *Spain v. Hines*, 214 N. C. 432, 200 S. E. 25 (1938). See 17 N. C. Law Rev. 448.

Construed against Exercise of Power.—Where reasonable doubt existed as to the interpretation of former § 45-26, it was required to be strictly construed against the exercise of the power of foreclosure and the doubt resolved in favor of the holder of the equitable title. *Spain v. Hines*, 214 N. C. 432, 200 S. E. 25 (1938).

Applicable to Contracts in Existence at Effective Date.—See *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998 (1912).

Doctrine of *Cone v. Hyatt* Changed.—The holding in *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678 (1903), that the power of sale in a deed of trust or mortgage was not barred by the statute of limitation, though an action for foreclosure thereon was barred, was changed by § 45-26. See also *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290 (1934).

Exercise of Power in Mortgage Subject to Ten Year Limitation.—While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, by § 45-26 mortgages then executed were made subject to the ten-year statute. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

The provisions of § 1-47, par. 3, relating to the bar of actions to foreclose mortgages of real property, were required to be read into former § 45-26; and it appears that a power of sale contained in a mortgage becomes inoperative and unenforceable when not exercised within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same "where the mortgagor or grantor has been in possession of the

property." *Ownbey v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900 (1942).

Statute Does Not Commence Running until Debt Due.—The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the power of sale contained in the mortgage may be exercised within ten years after the maturity of the principal. *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548 (1907).

Running of Statute on Installment Debts.—See *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678 (1903).

Limitation When Power of Sale for Default of Interest Optional.—See *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548 (1907).

Notes in Series, with Acceleration Clause.—See *E. H. & J. A. Meadows Co. v. Bryan*, 195 N. C. 398, 142 S. E. 487 (1928). See also § 45-21.11.

Restraining Foreclosure.—Where notes secured by a mortgage were barred by the statute of limitations, and the power of sale contained in the instrument was barred by the lapse of over ten years from the date of the last payment on the notes, the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure, on the principle that he who seeks equity must do equity, was unavailing. *Serls v. Gibbs*, 205 N. C. 246, 171 S. E. 56 (1933).

Foreclosure Deed Voidable Merely.—A foreclosure deed executed pursuant to a sale held after the power of sale was barred by § 45-26 was held voidable and not void. *Edwards v. Hair*, 215 N. C. 662, 2 S. E. (2d) 859 (1939).

Burden of Proof.—An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred by § 45-26 at the time of foreclosure, was error, the burden being upon plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. *Edwards v. Hair*, 215 N. C. 662, 2 S. E. (2d) 859 (1939).

Applied in *In re Gibbs*, 205 N. C. 312, 171 S. E. 55 (1933).

Stated in *Demai v. Tart*, 221 N. C. 106, 19 S. E. (2d) 130 (1942).

§ 45-21.13. Conditional sale contract; mortgage or deed of trust of personal property; statutory power of sale.—When a conditional sale

contract or mortgage or deed of trust of personal property, does not contain an express power of sale, a power of sale is hereby conferred upon the vendor, mortgagee or trustee, which power may be exercised in the same manner as an express power of sale, except as provided by G. S. § 45-21.18. (1949, c. 720, s. 1.)

Cross References.—As to registration of conditional sales of personal property, see §§ 47-23, 47-24. As to conditional sales contracts of corporations, see § 55-43.

For case applying repealed § 45-24, similar in subject matter to this section, see *House v. Parker*, 181 N. C. 40, 106 S. E. 137 (1921).

§ 45-21.14. 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 the 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. 720, s. 1.)

§ 45-21.15. Trustee's fees.—(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

(1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;

(2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to such compensation as the parties agree upon;

(4) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, and the parties are not able to agree as to the trustee's compensation, then five per cent (5%) of the amount of the obligation secured by the instrument, not exceeding the amount stipulated in the instrument as compensation for the trustee's services in actually holding a sale, shall be deposited with the clerk of the superior court. Such sum shall be held by the clerk until the trustee's compensation is fixed by the clerk, upon petition by the trustee, after notice to the person who deposited such sum. (1949, c. 720, s. 1.)

Part 2. Procedure for Sale.

§ 45-21.16. Contents of notice of sale.—The notice of sale shall—

(1) Refer to the instrument pursuant to which the sale is held;

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this article;

(3) Describe real property to be sold substantially as it is described in the instrument containing the power of sale, 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 substantially as it is described in the instrument pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale provided for by the instrument pursuant to

which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the instrument to be included therein. (1949, c. 720, s. 1.)

Cross Reference.—As to requirements for notice of execution and judicial sales, see §§ 1-339.15, 1-339.51.

Editor's Note.—The cases in the following note were decided under repealed § 45-25, which was similar in subject matter to paragraph (3) of this section.

Description "Substantially" as in Instrument.—In *Douglas v. Rhodes*, 188 N. C. 580, 125 S. E. 261 (1924), construing repealed § 45-25, the court said: "If the legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have

easily said so in the statute, but on the contrary it used the word 'substantially.' The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy."

In notices for the sale of realty under mortgages or deeds of trust, the identical description of the land, as contained in the instrument, was not required by § 45-25, and a description "substantially" as in the conveyance was sufficient. *Peedin v. Oliver*, 222 N. C. 665, 24 S. E. (2d) 519 (1943).

As to description held sufficient under § 45-25, see *Douglas v. Rhodes*, 188 N. C. 580, 125 S. E. 261 (1924); *Blount v. Basnight*, 209 N. C. 268, 183 S. E. 405 (1936).

§ 45-21.17. Posting and publishing notice of sale of real property.

—(a) When the instrument pursuant to which a sale of real property is to be held contains provisions with respect to posting or publishing notice of sale of the real property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of real property is to be held contains no provision with respect to posting or publishing notice of the sale of real property, the notice 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.

(c) 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.

(d) When the real property to be sold is situated in more than one county, the provisions of subsections (a) or (b) whichever is applicable, and subsection (c) shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1.)

Effect of Notice to Discontinue Publication of Notice of Sale.—A notice, from the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the prop-

erty and breaks the continuity of publication of notice required by former § 1-325, and no subsequent renewal of authority can bridge the gap or restore the publication to its original status. *Smith v. Bank of Pinehurst*, 223 N. C. 249, 25 S. E. (2d) 859 (1943).

§ 45-21.18. Posting notice of sale of personal property; mailing notice when statutory power of sale exercised.—(a) When an instrument containing an express power of sale of personal property contains provisions with respect to posting or publishing a notice of sale of the property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of personal property is to be held contains no provision with respect to posting or publishing notice of the sale, the notice of sale, except in the case of perishable property as described in G. S. § 45-21.19, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the sale.

(c) When a mortgage or deed of trust of personal property, or a conditional sale contract, contains no express power of sale, any person exercising the statutory power of sale provided therefor, in addition to the posting of notice required by subsection (b), shall, at least ten days before the date of sale, mail by registered mail a copy of the notice of sale to the mortgagor or grantor in case of a mortgage or deed of trust of personal property, or the vendee in case of a conditional sale contract—

(1) At the actual address of the mortgagor, grantor or vendee, if such address is known to the mortgagee, trustee or vendor, or

(2) At the address, if any, furnished the mortgagee, trustee or vendor by the mortgagor, grantor or vendee, when the actual address is not known to the mortgagee, trustee or vendor.

(d) If the actual address of the mortgagor, grantor or vendee is not known to the mortgagee, trustee or vendor, and if no address of the mortgagor, grantor or vendee has been furnished to the mortgagee, trustee or vendor, no mailing of a copy of the notice of sale pursuant to subsection (c) is required. (1949, c. 720, s. 1.)

Cross Reference.—As to advertisement for judicial sale and sale under execution of personal property, see §§ 1-339.18, 1-339.53.

Editor's Note.—The cases in the following note were decided under repealed § 45-23, which formerly governed notice of sale of personal property.

Strict Compliance with Statute.—In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument, not inconsistent with the statute in respect to notice and other terms on which the power may be exercised, shall be strictly complied with;

and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17 (1914).

Presumption of Regularity.—While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places, and the burden of proof is on the party claiming a failure of proper notice or advertisement to show it. *Cowfield v. Owens*, 129 N. C. 286, 40 S. E. 62 (1901); *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

§ 45-21.19. Exception; perishable property.—If, in the opinion of a person who is about to exercise a power of sale of personal property, the property is perishable because subject to rapid deterioration, such person may report such fact together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than this article would otherwise permit. If the clerk determines that the property is such perishable property, he shall 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 makes no such order, the person authorized to hold the sale shall proceed as if the matter had not been presented to the clerk. (1949, c. 720, s. 1.)

§ 45-21.20. Satisfaction of debt after publishing or posting notice,

but before completion of sale.—A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered of—

(1) The obligation secured by the mortgage, deed of trust or conditional sale contract, and

(2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G. S. § 45-21.15. (1949, c. 720, s. 1.)

§ 45-21.21. Postponement of sale.—(a) Any person exercising a power of 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 a sale, the person exercising the power of 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. § 45-21.17 in the case of real property or G. S. § 45-21.18 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 sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a sale at such later date as is fixed in the new notice of sale. (1949, c. 720, s. 1.)

§ 45-21.22. 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. 720, s. 1.)

§ 45-21.23. **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, sale of personal property may continue until 10:00 o'clock P. M. (1949, c. 720, s. 1.)

§ 45-21.24. **Continuance of uncompleted sale.**—A sale commenced but not completed within the time allowed by G. S. § 45-21.23 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. 720, s. 1.)

§ 45-21.25. **Delivery of personal property; bill of sale.**—The person holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The person holding the sale 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. No report of such sale is necessary. (1949, c. 720, s. 1.)

§ 45-21.26. **Preliminary report of sale of real property.**—(a) The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale was had.

(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 authority under which the person making the sale acted;
- (2) The name of the mortgagor or grantor;
- (3) The name of the mortgagee or trustee;
- (4) The date of the sale;
- (5) A reference to the book and page in the office of the register of deeds, where the instrument is recorded or, if not recorded, a description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (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;
- (8) The name of the person making the report; and
- (9) The date of the report. (1949, c. 720, s. 1.)

§ 45-21.27. **Upset bid on real property; compliance bonds.**—(a) An upset bid is an advanced, increased, or raised bid whereby any 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 re-

quired 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 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. 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 sale 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. 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. 720, s. 1.)

Editor's Note.—All of the cases in the following note were decided under repealed § 45-28, of similar import to this and the three following sections. It should be noted that § 45-28 applied to foreclosure by order of court, to execution sales, and to sales by personal representatives and sales by any person pursuant to a power contained in a will, as well as to sales under power of sale contained in a mortgage or deed of trust. As to former § 45-28, see 13 N. C. Law Rev. 15, 300.

Purpose of Former § 45-28 as to Mortgages.—Former § 45-28 was intended for the protection of mortgagors where sales were made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10% had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale. *Pringle v. Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914 (1921).

Liberal Construction.—Under former § 45-28 it was held that, while the clerk of the superior court is without authority to order a resale of lands foreclosed under a mortgage without an increase bid filed with him, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor. *Clayton Banking Co. v. Green*, 197 N. C. 534, 149 S. E. 689 (1929).

Statute Incorporated in Mortgages and Deeds of Trust.—The provisions of former § 45-28, concerning the sale of land under a power contained in a mortgage

or deed of trust, entered into and controlled the sale under such instruments. In *re Sermon's Land*, 182 N. C. 122, 108 S. E. 497 (1921).

Status of Mortgage and Deed of Trust Sales.—Under former § 45-28 a sale of land under the power in a mortgage or deed of trust was given the same status as if made under a judgment or decree of court. *Pringle v. Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914 (1921).

Power of Court over Judicial Sales Not Affected.—There was nothing in former § 45-28 which deprived the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees. *Koonce v. Fort*, 204 N. C. 426, 168 S. E. 672 (1933). See § 45-21.2.

Mortgagor or Trustor May Make Advanced Bid.—Under former § 45-28, of similar import to this and the two following sections, the mortgagor or trustor was entitled to procure resales through advanced bids made in conformity with the statute. In *re Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302 (1949).

Trustor May Repeatedly Procure Resales.—The fact that the trustor repeatedly procured resales through the making of advanced bids in compliance with former § 45-28 worked no legal wrong upon the cestui and was within the trustor's right, even though he procured such upset bids for the purpose of delaying foreclosure and the recovery by the cestui of the indebtedness. In *re Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302 (1949). See § 45-21.29.

Authority of Clerk—Generally.—The only authority conferred by former § 45-28 on the clerk is to order a resale of the property where the bid has been raised as

therein prescribed. In re Bauguess, 196 N. C. 278, 145 S. E. 395 (1928). See In re Mortgage Sale of Ware Property, 187 N. C. 693, 122 S. E. 660 (1924).

The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., by former § 45-28 were not those of general control as exercised by the courts in case of an ordinary judicial sale, but were confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. *Lawrence v. Beck*, 185 N. C. 196, 116 S. E. 424 (1923).

As to the supervisory powers given the clerks of the superior courts by former § 45-28, the statute must be strictly complied with. *Redfern v. McGrady*, 199 N. C. 128, 154 S. E. 3 (1930).

Same—Where Property Injured within Ten-Day Period.—Former § 45-28 controlled as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and conferred no power on the clerk to make such order, unless within the ten days allowed there had been an increased bid, etc., and did not extend to instances wherein a material loss had been sustained by destruction of a house on the lands, within the stated period. In re *Sermon's Land*, 182 N. C. 122, 108 S. E. 497 (1921).

Same—When Supervisory Power Begins.—Under former § 45-28 it was held that the clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, which continues until after the final sale under foreclosure. *Lawrence v. Beck*, 185 N. C. 196, 116 S. E. 424 (1923).

Report of Sale.—Former § 45-28 did not require that the sale of land under mortgage or deed in trust be reported to the clerk of the court until an advanced bid had been properly made. *Pringle v. Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914 (1921). See also In re *Sermon's Land*, 182 N. C. 122, 108 S. E. 497 (1921); *Dillingham v. Gardner*, 219 N. C. 227, 13 S. E. (2d) 478 (1941); *Peedin v. Oliver*, 222 N. C. 665, 24 S. E. (2d) 519 (1943). See § 45-21.26.

Jurisdiction of Judge on Appeal.—The discretion vested in the superior court judge on appeal from the clerk, under § 1-276, to hear and determine the matter in controversy, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, for the clerk has no

authority to further pass thereon in the absence of an increased bid. In re *Mortgage Sale of Ware Property*, 187 N. C. 693, 122 S. E. 660 (1924).

Sale Not Consummated until Expiration of Ten Days.—A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of ten days after the public auction. *Shelby Bldg., etc., Ass'n v. Black*, 215 N. C. 400, 2 S. E. (2d) 6 (1939).

Interest of Highest Bidder.—The bidder at the sale during the period of ten days allowed for the filing of upset bids acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re *Sermon's Land*, 182 N. C. 122, 108 S. E. 497 (1921). See *Richmond County v. Simmons*, 209 N. C. 250, 183 S. E. 282 (1936).

No Specific Performance When Sale Reopened.—The principle upon which specific performance of a binding contract to convey lands is enforceable has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands during the ten days allowed for the filing of upset bids, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re *Sermon's Land*, 182 N. C. 122, 108 S. E. 497 (1921).

Assignment of Bid.—While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the ten-day period, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had. *Creech v. Wilder*, 212 N. C. 162, 193 S. E. 281 (1937).

Revocation of Order for Deed.—It is the duty of the clerk of the superior court to readvertise and resell the mortgaged property as often as the statute is complied with, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. *Hanna v. Carolina Mort-*

gage Co., 197 N. C. 184, 148 S. E. 31 (1929).

Where Land Conveyed before Expiration of Statutory Time.—See *Wise v. Short*, 181 N. C. 320, 107 S. E. 134 (1921).

Payment of Mortgage within Ten-Day Period.—The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. *Cherry v. Gilliam*, 195 N. C. 233, 141 S. E. 594 (1928). See § 45-21.20.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. *Davis v. Central Life Ins. Co.*, 197 N. C. 617, 150 S. E. 120 (1929).

Deposit of Advanced Bid with Clerk.—Under the facts of this case presenting the question of a valid resale of mortgaged land under the provisions of former § 45-28, objection that only 2% of the proposed advanced bid was deposited with the clerk was untenable. *Briggs v. Asheville Developers*, 191 N. C. 784, 133 S. E. 3 (1926).

Clerk Cannot Require Larger Deposit than That Required by Statute.—Under former § 45-28, it was held that the clerk had no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute, or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. In *re Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302 (1949).

Time of Making Deposit.—Under re-

pealed § 45-28 it was held that when within the statutory time limit the offerer had communicated with the clerk of the court by telephone and offered to come from an adjacent town and make a sufficient deposit, and was informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check was accordingly mailed, a substantial compliance with the statute was made, though the check was received by the clerk after the expiration of the time limit of the statute. *Clayton Banking Co. v. Green*, 197 N. C. 534, 149 S. E. 689 (1929).

Rights of Owner of Equity of Redemption.—Where lands had been many times resold under former § 45-28 and the owner of the equity of redemption had not protected himself at the sales, he could not have the deed at the final sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. *Brown v. Sheets*, 197 N. C. 268, 148 S. E. 233 (1929). See *Phipps v. Wyatt*, 199 N. C. 727, 155 S. E. 721 (1930).

When Sale Not Subject to Collateral Attack.—See *First Carolina's Joint-Stock Land Bank v. Stewart*, 208 N. C. 139, 179 S. E. 463 (1935).

Recitals in Deed as to Compliance Prima Facie.—Where the question in controversy in a suit for specific performance against the purchaser is whether there has been a compliance with former § 45-28 as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and alone are insufficient to sustain the judgment. *Briggs v. Asheville Developers*, 191 N. C. 784, 133 S. E. 3 (1926).

As to commissions allowed under former § 45-28, see *Pringle v. Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914 (1921); *In re Hollowell Land*, 194 N. C. 222, 139 S. E. 769 (1927); *Tidewater Brokerage Co. v. Southern Trust Co.*, 203 N. C. 182, 165 S. E. 353 (1932). See § 45-21.15.

Applied, (former § 45-28) in *Vance v. Vance*, 203 N. C. 667, 166 S. E. 901 (1932); *Howard v. Ray*, 222 N. C. 710, 24 S. E. (2d) 529 (1943); *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948).

§ 45-21.28. Separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold in parts, as provided by G. S. § 45-21.8, the sale and each subsequent resale, of any such part is 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. 720, s. 1.)

§ 45-21.29. 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 person holding the resale shall report the resale in the same manner as required by G. S. § 45-21.26.

(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 resale remains subject to other upset bids and resales 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.

(i) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this article fails to make definite provision as to such procedure. (1949, c. 720, s. 1.)

Editor's Note.—The cases in the following note were decided, under repealed § 45-28, of similar import to §§ 45-21.27 to 45-21.30. See note to § 45-21.27.

Where a resale is ordered the bidder at the first sale is released from any and all obligation by reason of his bid. *Richmond County v. Simmons*, 209 N. C. 250, 183 S. E. 282 (1936).

Keeping Resale Open for Ten Days.—Under the provisions of former § 45-28 as to resale of mortgaged lands upon a raised bid, it was required that the matter be kept open by the clerk for ten days thereafter. *Briggs v. Asheville Developers*, 191 N. C. 784, 133 S. E. 3 (1926).

Clerk Must Order Resale Each Time

Upset Bid Is Placed.—Under former § 45-28 it was held that the clerk of the superior court was required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid was made in accordance with the statute, regardless of how often an upset bid may be placed. *In re Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302 (1949). See notes to § 45-21.27.

Clerk May Not Make Orders Abrogating Rights Conferred by Statute.—The provision of former § 45-28 that the clerk should make such orders as may be just and necessary to safeguard the interests of all parties did not authorize him to enter orders abrogating rights conferred

by the statute. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302 (1949).

Striking Out Order for Resale.—Where, on account of an upset bid, an order for a resale has been entered, it is error eleven days thereafter to strike out such order and declare the sale final, in prejudice of further rights of mortgagors. Va. Trust Co. v. Powell, 189 N. C. 372, 127 S. E. 242 (1925).

The order of the clerk to deliver title

§ 45-21.30. **Failure of bidder to make cash deposit or to comply with bid; resale.**—(a) If the terms of a sale of real or personal property require 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 sale of personal property for cash fails to pay the amount of his bid, 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 sale or resale of real property fails to comply with his bid upon tender to him of a deed for the property or after a bona fide attempt to tender such deed, the person authorized to sell the property may hold 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. § 45-21.29 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(d) 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.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1.)

Editor's Note.—The cases in this note were decided under repealed § 45-28, of similar import to §§ 45-21.27 to 45-21.30. See note to § 45-21.27.

Deposit When No Upset Bid Is Made.—Under the provisions of former § 45-28 the last and highest bidder at a foreclosure sale obtained no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee might, in fixing the terms of the sale, require a reasonable cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid was made, the reasonableness of such deposit might be determined by analogy to the deposit required for an upset bid, and a demand for a cash deposit at the sale amounting to 25% of the bid was unreasonable. Alexander v. Boyd, 204 N. C. 103, 167 S. E. 462 (1933).

Recovery of Deposit When Resale Is Ordered.—Where the last and highest bidder at a sale of lands has been required

required by former § 45-28 was merely ministerial in its nature, and its omission, when in fact the trustee had, after complying with all the terms of the power of sale, made title to the purchaser, did not invalidate the foreclosure, or render the title acquired by the purchaser as grantee in the deed of the trustee void. Cheek v. Squires, 200 N. C. 661, 158 S. E. 198 (1931). See Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424 (1923).

to deposit a certain percentage of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the placing of an advanced bid and cash deposit by another and the entering of an order of resale by the clerk. Koonce v. Fort, 204 N. C. 426, 168 S. E. 672 (1933).

Recovery of Deposit on Advanced Bid.—The deposit required by former § 45-28 was to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the superior court required of a person placing an advance bid a deposit representing a five per cent. increase bid, and in addition a deposit to guarantee compliance with the bid, and the lands were resold and bought in by the one making the advance bid, and he refused to pay the amount because of threatened litigation, and the lands were again resold and brought a surplus over that of the prior resale, there was no loss occasioned by the first resale, and the person making the deposit therefor was entitled to receive it back as against the

claim therefor of one holding a note secured by a junior mortgage on the same property. *Harris v. American Bank, etc., Co.*, 198 N. C. 605, 152 S. E. 802 (1930).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.—(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—

- (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;
- (2) Taxes due and unpaid on the property sold, as provided by G. S. § 105-408, if the property sold is real property;
- (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G. S. § 105-408, if the property sold is real property;
- (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—

- (1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and
- (2) In all cases when he is unable to locate the persons entitled thereto, and
- (3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and
- (4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1949, c. 720, s. 1.)

Alternatives of Mortgagee.—Where the owner of lands mortgaged the same as tracts numbered 1 and 2, and later conveyed tract No. 2 to a purchaser in fee simple, and devised tract No. 1 for life with remainder over, it was held, under repealed § 45-29, similar in subject matter to this section, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who might de-

termine whether the surplus should be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of § 8-47, or the mortgagee might relieve himself of liability by paying the fund into court pursuant to § 45-29. *Brown v. Jennings*, 188 N. C. 155, 124 S. E. 150 (1924).

Auctioneer's Fee Formerly Payable Out of Trustee's Commissions.—See *Duffy v. Smith*, 132 N. C. 38, 43 S. E. 501 (1903).

§ 45-21.32. 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. § 45-21.31, 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 proceeding 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. 720, s. 1.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Statute of Limitations Need Not Be Plead.—Section 1-15, requiring the defense of the statute of limitations to be raised by answer, applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an

agreed statement of facts for the distribution of funds arising from a foreclosure sale under repealed §§ 45-29 and 45-30. similar in subject matter to § 45-21.31 and this section, the rights of the parties being determined in accordance with the admitted facts. In re Gibbs, 205 N. C. 312, 171 S. E. 55 (1933).

§ 45-21.33. Final report of sale of real property.—(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within thirty days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk—

- (1) A copy of the notices of sale and resale, if any, which were posted, and
- (2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1.)

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed

by law in cases of injunction and receivership, with the right of appeal to the Supreme Court from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3.)

Cross Reference.—As to effective date and application of act inserting this article, see note under § 45-21.1.

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-32. See 11 N. C. Law Rev. 240, for review of this section.

Constitutionality.—This section does not violate any provision of the Constitution of the United States or of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934).

This section is constitutional and valid. *Hopkins v. Swan*, 206 N. C. 439, 174 S. E. 409 (1934).

This section is remedial only, and is valid for that purpose. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934).

Retroactive Effect.—This section is applicable to a sale made since its enactment, although the sale was made under the power of sale contained in a mortgage or deed of trust executed prior to its enactment. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934).

This and following sections have no application after confirmation of a foreclosure sale under power contained in the instrument. *Whitford v. North Carolina Joint-Stock Land Bank*, 207 N. C. 229, 176 S. E. 740 (1934).

Requiring Bond within Court's Discretion.—The condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay is within the court's discretionary equitable power, the provisions of this section being constitutional and valid. *Whitaker v. Chase*, 206 N. C. 335, 174 S. E. 225 (1934); *Little v. Wachovia Bank, etc., Co.*, 208 N. C. 726, 182 S. E. 491 (1935).

Where the mortgagee or cestui que trust is not satisfied with the bond given by the mortgagor or trustor, as provided by this section, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation

of the sale upon the ground that the bond is inadequate. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934).

When Court Determines Whether Bid Was Grossly Inadequate.—Where, in a suit to enjoin the consummation of a foreclosure sale the issue of whether the bid at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if it finds that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if it finds that the bid is grossly inadequate. *Smith v. Bryant*, 209 N. C. 213, 183 S. E. 276 (1936).

Where the parties expressly waive a jury trial, and the trial court finds that the amount bid at the sale represented the fair market value of the lands, and that there is no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale. *Barringer v. Wilmington Sav., Co.*, 207 N. C. 505, 177 S. E. 795 (1935).

Where It Is Error for Court to Grant Motion to Nonsuit.—Where plaintiffs, trustors in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. *Smith v. Bryant*, 209 N. C. 213, 183 S. E. 276 (1936).

Granting Resale after Action for Specific Performance.—Where the last and highest bidder at the sale instituted action for specific performance, and the personal representative of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court had authority to hear the motion. *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409 (1934).

Executor Seeking Injunction upon Peti-

tion to Sell Lands to Make Assets.—An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of this and the following sections. *Miller v. Shore*, 206 N. C. 732, 175 S. E. 133 (1934).

Injunction Held to Be Properly Continued to Hearing upon Court's Finding.—Where a mortgagor or trustor institutes suit to enjoin the consummation of a foreclosure sale had under the terms of the in-

strument, and files bond to indemnify the mortgagee or cestui que trust against loss, the temporary injunction granted in the cause is properly continued to the hearing upon the court's finding that serious controversy exists between the parties and that plaintiff is entitled to a jury trial upon the issues of fact raised by the pleadings. *Little v. Wachovia Bank, etc., Co.*, 208 N. C. 726, 182 S. E. 491 (1935).

Stated in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482 (1936).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the Supreme Court in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3.)

Cross Reference.—See note to § 45-21.34.

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-33.

Stated in Richmond Mtg., etc., Corp. v.

Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482 (1936).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.—When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3.)

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-34.

See 12 N. C. Law Rev. 366, for note on "Relief During the Depression."

This section is constitutional and valid. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

This section has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

Not "Emergency Legislation."—This section is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

Debtor's Obligation Recognized.—This section recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

This section recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

This section alters and modifies one of the existing remedies for realization of

the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement, but limits that right so as to prevent his obtaining more than his due. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

Amount Bid Is Not Conclusive as to Value.—The amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

This section applies only to foreclosure under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936). See also, *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

Not Applicable to Sales under Order of Court.—Where the maker of a note assigned a judgment in its favor to the payee as security and the judgment was sold under order of court and purchased by the payee who thereafter realized upon the judgment an amount in excess of the sale price, it was held that the note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and that since the bidding at the sale was open to all and the sale was under order of court, the endorser on the note could not assert this section as a defense to his liability, the statute, by the express language of its proviso, not being applicable. *Briggs v. Lassiter*, 220 N. C. 761, 18 S. E. (2d) 419 (1942).

Cited in *Thompson v. Angel*, 214 N. C. 3, 197 S. E. 618 (1938); *Virginia Trust Co. v. Dunlop*, 214 N. C. 196, 198 S. E. 645 (1938).

§ 45-21.37. Certain sections not applicable to tax suits.—Sections 45-21.34 through 45-21.36 do not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4; 1949, c. 720, s. 3.)

Editor's Note.—The 1949 amendment, effective as of Jan. 1, 1950, rewrote § 45-35 to appear as this section.

Cited in *Richmond Mtg., etc., Corp. v.*

Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price; deficiency judgment under conditional

sale contract.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out.

Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer. (1933, c. 36; 1949, c. 720, s. 3; c. 856.)

Cross Reference.—For provision that wife need not join in purchase-money mortgage, see § 39-13.

Editor's Note.—Prior to the first 1949 amendment, effective as of Jan. 1, 1950, the first paragraph of this section appeared as § 45-36. The second paragraph was derived from the second 1949 act cited to the section, and became effective April 8, 1949.

The effect of this section is to limit the creditor to the property conveyed, when the mortgage is for the purchase money, changing in that respect § 1-123. See 11 N. C. Law Rev. 219.

Foreign Executed Mortgage on Foreign Realty.—This section operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the section applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. *Bullington v. Angel*, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054 (1941).

This section does not limit the jurisdiction of the federal district court in an action by a nonresident for a deficiency judgment amounting to \$3,000 where the land mortgaged was in Virginia and the deed of trust signed by defendant was a Virginia contract securing notes signed by defendant and made payable at a bank in

Roanoke, Virginia. *Bullington v. Angel*, 56 F. Supp. 372 (1944), affirmed in *Angel v. Bullington*, 150 F. (2d) 679 (1945), holding that this section did not bar action in federal district court in North Carolina for deficiency judgment under a contract executed in Virginia and valid there. But see *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 557 (1947), reversing such case on the ground that the decision of the North Carolina Supreme Court denying a deficiency judgment in a previous suit on the same contract was res judicata. For article criticizing decision in *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 557 (1947), see 26 N. C. Law Rev. 29. For further comment on this case, see 26 N. C. Law Rev. 60.

Where Land Sold under Prior Mortgage.—This section is not available as a defense to an action on a purchase-money note secured by a second mortgage when the land has been sold under the first mortgage for a sum sufficient to pay only the notes secured by the first mortgage, assumed by the purchaser as a part of the purchase price. *Brown v. Kirkpatrick*, 217 N. C. 486, 8 S. E. (2d) 601 (1940).

Cited in *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886 (1937); *Jones v. Casstevens*, 222 N. C. 411, 23 S. E. (2d) 303 (1942).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.39. **Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.**—1. No action or proceed-

ing shall be brought or defense or counterclaim pleaded later than one year after March 14, 1941 in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

2. This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection one hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said section, unless the grounds set out in subsection 1 are an essential part thereof.

3. This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202; 1949, c. 720, s. 4.)

Cross Reference.—As to effective date and application of act inserting this article, see note to § 45-21.1.

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-22.

§ 45-21.40. Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.—In all cases where sales of real property have been made under powers of sale contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deed of trust, and the execution and delivery of deeds in consummation of such sales have been delayed until after the expiration of the period which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2; 1949, c. 720, s. 4.)

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-26.1.

§ 45-21.41. Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 53, s. 1; C. S., s. 2593(a); 1949, c. 720, s. 4.)

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-31.

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.—In all cases prior to the first day of March, one thousand nine hundred and forty-five where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of the superior court, or with the court, together with all necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be construed as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4.)

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-36.1.

ARTICLE 3.

Mortgage Sales.

§ 45-22: Transferred to § 45-21.39 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 45-23 to 45-26: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act provides that "the present law shall remain in effect for the completion of sales under power of sale to which this act, under section 6, does not apply." Section 6 of the act provides: "This act does not apply to any sale commenced prior to the

effective date of this act. For the purposes of this section, a sale has been commenced if a notice of sale has been posted or published." And section 7 provides: "This act shall become effective Jan. 1, 1950."

§ 45-26.1: Transferred to § 45-21.40 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 45-27 to 45-30: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act is effective as of Jan. 1, 1950. See note to §§ 45-23 to 45-26.

§ 45-31: Transferred to § 45-21.41 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-32: Transferred to § 45-21.34 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-33: Transferred to § 45-21.35 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-34: Transferred to § 45-21.36 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-35: Transferred to § 45-21.37 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-36: Transferred to § 45-21.38 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-36.1: Transferred to § 45-21.42 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

ARTICLE 4.

Discharge and Release.

§ 45-37. **Discharge of record of mortgages and deeds of trust.**—Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

2. Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, with endorsement of payment and satisfaction, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was cancelled.

3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

4. Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be cancelled as above provided until the ownership of said instruments shall have been lawfully determined: Provided that nothing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

5. The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property. This subsection shall be applicable from and after one year from March 20, 1945, to all instruments executed prior to the enactment of chapter one hundred and ninety-two of the Public Laws of one thousand nine hundred and twenty-three, and any person affected hereby shall have until said date to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for; provided, also, that this subsection shall be applicable from and after July 1st, 1947, to all instruments executed subsequent to March 6th, 1923, and prior to January 2nd, 1924, and any person affected by this proviso shall have until July 1st, 1947, to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. (1870-1, c. 217; Code, s. 1271; 1891, c. 180;

1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C. S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880.)

Cross Reference.—As to requirement of registration for mortgages and deeds of trust, see § 47-20.

Editor's Note.—The 1923 amendments inserted the proviso in subsection 2 and added all of subsection 5 except the last sentence.

The 1935 amendment added subsection 4.

The 1945 amendment, ratified March 20, 1945, added the first part of the sentence, at the end of subsection 5; and the 1947 amendment added the proviso to such sentence. For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 407.

Section Construed as a Whole.—This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663 (1924).

Not Retroactive.—This section has no application to a mortgage given prior to the passage of the section, nor does it wipe out a valid debt existing at the time the statute took effect. *Dixie Grocery Co. v. Hoyle*, 204 N. C. 109, 167 S. E. 469 (1933). And it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee. *Roberson v. Matthews*, 200 N. C. 241, 156 S. E. 496 (1931). But see the 1945 and 1947 amendments to subsection 5.

Applicable Only to Deeds of Trust and Mortgages.—This section giving to the marginal entry of satisfaction the effect of reconveyance applies only to discharge of trust deeds and mortgages. *Smith v. King*, 107 N. C. 273, 12 S. E. 57 (1890).

Subsection 2 Applies to Deeds of Trust.—Subsection 2, of this section does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663 (1924).

Modes of Release.—A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. *Barber v. Wadsworth*, 115 N. C. 29, 20 S. E. 178 (1894).

Procedure of Cancellation and Effect.—Regularly, the mortgagee acknowledges the satisfaction and discharge of the mortgage in the presence of the register of deeds, and he enters satisfaction on the margin of the record of the mortgage, and

this entry is signed by the mortgagee; and this, done as required by this section, will operate as a deed of release, or reconveyance of the land embraced by the mortgagee. Otherwise the mortgagee must reconvey the land by proper deed. *Walker v. Mebane*, 90 N. C. 259 (1884).

Marginal Satisfaction Not Necessary as between Parties.—When a mortgage debt has been discharged, the mortgage is no longer operative between the parties, though not marked "satisfied of record." *Blake v. Broughton*, 107 N. C. 220, 12 S. E. 127 (1890).

Who May Cancel.—Only the mortgagee, or his duly authorized agent or representative, is entitled to have his mortgage cancelled on the book in the office of the register of deeds by subsec. 1 of this section; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, for in such case the statute does not require the exhibition of the mortgage and the note it secures. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865 (1922).

Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but only with the surrender of the instrument to the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865 (1922).

Under this section, subsection 2, there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. *Faircloth v. Johnson*, 198 N. C. 429, 127 S. E. 346 (1930).

Payee or Mortgagee Must Be Sui Juris.—In order to constitute a valid cancellation under subsection 2, this section clearly contemplated a payee or mortgagee who is sui juris. *Faircloth v. Johnson*, 189 N. C. 429, 127 S. E. 346 (1925).

Cancellation by Attorney—Ratification Thereof.—While an attorney at law has no power to cancel or discharge a deed of mortgage, without authority conferred by his client, yet where such attorney informed his client that he was unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods, upon which the creditor had a lien, unless a cancellation of an old mortgage was

made, and that he would cancel the old mortgage by a day named, unless directed not to do so, and the attorney, receiving no such direction, cancelled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered, it was held to be a ratification by the client of the act of cancellation of the old mortgage. *Christian v. Yarborough*, 124 N. C. 72, 32 S. E. 383 (1899).

Authority of Trustee.—Possession of the papers by the trustee raises a presumption of his authority to cancel the deed of trust of record. *Williams v. Williams*, 220 N. C. 806, 18 S. E. (2d) 364 (1942).

Same — To Release Part of Property without Satisfaction.—This section only empowers the trustee to “acknowledge satisfaction of the provisions of such trust, etc.,” the entry operating as a reconveyance. As was said in *Browne v. Davis*, 109 N. C. 23, 13 S. E. 703 (1891): “It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land.” We do not mean to say, however, that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if it was done with the creditor’s consent and authority properly shown. *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321 (1898).

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remains unsatisfied. *Browne v. Davis*, 109 N. C. 23, 13 S. E. 703 (1891).

Cancellation by First Mortgagee.—The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section, and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price, of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the

security, acting in good faith, has a prior lien on the lands. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865 (1922).

Form and Validity of Cancellation.—This section must be strictly complied with in order to secure the grantee in a subsequent conveyance of the locus in quo against the prior encumbrance, and where this is done upon exhibit of the cancelled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. *Mills v. Kemp*, 196 N. C. 309, 145 S. E. 557 (1928).

Irregular Cancellation as Notice to Subsequent Mortgagee.—Where an entry of cancellation is made of record by the register of deeds in cancelling a mortgage under this section reciting another name as mortgagee, trustee or cestui que trust than that appearing in the registration of the instrument, and that the “bond” was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds has made a mistake in cancelling the mortgage, and fix him with notice of all facts which a reasonable inquiry would have revealed. *Mills v. Kemp*, 196 N. C. 309, 145 S. E. 557 (1928).

Effect of Forged Cancellation.—When the attorney for the owner of the land agreed to have a mortgage cancelled of record, and thereafter surreptitiously obtained the cancellation stamp of the register of deeds and forged his signature so that apparently the mortgage was cancelled under the provisions of this section, subsection 2, and relying thereon the proposed purchaser accepted the deed and paid the consideration, it was held that the supposed cancellation of the mortgage was void as against the mortgagee, who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. *Union Central Life Ins. Co. v. Cates*, 193 N. C. 456, 137 S. E. 324 (1927).

Same—Upon Rights of Subsequent Mortgagee.—As against the mortgagee of a third mortgage given on the same lands, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been cancelled of record. *Swindell v. Stephens*, 193 N. C. 474, 137 S. E. 420 (1927).

Effect of Prior Fraud.—Where the register of deeds has entered “satisfaction”

of a deed of trust, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the cancelled instrument will not affect the rights of the subsequent mortgagees, when such mortgagees were unaware of or had not participated in the fraud. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663 (1924).

Entry of "Satisfied" as Evidence of Payment of Debt.—It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of "satisfied" on the margin of the record signed by the mortgagee and witnessed by the register of deeds. *Robinson v. Sampson*, 121 N. C. 99, 28 S. E. 189 (1897).

The primary purpose sought to be accomplished by the fifth clause of this section was to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transactions, and this economic purpose is adequately accomplished by furnishing protection to parties who extend credit or purchase for a valuable consideration "from and after" the expiration of the fifteen-year period. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643 (1947).

The first clause of the caption or title of the act from which the fifth clause of this section is derived indicates the primary purpose of the act, that is, to facilitate the examination of titles. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643 (1947).

Retroactive Effect of Subsection 5.—It has been uniformly held [before the 1945 and 1947 amendments] that subsection 5 of this section is prospective and does not apply to mortgages, deeds of trust or other instruments securing the payment of money which were executed prior to the enactment of the statute. *Thomas v. Myers*, 229 N. C. 234, 49 S. E. (2d) 478 (1948). See *Hicks v. Kearney*, 189 N.

C. 316, 127 S. E. 205 (1925); *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383 (1926). But see the amendments of 1945 and 1947.

Subsection 5 is not to be construed retroactively so as to affect those who became creditors prior to its passage. *Hicks v. Kearney*, 127 N. C. 205, 127 S. E. 205 (1900).

Subsection 5 Does Not Protect Persons Purchasing or Extending Credit within Fifteen-Year Period.—Subsection 5 of this section was not enacted for the purpose of protecting parties who extend credit or purchase for a valuable consideration within the fifteen-year period fixed by the statute, but only "from and after" its expiration. *Thomas v. Myers*, 229 N. C. 234, 49 S. E. (2d) 478 (1948).

The presumption of payment of a mortgage or deed of trust provided for in the fifth clause of this section arises in favor of creditors or purchasers for valuable consideration from the mortgagor or trustor who extend credit or purchase after the expiration of the fifteen-year period, and does not arise in favor of those who become creditors or purchasers for valuable consideration prior thereto. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643 (1947).

Removal of Deed of Trust as Cloud on Title.—Where a deed of trust is executed subsequent to the effective date of subsection 5 of this section, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed in so far as it constitutes a cloud on their title. *Thomas v. Myers*, 229 N. C. 234, 49 S. E. (2d) 478 (1948).

Cited in Ownbey v. Parkway Properties, 222 N. C. 54, 21 S. E. (2d) 900 (1942).

§ 45-37.1. Validation of certain entries of cancellation made by beneficiary or assignee instead of trustee.—In all cases where, prior to January first, one thousand nine hundred and thirty, it appears from the margin or face of the record in the office of the register of deeds of any county in this State that the original beneficiary named in any deed of trust, trust indenture, or other instrument intended to secure the payment of money and constituting a lien on real estate, or his assignee of record, shall have made an entry purporting to fully satisfy and discharge the lien of such instrument, and such entry has been signed by the original payee and beneficiary in said deed of trust, or other security instrument, or by his assignee of record, or by his or their properly constituted officer, agent, attorney, or legal representatives, and has been duly witnessed by the register of deeds or his deputy, all such entries of cancellation and satisfaction are hereby validated and made full, sufficient and complete to release, satisfy and

discharge the lien of such instrument, and shall have the same effect as if such entry had been made and signed by the trustee named in said deed of trust, or other security instrument, or by his duly appointed successor or substitute. (1945, c. 986.)

§ 45-38. Entry of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee or mortgagee shall make an additional notation as to which property was sold and which was not sold. (1923, c. 192, s. 2; C. S., s. 2594(a); 1949, c. 720, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence. Section 6 of the amendatory act provides that it shall not apply to any sale commenced prior to said effective date. For brief comment on the amendment, see 27 N. C. Law Rev. 479.

Failure of Trustee to Comply Does Not Affect Purchaser.—The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply

with the provisions of this or the following section. *Cheek v. Squires*, 200 N. C. 661, 158 S. E. 198 (1931).

Cancellation without Knowledge of Cestui.—Where the trustor paid the trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge of the cestui que trust, the cancellation was held valid. *Parham v. Hinnant*, 206 N. C. 200, 173 S. E. 26 (1934).

§ 45-39: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act is effective as of Jan. 1, 1950. See note to §§ 45-23 to 45-26.

§ 45-40. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical indexes kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust. (1909, c. 658, s. 1; C. S., s. 2595.)

§ 45-41. Recorded deed of release of mortgagee's representative.—The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this State may discharge and release the same and all property thereby conveyed by deed of quitclaim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this State. (1909, c. 283, s. 1; C. S., s. 2596.)

Cross Reference.—As to provisions regarding probate and registration of deeds and mortgages, etc., see § 47-1 et seq.

§ 45-42. **Release of corporate mortgages by corporate officers.**—All mortgages and deeds in trust executed to a corporation may be satisfied and so marked of record, as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer or assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; C. S., s. 2597; 1935, c. 271.)

Editor's Note.—By the 1935 amendment, vice-president, assistant cashier, assistant secretary, assistant treasurer, trust officer and assistant trust officer were added to the list of officers enumerated in the first sentence of the section.

§ 45-42.1. **Corporate cancellation of lost mortgages by register of deeds.**—Upon affidavit of the secretary and treasurer of a corporation showing that the records of such corporation show that such corporation has fully paid and satisfied all of the notes secured by a mortgage or deed of trust executed by such corporation and such payment and satisfaction was made more than twenty-five years ago, and that such mortgage or deed of trust was made to a corporation which ceased to exist more than twenty-five years ago, and such affidavit shall further state that the records of such corporation show that no payments have been made on such mortgage by the corporation executing such mortgage or deed of trust for twenty-five years, the register of deeds of the county in which such mortgage or deed of trust is recorded is authorized and empowered to file such affidavit and record the same in his office and make reference thereto on the margin of the record in which the said mortgage or deed of trust is recorded, and, upon making such entry, the said mortgage or deed of trust shall be deemed to be cancelled and satisfied and the said register of deeds is hereby authorized to cancel the same of record: Provided, that this section shall not apply to any mortgagor corporation except those in which the State of North Carolina owns more than a majority of the capital stock and shall not apply to any mortgage or deed of trust in which the principal amount secured thereby exceeds the sum of fifteen thousand dollars: Provided, such cancellation shall not bar any action to foreclose such mortgage or deed of trust instituted within ninety days after the same is cancelled. (1945, c. 1090.)

ARTICLE 5.

Real Estate Mortgage Loans.

§ 45-43. **Real estate mortgage loans; commissions.**—Any individual or corporation authorized by law to do a real estate mortgage loan business may make or negotiate loans of money on notes secured by mortgages or deeds of trust on real estate bearing legal interest payable semiannually at maturity or otherwise, and in addition thereto, may charge, collect and receive such commission or fee as may be agreed upon for making or negotiation of any such loan, not exceeding, however, an amount equal to one and one-half per cent of the principal amount of the loan for each year over which the repayment of the said loan is extended: Provided, however, the repayment of such loan shall be in annual installments extending over a period of not less than three nor more than fifteen years, and that no annual installment, other than the last, shall exceed thirty-three and one-third per cent of the principal amount of loans which are payable in installments ex-

tending over a period of as much as three years and less than four years, twenty-five per cent of the principal amount of loans which are payable in installments extending over a period of not less than four years nor more than five years, and fifteen per cent of the principal amount of loans which are payable in installments extending over a period of more than five years and not more than fifteen years. This section shall only apply to the counties of Ashe, Buncombe, Caldwell, Forsyth, Gaston, Henderson, McDowell, Madison, Rutherford, Watauga, and Yancey. (Ex. Sess. 1924, c. 35; 1925, cc. 28, 209; Pub. Loc. 1925, c. 592, modified by 1927, c. 5; Pub. Loc. 1927, c. 187.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

- Sec.
 46-1. Partition is a special proceeding.
 46-2. Venue in partition.
 46-3. Petition by cotenant.
 46-4. Surface and minerals in separate owners; partitions distinct.
 46-5. Petition by judgment creditor of cotenant; assignment of homestead.
 46-6. Unknown parties; summons and representation.
 46-7. Commissioners appointed.
 46-7.1. Compensation of commissioners.
 46-8. Oath of commissioners.
 46-9. Delay or neglect of commissioner penalized.
 46-10. Commissioners to meet and make partition; equalizing shares.
 46-11. Owelty to bear interest.
 46-12. Owelty from infant's share due at majority.
 46-13. Partition where shareowners unknown or title disputed.
 46-14. Judgments in partition of remainders validated.
 46-15. Dower claims settled on partition; dower valued.
 46-16. Partial partition; balance sold or left in common.
 46-17. Report of commissioners; contents; filing.
 46-18. Map embodying survey to accompany report.
 46-19. Confirmation and impeachment of report.
 46-20. Report and confirmation enrolled and registered; effect.

Sec.

- 46-21. Clerk to docket owelty charges; no release of land and no lien.

Article 2.

Partition Sales of Real Property.

- 46-22. Sale in lieu of partition.
 46-23. Remainder or reversion sold for partition; outstanding life estate.
 46-24. Life tenant as party; valuation of life estate.
 46-25. Sale of standing timber on partition; valuation of life estate.
 46-26. Sale of mineral interests on partition.
 46-27. Sale of land required for public use on cotenant's petition.
 46-28. Sale procedure.
 46-29. [Repealed.]
 46-30. Deed to purchaser; effect of deed.
 46-31. Clerk not to appoint self, assistant or deputy to sell real property.
 46-32. [Repealed.]
 46-33. Shares in proceeds to cotenants secured.
 46-34. Shares to persons unknown or not sui juris secured.

Article 3.

Partition of Lands in Two States.

- 46-35 to 46-41. [Repealed.]

Article 4.

Partition of Personal Property.

- 46-42. Personal property may be partitioned; commissioners appointed.
 46-43. Report of commissioners.
 46-44. Sale of personal property on partition.
 46-45, 46-46. [Repealed.]

ARTICLE 1.

Partition of Real Property.

§ 46-1. **Partition is a special proceeding.**—Partition under this chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (1868-9, c. 122, s. 33; Code, s. 1923; Rev., s. 2485; C. S., s. 3213.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Editor's Note.—At one time partition could be effected only by a suit in equity of which the several State courts possessing general equity or chancery jurisdiction had cognizance. This was changed in 1868 and the proceedings made special.

Ordinarily a tenant in common in realty or personally is entitled to partition of the property. *Chadwick v. Blades*, 210 N. C. 609, 188 S. E. 198 (1936).

Chapter Does Not Apply to Partition by Agreement.—This chapter applies to compulsory or judicial partition. It does not apply to partition by agreement.

Keener v. Den, 73 N. C. 132 (1875). As to authority of court in partition by agreement, and procedure therein, see Outlaw v. Outlaw, 184 N. C. 255, 114 S. E. 4 (1922). See also Newsome v. Harrell, 168 N. C. 295, 84 S. E. 337 (1915).

Nonsuit.—When the proceeding for partition becomes adverse to him the plaintiff

is not allowed to take a voluntary nonsuit. Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9 (1914).

Applied in Gibbs v. Higgins, 215 N. C. 201, 1 S. E. (2d) 554 (1939).

Cited in Skinner v. Carter, 108 N. C. 106, 12 S. E. 908 (1891).

§ 46-2. **Venue in partition.**—The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (1868-9, c. 122, s. 7; Code, s. 1898; Rev., s. 2486; C. S., s. 3214; Ex. Sess. 1924, c. 62, s. 1.)

Editor's Note.—The 1924 amendment added the latter part of the section stating the extent of the jurisdiction of the court, and the provision for partition of land consisting of several tracts.

Waiver of Venue.—Construing §§ 1-82, 1-83 and this section in *pari materia*, venue

cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20 (1925).

§ 46-3. **Petition by cotenant.**—One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C. S., s. 3215.)

I. In General.

II. Parties.

III. Plea of Sole Seizin.

748, 54 Am. St. Rep. 757 (1896); Church v. Thornton, 158 N. C. 119, 73 S. E. 810 (1912).

Tenants in common may make a valid agreement whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198 (1936). See 15 N. C. Law Rev. 279.

Petition Omitting Term of Court.—A petition entitled in the original cause, but addressed to the clerk, in special proceedings for partition is not demurrable because it does not give the term of court or any court in the caption. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379 (1919).

Failure to Allege Right to Possession.—If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. Epley v. Epley, 111 N. C. 505, 16 S. E. 321 (1892); Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757 (1896).

Where tenants in common allege they are the owners of land and seized of the fee simple title thereto, the law presumes possession. Moore v. Baker, 222 N. C. 736, 24 S. E. (2d) 749 (1943).

Cross Reference.
As to procedure for sale or mortgage of property where there is a vested interest and a contingent remainder to uncertain persons, see § 41-11.

I. IN GENERAL.

Jurisdiction of Superior Court.—The superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86 (1912).

Right of Possession.—A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. Moore v. Baker, 222 N. C. 736, 24 S. E. (2d) 749 (1943). See Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639 (1884); Osborne v. Mull, 91 N. C. 203 (1884); Alexander v. Gibbon, 118 N. C. 796, 24 S. E.

Leave to Amend Petition.—On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. *Simmons v. Jones*, 118 N. C. 472, 24 S. E. 114 (1896).

Partition of Part—Inclusion of Other Land.—The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held in common included. *Luther v. Luther*, 157 N. C. 499, 73 S. E. 102 (1911). But see § 46-16 and note thereto as to partial partition.

Partition Not Proper Remedy for Ouster.—Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. *Thomas v. Garvin*, 15 N. C. 223, 25 Am. Dec. 708 (1833).

Divorced Couple Entitled to Partition.—When marriage is dissolved by divorce, the husband and wife become tenants in common of property formerly held by the entirety, and are entitled to partition. *McKinnin, etc., Co. v. Caulk*, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396 (1914).

Partition as to Churches.—Churches belonging to an association controlling a school are not entitled to partition. *Church v. Thornton*, 158 N. C. 119, 73 S. E. 810 (1912).

Whether Partition or Sale Question of Fact for Court.—Whether or not, in a proceeding instituted under this section, for partition of land, held by two or more persons as tenants in common, between or among such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. *Talley v. Murchison*, 212 N. C. 205, 193 S. E. 148 (1937).

Effect of Adjudication When Title Put in Issue.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. *Buchanan v. Harrington*, 152 N. C. 333, 67 S. E. 747, 136 Am. St. Rep. 838 (1910); *Baugham v. Trust Co.*, 181 N. C. 406, 107 S. E. 431 (1921).

Applied in *Gibbs v. Higgins*, 215 N. C. 201, 1 S. E. (2d) 554 (1939); *Moore v. Baker*, 224 N. C. 133, 29 S. E. (2d) 452 (1944).

II. PARTIES.

Bringing in Defendants.—Parties claiming to hold in common may be brought in as defendants. *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445 (1913).

Sale or Partition of Reversions, Remain-

ders and Executory Interests.—This section is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen, and the life tenant is joined. *Burton v. Cahill*, 192 N. C. 505, 135 S. E. 332 (1926).

Prior to the enactment of § 46-23, cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Moore v. Baker*, 222 N. C. 736, 24 S. E. (2d) 749 (1943).

Persons Bound.—Persons not parties are not bound. *Henderson v. Wallace*, 72 N. C. 451 (1875). And if named as parties they must be served with process. *Patillo v. Lytle*, 158 N. C. 92, 73 S. E. 200 (1911).

Partition by Infant and Another.—Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811 (1901).

Intervention by Claimant of Paramount Title.—In an action for partition of lands, it is proper to allow another party claiming paramount title to the land to intervene and assert his rights. *Roughton v. Duncan*, 178 N. C. 5, 100 S. E. 78 (1919). But such a claimant may be estopped by his laches. *Thomas v. Garvin*, 15 N. C. 223, 25 Am. Dec. 703 (1833).

Intervention by Judgment Debtor.—See *Edmonds v. Wood*, 222 N. C. 118, 22 S. E. (2d) 237 (1942).

Administrator Not a Party.—In an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant because he opposes the partition and wishes in the same action to make application to sell the land for debts of the estate. *Garrison v. Cox*, 99 N. C. 478, 6 S. E. 124 (1888).

Judgment Creditors and Mortgagees.—In proceedings for partition, judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is error for the trial judge to dismiss the action as to them. *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1916).

The mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land. *Rostan v. Higgins*, 216 N. C. 386, 5 S. E. (2d) 162, 126 A. L. R. 410 (1939).

Making Additional Party for Purpose of Setting Aside Sale.—An application to be made a party defendant in partition proceedings after confirmation of sale was

properly denied, where it was based on deeds from persons who never had claimed any title and accompanied by a motion to set aside the sale to permit his principals to make a bid. *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113 (1913).

The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. *Baggett v. Jackson*, 160 N. C. 26, 76 S. E. 86 (1912).

Unknown Parties.—See § 46-6.

III. PLEA OF SOLE SEIZIN.

Effect of Plea.—Where the plea of sole seizin is set up, the effect is practically to convert it into an action of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. *Graves v. Barrett*, 126 N. C. 267, 35 S. E. 539 (1900); *Haddock v. Stocks*, 167 N. C. 70, 83 S. E. 9 (1914). Where the plea is set up the proper course is for the court to try

title to the land. *Purvis v. Wilson*, 50 N. C. 22, 69 Am. Dec. 773 (1857).

Plea Not Put In before Partition Ordered.—Where, in partition, a plea of sole seizin is not put in before the order of partition is made, it will be considered as waived. *Wright v. McCormick*, 69 N. C. 14 (1873).

Burden of Proof.—Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common is made out. *Lester v. Harvard*, 173 N. C. 83, 91 S. E. 698 (1917).

Where defendants in partition deny cotenancy and plead sole seizin, the burden is upon plaintiffs to show title in the parties by tenancy in common. *Johnson v. Johnson*, 229 N. C. 541, 50 S. E. (2d) 569 (1948).

Cited in *Brittain v. Mull*, 91 N. C. 498 (1884).

§ 46-4. Surface and minerals in separate owners; partitions distinct.—When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interest have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (1905, c. 90; Rev., s. 2488; C. S., s. 3216.)

Applied in *Buffaloe v. Barnes*, 226 N. C. 313, 38 S. E. (2d) 222 (1946).

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.—When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for

the enforcement of his judgement lien. (1905, c. 429; Rev., s. 2489; C. S., s. 3217.)

Cross References.—As to homestead and exemptions in sale under execution, see § 1-369 et seq. As to execution, see § 1-302 et seq.

Intervention in Partition Proceeding.—See *Edmonds v. Wood*, 222 N. C. 118, 22 S. E. (2d) 237 (1942).

§ 46-6. **Unknown parties; summons and representation.**—If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (1887, c. 284; Rev., s. 2490; C. S., s. 3218.)

Discretion in Appointing Representative Not Reviewable.—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. *Lawrence v. Hardy*, 151 N. C. 123, 65 S. E. 766 (1909).

Purchaser Acquires Good Title.—When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter,

a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. *Lawrence v. Hardy*, 151 N. C. 123, 65 S. E. 766 (1909).

Purchaser Cannot Resist Payment of Purchase Price.—Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title for that the commissioner's deed would not preclude the claim of the missing heir. *Bynum v. Bynum*, 179 N. C. 14, 101 S. E. 527 (1919).

§ 46-7. **Commissioners appointed.**—The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C. S., s. 3219; Ex. Sess. 1924, c. 62, s. 2.)

Editor's Note.—The 1924 amendment added the proviso.

Approval by Only Two Appraisers Held Error.—Testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, whereupon the court ordered the two surviving appraisers to complete the appraisal and file a report, which report was later approved by the court. It was held

that under the terms of the will and under this section, it is necessary that three appraisers act in the matter, although two of them may file the report, § 46-17, and the court should have appointed a third appraiser, and the approval of the report based upon the findings of but two appraisers was reversible error. *Sharpe v. Sharpe*, 210 N. C. 92, 185 S. E. 634 (1936).

§ 46-7.1. **Compensation of commissioners.**—The clerk of the superior court is hereby authorized to fix the compensation of commissioners for the partition or division of lands at a sum not in excess of six dollars (\$6.00) per day each for the time devoted to the performance of their duties as such commissioners. (1949, c. 975.)

§ 46-8. Oath of commissioners.—The commissioners shall be sworn by a justice of the peace, the sheriff or any deputy sheriff of the county, or any other person authorized to administer oaths, to do justice among the tenants in common in respect to such partition, according to their best skill and ability. (1868-9, c. 122, s. 2; Code, s. 1893; Rev., s. 2492; C. S., s. 3220; 1945, c. 472.)

Cross Reference.—As to form of oath, authorized sheriffs and deputies to administer the oath.

Editor's Note.—The 1945 amendment

§ 46-9. Delay or neglect of commissioner penalized.—If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner. (1868-9, s. 122, s. 10; Code, s. 1901; Rev., s. 2498; C. S., s. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares.—The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C. S., s. 3222.)

Section Applies Only to Compulsory Partition.—Where the partition was not compulsory but was under an agreement between cotenants, this section is not applicable. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337 (1915); *Outlaw v. Outlaw*, 184 N. C. 255, 114 S. E. 4 (1922).

Validity of Action of Two Commissioners.—Where three commissioners are appointed to partition land the action of any two of them is valid. *Thompson v. Shemwell*, 93 N. C. 222 (1885). And this action may consist in filling the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. *Simmons v. Foscue*, 81 N. C. 86 (1879).

But the court's approval of a report based upon the findings of but two appraisers or commissioners was held reversible error in *Sharpe v. Sharpe*, 210 N. C. 92, 185 S. E. 634 (1936). See note to § 46-7.

By the very terms of § 46-17, the signature of two of the commissioners to their report is sufficient. *Thompson v. Shemwell*, 93 N. C. 222 (1885); *Sharpe v. Sharpe*, 210 N. C. 92 (1936).

Existing Easements.—It would seem that existing easements are not destroyed by a division in partition. See *Jones v. Swindell*, 176 N. C. 34, 96 S. E. 663 (1918).

Improvements.—A tenant in common is

entitled to recover against a cotenant for betterments he has placed on the land. *Daniel v. Dixon*, 163 N. C. 137, 79 S. E. 425 (1913). As to statute not applying to tenants in common, see note to § 1-340.

Where no appeal is taken from the order allowing for the improvements, it concludes the plaintiff from having the good faith of the defendant, in making the improvements, inquired into. *Fisher v. Toxaway Co.*, 171 N. C. 547, 88 S. E. 887 (1916).

But where in a partition an excessive portion is allotted to one, which is reduced on a re-allotment, he cannot be allowed for improvements made on the excess, as it was his own folly to make them before obtaining a final decree and his deed. *Carland v. Jones*, 55 N. C. 506 (1856).

Equality in value must be afforded by the assessment of an owelty charge. *Moore v. Baker*, 224 N. C. 498, 31 S. E. (2d) 526 (1944).

Basis of Owelty.—The right to owelty on an unequal partition is based on the implied warranty attaching to each share from all the others. *Nixon v. Lindsay*, 55 N. C. 230 (1855); *Cheatham v. Crews*, 88 N. C. 38 (1883).

Owelty Not Mere Lien Debt.—The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is a tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge,

until the same shall be satisfied. In re Walker, 107 N. C. 340, 12 S. E. 136 (1890).

Owely Is Charge upon Land.—The sums charged upon “the more valuable dividends” in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees, 62 N. C. 261 (1867).

Owely Follows Land.—Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Dobbin v. Rex, 106 N. C. 444, 11 S. E. 260 (1890); Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380 (1899). At to the docketing of owely charges, see § 46-21.

When Land Charged with Payment of Several Shares.—Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66 (1890).

A discharge in bankruptcy does not cancel the charge of owely of partition against the land of the bankrupt. In re Walker, 107 N. C. 340, 12 S. E. 136 (1890).

Procedure to Subject Land Charged.—A motion in the cause for execution is the proper proceeding to subject land charged with owely of partition to the payment thereof. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66 (1890).

Charges for equality of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Trustees, 62 N. C. 261 (1867); Waring v. Wadsworth, 80 N. C. 345 (1879); Meyers

v. Rice, 107 N. C. 24, 12 S. E. 66 (1890).

Division of Costs.—The costs in proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N. C. 149, 29 S. E. 221 (1898).

Costs Precede Homestead Exemption.—Where in an ex parte proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A, and A failed to pay the costs adjudged against her and the share allotted to her was sold on execution issued on the judgment, and no homestead was allotted to A, who has no other land, and her interest was not worth \$1,000, in an action by the heirs of A against the purchaser at the execution sale, the sale was held to be valid. Hinnant v. Wilder, 122 N. C. 149, 29 S. E. 221 (1898).

Confirmation Necessary to Execution.—No execution can issue to satisfy a charge against land in partition proceedings until the commissioners’ report has been confirmed. In re Ausborn, 122 N. C. 42, 29 S. E. 56 (1898).

Parties to Action to Recover Owely of Partition.—The widow of the party upon whose land a charge is placed is not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N. C. 253 (1874).

Counterclaim.—A cotenant, who is charged in the partition proceedings with owely, may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N. C. 458 (1885).

Cited in Capps v. Capps, 85 N. C. 408 (1881).

§ 46-11. **Owely to bear interest.**—The sums of money due from the more valuable dividends shall bear interest until paid. (1868-9, c. 122, s. 8; Code, s. 1899; Rev., s. 2496; C. S., s. 3223.)

§ 46-12. **Owely from infant’s share due at majority.**—When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (1868-9, c. 122, s. 9; Code, s. 1900; Rev., s. 2497; C. S., s. 3224.)

Charged Land Inherited by Infants.—Owely may be enforced against land inherited by infants from an adult who owned the land when the owely was made a charge against it, though as to land par-

tioned to an infant cotenant owely is not payable until he reaches his majority. Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380 (1899).

§ 46-13. **Partition where shareowners unknown or title disputed.**—If there are any of the tenants in common, or joint tenants, whose names are not

known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, by order of the court, allot their several shares to them in common, as one parcel, provided such division shall not be injurious or detrimental to any cotenant or joint tenant. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, ss. 2, 4; Rev., ss. 2491, 2511; C. S., s. 3225; 1937, c. 98.)

Editor's Note.—The 1937 amendment added the last sentence.

While the primary purpose of the partition proceeding is to allot to each of the former cotenants his share of the property in severalty, this amendment by no means militates against such purpose but makes it

possible for some of the former cotenants, who find it economically desirable, to have their several shares allotted to them as one parcel so that they may again hold as cotenants that parcel of land. 15 N. C. Law Rev. 355.

§ 46-14. **Judgments in partition of remainders validated.**—In all cases where land has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, where a judgment of partition has been rendered by the superior court authorizing a division of said lands upon the petition of the life tenant or tenants and all other persons then in being who would have taken such land if the contingency had then happened, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing a division of said lands among the respective life tenants and remaindermen, or executory devisees, shall be valid and binding upon the parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1.)

§ 46-15. **Dower claims settled on partition; dower valued.**—When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, or joint tenants, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six percent on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds. (1868-9, c. 122, s. 18; Code, s. 1909; 1893, c. 341; Rev., s. 2517; C. S., s. 3226.)

Cross References.—As to computation of present value of annuity, see § 8-47. As to allotment of dower generally, see § 30-11 et seq.

Partition and Dower in Same Proceedings.—Partition of lands and the allotment of dower therein may be had in the same proceedings. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86 (1912). See Vannoy v. Green, 206 N. C. 77, 173 S. E. 277 (1934).

Allotment before Division.—The widow of a deceased owner of lands held by him in common with another may have her dower interest therein set apart to her before division of the lands among the heirs

at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025 (1914).

Immediate Payment of Dower.—In a sale for partition of land subject to dower, where the widow is a party, her life estate may be valued in money and the money paid to her in lieu of the interest for life on one-third of the proceeds of the sale. Ex parte Winstead, 92 N. C. 703 (1885).

Allotment to widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025 (1914).

§ 46-16. Partial partition; balance sold or left in common.—In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (1887, c. 214, s. 1; Rev., s. 2506; C. S., s. 3227.)

Intent of Section.—This section does not authorize a partition or a sale of the undivided interest of some of the cotenants, in an entire tract of land, leaving the undivided interest of other cotenants unaffected. *Patillo v. Lytle*, 158 N. C. 92, 73 S. E. 200 (1911), citing *Brooks v. Austin*, 95 N. C. 474 (1886).

§ 46-17. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in his discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding sixty days. This proviso shall be applicable to proceedings now pending for the partition of real property. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C. S., s. 3228; 1949, c. 16.)

Editor's Note.—The 1949 amendment added the proviso.

Alteration of Report.—The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes a muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same. *Clinard v. Brummell*, 130 N. C. 547, 41 S. E. 675 (1902).

§ 46-18. Map embodying survey to accompany report.—The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (1868-9, c. 122, s. 4; Code, s. 1895; Rev., s. 2493; C. S., s. 3229.)

§ 46-19. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within ten days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C. S., s. 3230; 1947, c. 484, s. 2.)

Editor's Note.—The 1947 amendment substituted "ten days" for "twenty days" in the first sentence. Section 5 of the amendatory act provides that estates, proceedings and actions pending on June 30th, 1947, shall not be affected by its provisions.

Proceedings Interlocutory until Confirmation.—Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911).

Findings as to Value Not Reviewable.—The findings of commissioners on value are not subject to review in the appellate court. *Fisher v. Toxaway Co.*, 171 N. C. 547, 88 S. E. 887 (1916).

Two commissioners can make the report under the express terms of this section. *Thompson v. Shemwell*, 93 N. C. 222 (1885); *Sharpe v. Sharpe*, 210 N. C. 92, 185 S. E. 634 (1936).

Effect of Failure to Object.—Where no exceptions were filed and no objections made, plaintiff was entitled to a decree of confirmation as a matter of law. *Roberts v. Roberts*, 143 N. C. 309, 55 S. E. 721 (1906).

Time for Filing Exception.—Exceptions to the report of the commissioners appointed to make partition of land must be filed within twenty [now ten] days after the report is filed. *Floyd v. Rock*, 128 N. C. 10, 38 S. E. 33 (1901).

Sufficiency of Exception.—Where within the required time after filing the report defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a memorandum that defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on the ground that no exception had been filed within the statutory time. *McDevitt v. McDevitt*, 150 N. C. 644, 64 S. E. 761 (1909).

Resale after Confirmation.—After confirmation a resale may be ordered for sufficient cause shown; but should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation. *Ex parte White*, 82 N. C. 378 (1880).

Appeals May Be to Different Judges.—When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911).

Jurisdiction of Judge in Chambers.—A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to parti-

tion land. *McMillan v. McMillan*, 123 N. C. 577, 31 S. E. 729 (1898).

Right of Clerk to Set Aside Former Order.—Where it appears of record that the clerk of the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set it aside on the defendant's motion made before him seventeen months thereafter upon allegation of fraud in its procurement, and that the plaintiff had fraudulently prevented the defendant from appearing and defending, to which the plaintiff did not except, the plaintiff's motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed. It is held that the clerk was within the provisions of this section in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. *Turner v. Davis*, 163 N. C. 38, 79 S. E. 257 (1913).

Statute of Limitations.—Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. *Cochran v. Colson*, 192 N. C. 663, 135 S. E. 794 (1926).

§ 46-20. **Report and confirmation enrolled and registered; effect.**—Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. (1868-9, c. 122, s. 6; Code, s. 1897; Rev., s. 2495; C. S., s. 3231.)

Effect of Adjudication before Clerk.—In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and those in privity with them, when no appeal has been taken. *Southern State Bank v. Leverette*, 187 N. C. 743, 123 S. E. 68 (1924). Matters not in issue and claims for different rights are not, however, concluded. *Gillans v. Edmonson*, 154 N. C. 127, 69 S. E. 9 (1910).

Color of Title.—The record of the proceedings constitutes color of title. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811 (1901).

Admissibility of Record in Evidence.—The record of the proceedings is admissible in evidence though not recorded as required by this section. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811 (1901).

Cited in *Cochran v. Colson*, 192 N. C. 663, 135 S. E. 794 (1926).

§ 46-21. **Clerk to docket owelty charges; no release of land and no lien.**—In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; said entry on

said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are cancelled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1; C. S., s. 3232.)

Effect of Failure to Docket.—Failure of the clerk to docket the owelty of partition upon his judgment docket, within seven years after such date, does not affect the

right of plaintiff to enforce payment of the owelty by execution. *Cochran v. Colson*, 192 N. C. 663, 135 S. E. 794 (1926).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. **Sale in lieu of partition.**—Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3233.)

Cross Reference.—As to power of court to enter judgment for money due on judicial sales, see § 1-243.

Tenants in common are entitled to actual partition, if it can be made without injury to any of the co-owners. *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911). See *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627 (1894).

Tenant Entitled to Homestead.—That a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1916).

Purchase of Land by Tenant in Common.—A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure anyone to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. *Tuttle v. Tuttle*, 146 N. C. 484, 59 S. E. 1008 (1907). See *Credle v. Baugham*, 152 N. C. 18, 67 S. E. 46 (1910).

Issues and Questions of Fact.—In *Ledbetter v. Piner*, 120 N. C. 455, 27 S. E. 123 (1897), it was held that the controverted fact arising on the pleadings as to the advisability of a sale for partition, or an actual division, was not an issue of fact but a question of fact for the decision of the clerk subject to review by the judge on appeal. *Vanderbilt v. Roberts*, 162 N. C. 273,

78 S. E. 156 (1913).

Whether or not, in a proceeding instituted under § 46-3, for partition of the land of tenants in common, there shall be an actual partition, or a sale for partition, involves question of fact to be determined by court. In such proceedings, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact for the trial judge, and not an issue of fact for the jury, and he has the power to order a sale for partition. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

The burden is on the party seeking sale for partition to show the necessity therefor, and where sale for partition is decreed by the court without hearing evidence or finding facts to show the right to sell, the cause will be remanded. *Wolfe v. Galloway*, 211 N. C. 361, 190 S. E. 213 (1937).

The court must find the facts required by this section in order to support a decree of sale for partition. *Priddy & Co. v. Sanderford*, 221 N. C. 422, 20 S. E. (2d) 341 (1942).

Effect of Interests of Others.—The owner of an undivided one-half interest in land cannot be denied his rights to have a partition or sale in lieu of partition, because of interests which defendants, other than his cotenants, claiming under him, have acquired in and to his undivided interest. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

Effect of Trust Created by Another Cotenant.—The right of a tenant in common to have the lands sold for a division, under this section, cannot be defeated by a trust creating an interest in the lands by another of the tenants. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

The trustee and beneficiaries under a trust created in lands by a tenant in common are proper parties to the proceedings for a sale for division. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

Right of Wife of Cotenant to Resist Partition.—The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof, for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, under this section or § 46-3, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale. But she cannot resist the plaintiff's right to a partition nor challenge the power of the court to order sale for partition. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

A wife having a dower interest in property held by her husband as tenant in common may not defeat sale for partition. *Citizen Bank, etc., Co. v. Watkins*, 215 N. C. 292, 1 S. E. (2d) 853 (1939).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.—The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate. (1887, c. 214, s. 2; Rev., s. 2508; C. S., s. 3234.)

Cross Reference.—See § 41-11.

Rule before Section Adopted.—Before the passage of this section cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627 (1894); *Moore v. Baker*, 222 N. C. 736, 24 S. E. (2d) 749 (1943). But partition was permitted between the holder of the life estate and the owner in fee. *McEachern v. Gilchrist*, 75 N. C. 196 (1876).

Possession Need Not Be Actual.—A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. *Moore v. Baker*, 222 N. C. 736, 24 S. E. (2d) 749 (1943). See also, *Priddy & Co. v. Sanderford*, 221

Interest of Trust Beneficiaries Attaches to Proceeds.—The interest of the beneficiaries under a deed of trust upon the interest of a tenant in common in land will, upon its sale under this section, attach to the proceeds and be fully protected in the final judgment or order in the proceedings. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

Review of Decision.—The action of a judge of the superior court in setting aside the report of partition commissioners, advising actual partition, and ordering a sale, is not reviewable, unless an error of law was committed. *Albemarle Steam Nav. Co. v. Wovell*, 133 N. C. 93, 45 S. E. 466 (1903); *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911).

Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, an order for sale for partition affects a substantial right, and an appeal will lie to the supreme court from such order entered by the judge on appeal from the clerk. *Hyman v. Edwards*, 217 N. C. 342, 7 S. E. (2d) 700 (1940).

Applied in *Talley v. Murchison*, 212 N. C. 205, 193 S. E. 148 (1937).

N. C. 422, 20 S. E. (2d) 341 (1942).

Section Not Limited to Sale.—By the wording of this section, that is, "a sale for partition" followed by the words "purposes of partition," it is apparent that the legislature did not intend to limit the application of the section to sales, and it is held that it is to be construed to include actual partition by the remaindermen, as well as for a sale for division by them. *Baggett v. Jackson*, 160 N. C. 26, 76 S. E. 86 (1912).

Section Enlarges Vested Rights.—A statute giving to remaindermen the right to have partition of lands in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights. *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627 (1894).

All Parties Interested Must Unite.—A sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the

persons who may be by any possibility interested unite in asking such a decree. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918), quoting *Aydlott v. Pendleton*, 111 N. C. 28, 16 S. E. 8 (1892).

If contingent interests are to be affected by the partition they must be represented. *Overman v. Tate*, 114 N. C. 571, 19 S. E. 706 (1894).

Life Estate with Power of Sale.—When lands are devised to the wife for life, giving her control thereof with power to sell, pay debts, etc., this section does not apply,

§ 46-24. Life tenant as party; valuation of life estate.—In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely. (1887, c. 214, s. 3; Rev., s. 2509; C. S., s. 3235.)

Cross References.—As to evaluation of life tenant's interest, see § 8-47. As to dower upon partition, see § 46-15.

Life Tenants May Waive Rights.—Under a will providing that "home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin," single members of the family were entitled to partition of the home place among remaindermen as directed by will, where they showed the court that they no longer desired to retain it as a home, since life tenants could waive the right if they desired to enjoy their share in severalty. *Sides v. Sides*, 178 N. C. 554, 101 S. E. 100 (1919).

While the life tenant during the existence of her estate may waive her rights and consent to the sale of her estate, under this section, this may not be done, against her will, in a partition proceeding. *Priddy & Co. v. Sanderford*, 221 N. C. 422, 20 S. E. (2d) 341 (1942).

Estate Durante Viduitate.—This section does not apply to an estate durante viduitate, as there is no practicable rule by which the present value of such an estate can be determined; hence, where land to which an estate durante viduitate attached was sold for partition and the proceeds are

for if applied it would defeat the very purpose as to powers given the wife. *Makely v. Makely*, 175 N. C. 121, 95 S. E. 51 (1918).

Holder of Contingent Interest.—Proceedings for partition of lands cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. *Vinson v. Wise*, 159 N. C. 653, 75 S. E. 732 (1912).

Applied in *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941).

in custody of the court below, they cannot be divided among the widow and the remaindermen, against the will of the remaindermen, but will remain real estate until partition can be made at the termination of the estate durante viduitate. *Gillespie v. Allison*, 117 N. C. 512, 23 S. E. 438 (1895).

Same—Payment of Interest until Termination of Estate.—Where the tenant of an estate durante viduitate joins with some of the remaindermen for a sale for partition of the lands, this section will be satisfied with the payment to her of the interest upon the proceeds of the lands sold, until the termination of the particular estate by her marriage or death. *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627 (1894).

Application of Life Tenant for Sale.—While under this and the preceding section there is authority for a sale for partition, at the instance of the remaindermen, of the reversion, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5 (1924).

Cited in *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500 (1918).

§ 46-25. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the

life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (1895, c. 187; Rev., s. 2510; C. S., s. 3236; 1949, c. 34.)

Cross Reference.—As to mortuary tables and present worth of annuities, see §§ 8-46, 8-47.

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on the amendment, see 27 N. C. Law Rev. 475.

Section Is Permissive.—The statute authorizing partition sale of standing timber is permissive rather than mandatory. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Provision in Judgment Requiring Actual Partition of Timber.—A tenant in common, without the knowledge or authorization of

his cotenants, contracted to sell the timber on the entire tract. Thereafter he joined his cotenants in a timber deed to another person. In an action brought by the grantee in the deed against the vendee in the contract to sell, a provision of the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, was upheld. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

§ 46-26. **Sale of mineral interests on partition.**—In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (1905, c. 90, s. 2; Rev., s. 2507; C. S., s. 3237.)

The mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale

for partition. *Carolina Mineral Co. v. Young*, 220 N. C. 287, 17 S. E. (2d) 119 (1941).

§ 46-27. **Sale of land required for public use on cotenant's petition.**—When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. (1868-9, c. 122, s. 16; Code, s. 1907; Rev., s. 2518; C. S., s. 3238; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out the words "in the manner and on the terms it deems

expedient" formerly ending the second sentence.

§ 46-28. **Sale procedure.**—The procedure for a partition sale shall be the same as is provided in article 29A of chapter 1 of the General Statutes. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3239; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section.

§ 46-29: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—This section was repealed in conformity to § 46-28, which makes the procedure for a petition sale the same as is provided in article 29A of chap-

ter 1 of the General Statutes. Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 46-30. Deed to purchaser; effect of deed.—The deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, and all other parties to the proceeding had therein. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3241; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section.

§ 46-31. Clerk not to appoint self, assistant or deputy to sell real property.—No clerk of the superior court shall appoint himself or his assistant or deputy to make sale of any property in any proceeding before him. (1868-9, c. 122, s. 15; Code, s. 1906; 1899, c. 161; Rev., s. 2513; C. S., s. 3242; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, eliminated the former provision that the court "may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding." It also substituted in the present provision of the section the words "superior court" for "any court," and in-

serted the reference to "his assistant."

The purpose of this section is to abolish the practice of clerks appointing themselves to make partition sales. This practice was condemned in *Evans v. Cullens*, 122 N. C. 55, 28 S. E. 961 (1898), and thereupon the next legislature prohibited the practice.

§ 46-32: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—This section was repealed in conformity to § 46-28, which makes the procedure for a partition sale the same as is provided in article 29A of

chapter 1 of the General Statutes. Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 46-33. Shares in proceeds to cotenants secured.—Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (1868-9, c. 122, s. 31; Code, s. 1921; Rev., s. 2513; C. S., s. 3244.)

§ 46-34. Shares to persons unknown or not sui juris secured.—When a sale is made under this chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the State, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (1868-9, c. 122, s. 17; Code, s. 1908; 1887, c. 284, s. 3; Rev., s. 2516; C. S., s. 3245.)

Effect on Title.—This section does not interfere with the power to free the title and make a valid conveyance of the same. *Bynum v. Bynum*, 179 N. C. 14, 101 S. E. 527 (1919).

Same—Failure to Invest.—A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law, acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands. *Lawrence v. Hardy*, 151 N. C. 123, 65 S. E. 766 (1909).

Consent of Court Necessary to Agree-

ment.—Parties can not stipulate as to the distribution of the proceeds of a judicial sale without the full knowledge and consent of the court, especially where there are infants in the case whose rights may be seriously prejudiced by such an agreement. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242 (1922).

Infant's Share of Proceeds Remains Realty.—The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. *Bateman v. Latham*, 56 N. C. 35 (1856).

Payment to Guardian.—A payment made by purchaser of lands, under a decree for the sale and partition of lands which di-

rected the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common is proper and in pursuance of the statute. Hower-

ton v. Sexton, 104 N. C. 75, 10 S. E. 148 (1889).

Cited in McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225 (1927).

ARTICLE 3.

Partition of Lands in Two States.

§§ 46-35 to 46-41: Repealed by Session Laws 1943, c. 543.

ARTICLE 4.

Partition of Personal Property.

§ 46-42. **Personal property may be partitioned; commissioners appointed.**—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equally as possible among the tenants in common, or joint tenants. (1868-9, c. 122, s. 27; Code, s. 1917; Rev., s. 2504; C. S., s. 3253.)

Exclusiveness of Remedy.—A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. Powell v. Hill, 64 N. C. 169 (1870); Grim v. Wicker, 80 N. C. 343 (1879).

One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property because the defendant forcibly took it from the plaintiff's possession; the plaintiff's only remedy is to have the property partitioned. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782 (1906).

Injunction or Receiver.—Where, pending a suit for partition of personal property, the defendant threatened the destruction or

removal of the property, the court, on the plaintiff's application, might grant an injunction or appoint a receiver. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782 (1906).

Title to Personalty.—In petitions for the partition of personal property owned in common, where the defendant sets up title in severalty in himself, the title to the property may be tried on the petition. Edwards v. Bennett, 32 N. C. 361 (1849).

Notes.—The owners of notes, as tenants in common, are entitled to partition. Central Bank, etc., Co. v. Board of Commissioners, 195 N. C. 678, 143 S. E. 252 (1928).

Quoted in Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198 (1936).

§ 46-43. **Report of commissioners.**—The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (1868-9, c. 122, s. 28; Code, s. 1918; Rev., s. 2505; C. S., s. 3254.)

Cited in Clement v. Ireland, 129 N. C. 220, 39 S. E. 838 (1901).

§ 46-44. **Sale of personal property on partition.**—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made as provided in article 29A of chapter 1 of the General Statutes. (1868-9, c. 122, s. 29; Code, s. 1919; Rev., s. 2519; C. S., s. 3255; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote the latter part of the section and omitted the former

provision relating to filing report.

Cited in Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198 (1936).

§§ 46-45, 46-46: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

Chapter 47.

Probate and Registration.

Article 1.

Probate.

- Sec.
 47-1. Officials of State authorized to take probate.
 47-2. Officials of the United States, foreign countries, and sister states.
 47-2.1. Validation of instruments proved before officers of certain ranks.
 47-3. Commissioner appointed by clerk for nonresident maker.
 47-4. By justice of peace of other than registering county.
 47-5. When seal of officer necessary to probate.
 47-6. Officials may act although land or maker's residence elsewhere.
 47-7. Probate where clerk is a party.
 47-8. Attorney in action not to probate papers therein.
 47-9. Probates before stockholders in building and loan associations.
 47-10. Probate before stockholders or directors in banking corporations.
 47-11. Subpoenas to maker and subscribing witnesses.
 47-12. Proof of attested writing.
 47-13. Proof of unattested writing.
 47-14. Clerk to pass on certificate and order registration.
 47-15. Probate of husband's deed where wife insane.
 47-16. Probate of corporate deeds, where corporation has ceased to exist.

Article 2.

Registration.

- 47-17. Probate and registration sufficient without livery of seizin, etc.
 47-18. Conveyances, contracts to convey, and leases of land.
 47-19. Unregistered deeds prior to January, 1890, registered on affidavit.
 47-20. Deeds of trust and mortgages, real and personal.
 47-21. Blank or master forms of mortgages, etc., embodiment by reference in instruments later filed.
 47-22. Counties may provide for photographic or photostatic registration.
 47-23. Conditional sales of personal property.
 47-24. Conditional sales or leases of railroad property.

Sec.

- 47-25. Marriage settlements.
 47-26. Deeds of gift.
 47-27. Deeds of easements.
 47-28. Powers of attorney.
 47-29. Recording of bankruptcy records.
 47-30. Plats and subdivisions.
 47-31. Certified copies may be registered; used as evidence.
 47-32. Photostatic copies of plats, etc.; fees of clerk.
 47-33. Certified copies of deeds made by alien property custodian may be registered.
 47-34. Certified copies of deeds made by alien property custodian admissible in evidence.
 47-35. Register to fill in deeds on blank forms with lines.
 47-36. Errors in registration corrected on petition to clerk.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

- 47-37. Adjudication and order of registration.
 47-38. Acknowledgment by grantor.
 47-39. Form of acknowledgment of conveyances and contracts between husband and wife.
 47-40. Husband's acknowledgment and wife's acknowledgment before the same officer.
 47-41. Corporate conveyances.
 47-42. Attestation of banking corporation conveyances by cashier.
 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.
 47-43.1. Execution and acknowledgment of instruments by attorneys or attorneys in fact.
 47-44. Clerk's certificate upon probate by justice of peace.
 47-45. Clerk's certificate upon probate by nonresident official without seal.
 47-46. Verification; form of entry.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

- 47-47. Defective order of registration; "same" for "this instrument."
 47-48. Clerk's certificate failing to pass on all prior certificates.

CHAPTER 47. PROBATE AND REGISTRATION

- | Sec. | Sec. |
|--|--|
| 47-49. Defective certification or adjudication of clerk, etc., admitting to registration. | 47-80. Sister state probates without governor's authentication. |
| 47-50. Order of registration omitted. | 47-81. Before commissioners of deeds. |
| 47-51. Official deeds omitting seals. | 47-81.1. Before commissioner of oaths. |
| 47-52. Defective acknowledgment on old deeds validated. | 47-81.2. Before army, etc., officers. |
| 47-53. Probates omitting official seals, etc. | 47-82. Foreign probates omitting seals. |
| 47-54. Registrations by register's clerks or deputies. | 47-83. Before consuls general. |
| 47-55. Before officer in wrong capacity or out of jurisdiction. | 47-84. Before vice consuls and vice consuls general. |
| 47-56. Before justices of peace, where clerk's certificate or order of registration defective. | 47-85. Before masters in chancery. |
| 47-57. Probates on proof of handwriting of maker refusing to acknowledge. | 47-86. Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted. |
| 47-58. Before judges of Supreme Court or superior courts or clerks before 1889. | 47-87. Validation of probates by different officers of deeds by wife and husband. |
| 47-59. Before clerks of inferior courts. | 47-88. Registration without formal order validated. |
| 47-60. Order of registration by judge, where clerk party. | 47-89. Same. |
| 47-61. Order of registration by interested clerk. | 47-90. Validation of acknowledgments taken by notaries public holding other office. |
| 47-62. Probates before interested notaries. | 47-91. Validation of certain probates of deeds before consular agents of the United States. |
| 47-63. Probates before officer of interested corporation. | 47-92. Probates before stockholders and directors of banks. |
| 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1945. | 47-93. Acknowledgments taken by stockholder, officer, or director of bank. |
| 47-65. Clerk's deeds, where clerk appointed himself to sell. | 47-94. Acknowledgment and registration by officer or stockholder in building and loan association. |
| 47-66. Certificate of wife's "previous" examination. | 47-95. Acknowledgments taken by notaries interested as trustee or holding other office. |
| 47-67. Probates of husband and wife in wrong order. | 47-96. Validation of instruments registered without probate. |
| 47-68. Probates of husband and wife before different officers. | 47-97. Validation of corporate deed with mistake as to officer's name. |
| 47-69. Wife free trader; no examination or husband's assent. | 47-98. Registration on defective probates beyond State. |
| 47-70. By president and attested by treasurer under corporate seal. | 47-99. Certificate of clerks without seal. |
| 47-71. By president and attested by witness before January, 1900. | 47-100. Acknowledgments taken by officer who was grantor. |
| 47-72. Corporate name not affixed, but signed otherwise prior to January, 1927. | 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence. |
| 47-73. Probated and registered on oath of subscribing witness. | 47-102. Absence of notarial seal. |
| 47-74. Certificate alleging examination of grantor instead of witness. | 47-103. Deeds probated and registered with notary's seal not affixed, validated. |
| 47-75. Proof of corporate articles before officer authorized to probate. | 47-104. Acknowledgments of notary holding another office. |
| 47-76. Before officials of wrong state. | 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor. |
| 47-77. Before notaries and clerks in other states. | 47-106. Certain instruments in which clerk of superior court was a party, validated. |
| 47-78. Acknowledgment by resident taken out of State. | |
| 47-79. Before deputy clerks of courts of other states. | |

- Sec.
- 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.
- 47-108. Acknowledgments before notaries under age.
- 47-108.1. Certain corporate deeds, etc., declared validly admitted to record.
- 47-108.2. Acknowledgments and examinations before notaries holding some other office.
- 47-108.3. Validation of acts of certain notaries public prior to November 26th, 1921.
- 47-108.4. Acknowledgments, etc., of instruments of married women made since February 7, 1945.
- 47-108.5. Validation of certain deeds executed in other states where seal omitted.
- 47-108.6. Validation of certain conveyances of foreign dissolved corporations.
- 47-108.7. Validation of acknowledgments, etc., by deputy clerks of superior court.
- 47-108.8. Acts of registers of deeds or deputies in recording plats and maps by certain methods validated.

- Sec.
- 47-108.9. Validation of probate of instruments pursuant to § 47-12.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

- 47-109. Book for record of discharges in office of register of deeds; specifications.
- 47-110. Registration of official discharge or certificate of lost discharge.
- 47-111. Inquiry by register of deeds; oath of applicant.
- 47-112. Forgery or alteration of discharge or certificate; punishment.
- 47-113. Certified copy of registration; fee.
- 47-114. Payment of expenses incurred.

Article 6.

Execution of Powers of Attorney.

- 47-115. Execution in name of either principal or attorney in fact; indexing in names of both.

Article 7.

Private Examination of Married Women Abolished.

- 47-116. Repeal of laws requiring private examination of married women.

ARTICLE 1.

Probate.

§ 47-1. **Officials of State authorized to take probate.**—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: the several justices of the Supreme Court, the several judges of the superior court, commissioners of affidavits appointed by the Governor of this State, the clerk of the Supreme Court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C. S., s. 3293.)

Effect of Disqualification.—If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrancers. *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99 (1894). But when the incapacity of the acknowledging or probating officer is latent, i. e., does not

appear upon the record, one who takes under the grantee in such instrument gets a good title, unless the party claiming the benefit of the defected acknowledgment or probate is cognizant of the facts. *Richmond Co. v. Walston*, 187 N. C. 67, 122 S. E. 663 (1924); *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

Woman Notary Qualified.—A woman

is qualified to act as a notary public in North Carolina. *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586 (1922).

Interest and Relationship.—As to disqualification on the ground of interest and relationship, see § 47-7.

A contract to sell and convey timber, in order to be enforceable against creditors

and purchasers for value, must be probated and registered as provided by this chapter. *Winston v. Williams, etc.*, Lbr. Co., 227 N. C. 339, 42 S. E. (2d) 218 (1947).

Cited in *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929).

§ 47-2. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army of the United States or United States marine corps having the rank of second lieutenant or higher, any officer of the United States navy or coast guard having the rank of ensign, or higher, or any officer of the United States merchant marine having the rank of ensign, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the day of, 19.... before me, the undersigned officer, personally appeared, known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instruments and acknowledged that he executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....
Signature of Officer

.....
Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (1899, c. 235, s. 5; 1905, c. 451; Rev., s. 990; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; C. S., s. 3294; 1943, c. 159, s. 1, c. 471, s. 1; 1945, c. 6, s. 1.)

Cross References.—As to commissioner of affidavits and deeds appointed by the Governor, see § 3-1 et seq. As to powers of clerks of courts of record of other states, see § 3-7. As to power of notaries public in and out of State, see § 10-4. As to form of certificate required upon acknowledgment by nonresident official, see

§§ 47-44 and 47-45.

Editor's Note.—Both 1943 amendments inserted the words "any commissioner of oaths" in the first sentence. The first 1943 amendment also added to the first sentence the provisions relating to military, naval and merchant marine officials.

The 1945 amendment substituted, in the

second sentence, "second lieutenant" for "captain," and "ensign" for "lieutenant, senior grade."

For comment on the 1943 amendments, see 21 N. C. Law Rev. 323.

Compliance Essential.—This section, prescribing how deeds may be proved and acknowledgments taken in other states as well as in foreign countries, must be followed, or they and the registration thereon will be declared void. *New Hanover Shingle Mills v. Roper Lumber Co.*, 171 N. C. 410, 88 S. E. 633 (1916).

Commissioner of Deeds.—Prior to the 1913 amendment a probate before a commissioner of deeds of another state was held ineffectual in this State. *Wood v. Lewey*, 153 N. C. 401, 69 S. E. 268 (1910); *New Hanover Shingle Mills v. Roper Lumber Co.*, 171 N. C. 410, 88 S. E. 633 (1916).

Proof before Notary Public in Another State.—A deed regularly proved before a notary public in South Carolina by authority of this section, is effectual to pass title as against creditors. *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

Proof in This State by Notary of An-

§ 47-2.1. **Validation of instruments proved before officers of certain ranks.**—Any instrument or writing, required by law to be proved or acknowledged before an officer, which prior to the ratification of this section was proved or acknowledged before an officer of the United States army or United States marine corps having the rank of second lieutenant or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of ensign or higher, is hereby validated and declared sufficient for all purposes. (1945, c. 6, s. 2.)

§ 47-3. **Commissioner appointed by clerk for nonresident maker.**—When it appears to the clerk of the superior court of any county that any person nonresident of this State desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and take such proof as to a married woman. The commissioner shall make certificate of acknowledgment or proof and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved and shall order the same to be registered. (1869-70, c. 185; Code, s. 1258; Rev., s. 991; C. S., s. 3295; 1945, c. 73, s. 9.)

Cross Reference.—As to acknowledgments before officials of the United States, foreign countries, and sister states, see §§ 3-5, 10-4, 47-2, 47-6, 47-44, 47-45.

other State.—The probate of an instrument taken in this State by a notary public of another state is defective. *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

Same—Rights of Purchaser Where Record Is Clear.—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record, in the office of the register of deeds in the county wherein the land is situate here, to have been regularly taken in such other state, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

Woman Notary Public.—Where it appears from the probate of a deed that it was probated before a woman notary public in another state, it will be assumed that the notary was rightfully appointed and her act will be recognized as valid here. *Nicholson v. Eureka Lumber Co.*, 160 N. C. 33, 75 S. E. 730 (1912).

Editor's Note.—The 1945 amendment omitted provisions relating to the private examination of a married woman.

§ 47-4. **By justice of peace of other than registering county.**—If the proof or acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the

county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (1899, c. 235, s. 4; Rev., s. 992; C. S., s. 3296.)

Cross Reference.—As to form of clerk's certificate, see § 47-44.

Omission to Register Seal Not Fatal.—The execution of a deed was proved before a justice of the peace in Franklin County, and the clerk of the superior court of that county certified the official character of the justice of the peace under his official

seal; the deed was thereupon registered in Granville County upon the fiat of the clerk of the superior court of the county, but the official seal of the clerk of Franklin superior court was not registered. It was held that the registration was valid. *Perry v. Bragg*, 111 N. C. 159, 16 S. E. 10 (1892).

§ 47-5. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297.)

Cross References.—See § 10-9. As to validation of certain acknowledgments of deeds, etc., before a notary public where seal omitted, see §§ 47-52, 47-102. As to validation of certain acknowledgments before officers with seal where seal does not appear of record, see § 47-53.

Name of Notary on Notarial Seal.—The statute does not require that his name or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary. *Deans v. Pate*, 114 N. C. 194, 19

S. E. 146 (1894).

Effect of Omission of Justices' Seal.—The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, otherwise regular. *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758 (1889).

No Seal When Not Required by Statute.—The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution. *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823 (1902).

Presumption as to Seal.—When a copy of the certificate of the commissioner of affidavits concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. *Johnson v. Eversole Lumber Co.*, 147 N. C. 249, 60 S. E. 1129 (1908).

§ 47-6. Officials may act although land or maker's residence elsewhere.—The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this State in which the subject matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (1899, c. 235, s. 13; Rev., s. 994; C. S., s. 3298.)

§ 47-7. Probate where clerk is a party.—All instruments required or permitted by law to be registered to which clerks of the superior court are parties, or in which such clerks are interested, may be proved or acknowledged and the acknowledgment of any married woman may be taken before any justice of the

peace or notary public of the county of said clerk which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs and acknowledgments may also be taken before any judge of the superior court or justice of the Supreme Court, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some justice of the peace or notary public. All probates, adjudications and orders of registration made prior to January first, one thousand nine hundred and thirty, by any such clerk of conveyances or other papers in which said clerk is an interested party, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (1891, c. 102; 1893, c. 3; Rev., s. 995; 1913, c. 148, s. 1; C. S., s. 3299; 1921, c. 92, c. 106, s. 2; 1939, c. 210, s. 1; 1945, c. 73, s. 10.)

Cross References.—As to disqualification of clerk to act, see § 2-17. See also § 47-7.

Editor's Note.—The 1939 amendment inserted the words "who is a party to any instrument or" in the proviso after the words "clerk of the superior court." The 1945 amendment substituted "acknowledgment" for "privy examination."

Officer Party Trustee or Cestui Que Trust.—An acknowledgment before an

officer who was a party, trustee or cestui que trust in the deed is invalid. *Long v. Crews*, 113 N. C. 256, 18 S. E. 499 (1893); *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715 (1899).

Relation to Parties Not Disqualification.—Probate taken before an officer is not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715 (1899).

§ 47-8. Attorney in action not to probate papers therein.—No practicing attorney at law has power to administer any oaths to a person to any paper writing to be used in any legal proceedings in which he appears as attorney. (Rev., s. 2350; Ex. Sess. 1908, c. 105, s. 2; C. S., s. 3300.)

§ 47-9. Probates before stockholders in building and loan associations.—No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939, by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; C. S., s. 3301; 1939, c. 136.)

Editor's Note.—The 1939 amendment added the last two sentences.

§ 47-10. Probate before stockholders or directors in banking corporations.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy

examination, was a stockholder or director in such banking corporation. (1929, c. 302, s. 1.)

Acknowledgment before Bank Official.—Under this section where a mortgage is executed on the equity in lands in order to secure endorsers on a note against loss and the note is discounted at a bank, the contract to secure the endorsers against loss is a collateral agreement between

the makers and endorsers to which the bank is not a party, and the acknowledgment to the mortgage taken by an official of the bank is valid. *Watkins v. Simonds*, 202 N. C. 746, 164 S. E. 363 (1932).

§ 47-11. **Subpoenas to maker and subscribing witnesses.**—The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpoena for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpoena shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpoena he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Code, s. 1268; 1897, c. 28; 1899, c. 235, s. 16; Rev., s. 996; C. S., s. 3302.)

Cross Reference.—As to power of clerk to punish for contempt, see § 5-6.

§ 47-12. **Proof of attested writing.**—In all instruments required or permitted by law to be registered including deeds and mortgages on real estate executed by a married woman, where her husband is not the grantee, and attested by subscribing witness, the said instruments may be proven and probated by the oath and examination of such subscribing witness before any official authorized by law to take proof, probate or acknowledgments of such instruments, and if such witness is dead or out of the State, or of unsound mind, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, and this shall likewise apply to the execution of instruments by married women: Provided, that no instrument required or permitted by law to be registered shall be proven, probated or ordered to be registered upon the oath and examination of a subscribing witness who is also the grantee named in said instrument, and the registration of any instrument which has been proven and admitted to probate upon the oath and examination of a subscribing witness who is the grantee in said instrument shall be void: Provided, further, that nothing herein shall invalidate the registration of any instrument registered prior to the ninth day of April, A. D. one thousand nine hundred and thirty-five. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2.)

Editor's Note.—The provisos added by the 1935 amendment were changed by the 1937 amendment. The 1937 amendment omitted the former prohibition of registration of an instrument if the witness attesting its execution is the agent or servant of the grantee. It also omitted a former proviso applying the section to agricultural liens. See 15 N. C. Law Rev. 337.

The 1945 amendment made this section

applicable to proof of execution of instruments by married women.

The 1947 amendment rewrote the first sentence. For brief comment on amendment, see 25 N. C. Law Rev. 406.

The 1949 amendment struck out the commas formerly setting off the words "including deeds and mortgages on real estate" appearing near the beginning of the section.

§ 47-13. **Proof of unattested writing.**—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married women. (1899, c. 235, s. 11; Rev., s. 998; C. S., s. 3304; 1945, c. 73, s. 12.)

Cross References.—As to proof by attesting witnesses of instruments not required to be attested, see § 8-38. As to proof of handwriting by comparison as evidence, see § 8-40.

Editor's Note.—The 1945 amendment made this section applicable to proof of execution of instruments by married women.

Admission to Probate by Proof of Handwriting of the Maker.—A deed having no subscribing witness, may be omitted to probate and registration upon proof of

the handwriting of the maker; or, if the subscribing witness be dead, upon proof of his handwriting. *Black v. Justice*, 86 N. C. 504 (1882), overruling *Rollins v. Henry*, 78 N. C. 342 (1878).

Proof of Writing of Nonresident by Resident Party.—Where the parties to an instrument requiring registration are non-residents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. *LeRoy v. Jacobsosky*, 136 N. C. 443, 48 S. E. 796 (1904).

§ 47-14. **Clerk to pass on certificate and order registration.**—When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C. S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2.)

Cross Reference.—As to form of adjudication and order of registration, see § 47-37.

Elements of Adjudication.—If the certificate is not found in due form, the instrument is rejected. If the certificate is adjudged in due form, then the clerk admits to probate, i. e., probates it, passes upon the certificate as furnishing proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof as certified. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Adjudication Mandatory.—The requirement of this section that the clerk or deputy clerk shall pass upon the sufficiency of the probate of a deed is mandatory and not directory. *Woodlief v. Woodlief*, 192 N. C. 634, 135 S. E. 612 (1926). And the omission of such official to adjudicate upon the probate to a deed for lands situated here will invalidate the conveyance as against the rights of purchasers and creditors. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922).

In *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922), two lines of

decisions, one holding that this section is directory, the other holding that it is mandatory, are reviewed and distinguished. The first series, to which belong *Holmes v. Marshall*, 72 N. C. 37 (1875); *Young v. Jackson*, 92 N. C. 144 (1885); *Darden v. Neuse, etc., Steamboat Co.*, 107 N. C. 437, 12 S. E. 46 (1890); and *Heath v. Lane*, 176 N. C. 119, 96 S. E. 889 (1918), hold that inasmuch as every clerk of the superior court in North Carolina has equal jurisdiction with every other clerk in respect to probate matters, where the clerk of the court of any county in the State takes the acknowledgment of a deed and orders it to registration, it is not absolutely necessary that the certificate of this clerk be passed upon by the clerk of the court of the county in which the land is situated. In the other series of cases, which includes *Simmons v. Gholson*, 50 N. C. 401 (1858); *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386 (1888); *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890); and *Cozad v. McAden*, 148 N. C. 10, 61 S. E. 633 (1908), the section is held to be mandatory, but in these cases the probate was taken before some officer other than the clerk of court, judges of the superior court, or

justices of the Supreme Court. In *Darden v. Neuse, etc., Steamboat Co.*, supra, the court apparently limits the doctrine that the statute is directory to cases in which deeds have been acknowledged before other clerks, judges, or justices of the Supreme Court.

Same — Qualification of the Rule.— While it is held that such act of adjudication and order of registration are directory upon the clerk of the superior court of the county wherein the land is situated, it is so only where the fiat or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922).

Same—Where Probate Taken by Foreign Commissioner of Deeds.—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another state, registered without the fiat or order for registration by a clerk of the superior court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922).

Use of Words "In Due Form" Not Essential to Adjudication.—The adjudication by the clerk of the superior court that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and "will be upheld without regard to mere form." *Devereux v. McMahon*, 102 N. C. 284, 9 S. E. 635 (1889).

Where the acknowledgment was before an officer authorized to take it and the probate was in fact in due form, the omission of the clerk to adjudge in just so many words that the probate was "in due form" when in substance he did so adjudge, was not sufficient ground to exclude the deed. *Deans v. Pate*, 114 N. C. 194, 19 S. E. 146 (1894).

Adjudication Exercise of Judicial Function.—When the clerk of the superior court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution before him,

adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Substantial Compliance Sufficient.—A substantial compliance with this section and § 47-37 is all that is necessary to be observed by the clerk of the superior court of the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state; and when objection to the validity of registration is made on that ground, and it appears of record on appeal that the certificate made in such other state is in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N. C. 635, 66 S. E. 663 (1910).

Registration No Evidence of Adjudication without Signed Certificate of Clerk.—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence that the clerk or his deputy has complied with the provisions of this section. The curative statutes, §§ 47-49, 47-86, 47-87, 47-88, and 47-89, have no application. *Woodlief v. Woodlief*, 192 N. C. 634, 135 S. E. 612 (1926).

No Adjudication When Instrument Proved before Clerk.—It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate, and order the instrument to be registered. *Table Rock Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164 (1911).

Certificate of Probate or Acknowledgment Is Necessary Even if Probate Made before Clerk.—The statutes of North Carolina require, as the method of authentication and warrant to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or indorsed upon the deed, even though probate is had before the clerk of the superior court, and where no sufficient certificate was attached to or indorsed upon an instrument, it could not be shown by parol that proper proof was made before the clerk. *National Bank v. Hill*, 226 F. 102 (1915).

Adjudication of Instrument Probated in

Another State.—When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with this and § 47-37, for the clerk of the superior court of the county wherein the land lay, to certify that “the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc.” *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N. C. 635, 66 S. E. 663 (1910).

Certificate of Clerk for Registration of Grant by State Not Required.—The certificate of the clerk of the court, required as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a grant; the great seal of the State being sufficient authority for such registration. *Ray v. Stewart*, 105 N. C. 472, 11 S. E. 182 (1890).

Presumption of Regularity from Clerk's Certificate.—Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing,

§ 47-15. **Probate of husband's deed where wife insane.**—When a deed executed by a married man whose wife is insane or a lunatic, and whose homestead has been allotted, together with the certificate of the clerk of the superior court or with the certificate of the superintendent of the insane institution of the state where the wife is confined in conformity to § 39-14 under the chapter Conveyances, is offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed is acknowledged or proved, the clerk shall adjudge whether the certificate of the superintendent or the clerk is in due form, and if adjudged to be in due form he shall order the registration of the deed and certificate. (1905, c. 138, s. 2; Rev., s. 1000; 1919, c. 20; C. S., s. 3306.)

§ 47-16. **Probate of corporate deeds, where corporation has ceased to exist.**—It is competent for the clerk of the superior court in any county in this State, on proof before him upon the oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this State, to adjudge and order that such contract or instrument be registered as by law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and pur-

that it was in due form. *Darden v. Neuse, etc., Steamboat Co.*, 107 N. C. 437, 12 S. E. 46 (1890).

Defective Corporate Deed Invalid Notwithstanding Adjudication.—A corporate deed of trust was executed by the trustee, as well as the corporation, and bore a notary's certificate of proof of the trustee's execution, and a certificate of the clerk that the instrument had been duly proved, “as appears from the foregoing seals and certificate, which are adjudged to be in due form and according to law,” but no certificate as to the proof of execution by the corporation was attached. It was held, under this section that the clerk's certificate was invalid, and did not entitle the deed to registration. *National Bank v. Hill*, 226 F. 102 (1915).

Ancient Document Rule.—Plaintiffs claimed the locus in quo under seven years adverse possession under color and under twenty years adverse possession. Defendants objected to certain deeds in plaintiffs' chain of color of title on the ground that they were improperly registered and did not comply with this and § 47-17. It was held the deeds, having been on record for some thirty years, were competent under the ancient document rule to be submitted to the jury on the claim of adverse possession for twenty years, and error, if any, in admitting the deeds as color of title was not prejudicial under the facts. *Owens v. Blackwood Lbr. Co.*, 212 N. C. 133, 193 S. E. 219 (1937).

poses as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this State. (1911, c. 44, s. 1; C. S., s. 3307.)

Cross Reference.—As to forms of probate for deeds and other conveyances by corporations, see § 47-41.

ARTICLE 2.

Registration.

§ 47-17. **Probate and registration sufficient without livery of seizin, etc.**—All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony. (29, Ch. II, c. 3; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; R. C., c. 37, s. 1; Code, s. 1245; 1885, c. 147, s. 3; 1905, c. 277; Rev., s. 979; C. S., s. 3308.)

Section Applies to All Deeds.—The construction first put upon this statute was, that it only applied to such deeds as operated at common law by livery of seizin. *Hogan v. Strayhorn*, 65 N. C. 279 (1871). But our courts have since extended the construction so as to bring all deeds of conveyance within the purview of the statute. *Ivy v. Cranberry*, 66 N. C. 224 (1872); *Love v. Harbin*, 87 N. C. 249 (1882); *Jones v. Jones*, 164 N. C. 320, 80 S. E. 430 (1913). See *Bryan v. Eason*, 147 N. C. 284, 61 S. E. 71 (1908); 1 N. C. Law Rev. 155.

Registration has the effect of livery of seizin. *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787 (1905); *Jones v. Jones*, 164 N. C. 320, 80 S. E. 430 (1913).

Formal Deed Regarded as Feoffment in Enforcing Parol Trust.—In properly constituted cases indicating the propriety of equitable relief in declaring and enforcing a parol trust, the formal deed by which the legal title is held is regarded as a feoffment not inconsistent with the trust sought to be established. *Thompson v. Davis*, 223 N. C. 792, 28 S. E. (2d) 556 (1944).

Where it appears from the face of a corporate deed that the corporate seal has not been affixed, an order admitting it to probate as a conveyance is unauthorized and

registration thereon is invalid; for it is well settled that registration had upon an unauthorized probate is invalid and ineffectual to pass title against creditors and purchasers. However, the order of probate is sufficient to authorize its registration as a contract to convey under § 47-18. *Haas v. Rendleman*, 62 F. (2d) 701 (1933).

Subsequently Acquired Title—Estoppel.—See article in 1 N. C. Law Rev. 153, as to relation of this section to the doctrine of estoppel and rebutter where the grantor at the time of conveyance has no interest in the property conveyed but subsequently acquires title thereto.

Registration between Parties Not Necessary to Validity of Conveyance.—See note to § 47-18.

Evidence Supporting Judgment for Recovery of Land.—Evidence showing good record title in plaintiff, without any record evidence of title in defendant, held to support judgment for plaintiff for recovery of land. *Knowles v. Wallace*, 210 N. C. 603, 188 S. E. 195 (1936).

Cited in General Motors Acceptance Corp. v. United States, 23 F. (2d) 799 (1928); *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929); *Owens v. Blackwood Lbr. Co.*, 212 N. C. 133, 193 S. E. 219 (1937); *Freeman v. Morrison*, 214 N. C. 240, 199 S. E. 12 (1938).

§ 47-18. **Conveyances, contracts to convey, and leases of land.**—No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed

prior to the first day of December, one thousand eight hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Code, s. 1245; 1885, c. 147, s. 1; Rev., s. 980; C. S., s. 3309.)

I. In General.

II. Registration as between Parties.

III. What Instruments Affected.

IV. Rights of Persons Protected.

V. Notice.

VI. Effective of Defective Registration.

VII. Unregistered Deed as Color of Title.

Cross Reference.

As to the statute of frauds with reference to contracts for sale of land, leases, etc., see § 22-2.

I. IN GENERAL.

Editor's Note.—As to priority by recordation, see 27 N. C. Law Rev. 376. As to effect of recordation on title by estoppel, see 27 N. C. Law Rev. 376.

The object of registration in the county where the land lies is to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. Warren v. Williford, 148 N. C. 474, 62 S. E. 697 (1908); Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800 (1912); Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942).

This section is intended to remedy the evil of uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. Bell v. Couch, 132 N. C. 346, 43 S. E. 911 (1903).

Purpose Is to Enable a Safe Reliance upon the Records.—The purpose of this section was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. Grimes v. Guion, 220 N. C. 676, 18 S. E. (2d) 170 (1942).

This section was enacted for the purpose of providing a plan and a method by which an intending purchaser or encumbrancer can safely determine just what kind of a title he is in fact obtaining. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Where the Index Is Sufficient.—The purpose of the registration laws is to give

notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry, but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim, the proviso of this section being applicable only to deeds executed prior to December 1, 1885. Dorman v. Goodman, 213 N. C. 406, 196 S. E. 352 (1938).

Section Settles Priorities.—In construing the Connor Act of 1885, codified as this section, the court said: "The primary purpose and intent of the legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations." Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

Date of Registration Controls Title.—Under this section a grantee in a deed acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument. Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916).

First Registration Prevails.—Among two or more contracts to sell land, the one first registered will confer the superior right. Combes v. Adams, 150 N. C. 64, 63 S. E. 186 (1908).

An unregistered deed does not convey complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor. Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899 (1937).

This section and § 47-20 may be construed interchangeably in view of the similarity of their terminology. Cowen v. Withrow, 112 N. C. 736, 17 S. E. 575 (1893).

This section and § 47-20 were intended to uproot all secret liens, trusts, unregistered mortgages, etc., and it has been held that no notice, however full and formal, will supply the place of registration. Hooker v. Nichols, 116 N. C. 157, 21 S. E. 207 (1895), citing Robinson v. Willoughby, 70 N. C. 358 (1874).

Liberal Construction of Proviso.—The

words of the proviso should receive a liberal construction so as to give full force and effect to the spirit and intention of the section. *Cowen v. Withrow*, 112 N. C. 736, 17 S. E. 575 (1893).

Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 1-117 must be construed *in pari materia*, and while the *lis pendens* statutes do not affect the registration laws, the converse is not true. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942).

Effect of Connor Act.—Under this section a conveyance of land, made prior to the 1885 amendment, known as the Connor Act, is not valid against creditors or bona fide purchasers, unless registered before January 1, 1886. *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. 769 (1891).

Registration Does Not Cure Lack of Mental Capacity.—Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under this section can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective. *Thompson v. Thomas*, 163 N. C. 500, 79 S. E. 896 (1913).

Where plaintiff's deed was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper-writing executed by plaintiff's grantor, this section does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper-writing giving defendant a life estate was not registered, since the protection of this section extends only to creditors and purchasers for value. *Twitty v. Cochran*, 214 N. C. 265, 199 S. E. 29 (1938).

Conversion in Partition Proceedings.—Registration before Confirmation of Sale.—In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. *McLean v. Leitch*, 152 N. C. 266, 67 S. E. 490 (1910).

Registered Deed Good Although Deed to

Grantor Was Unregistered.—Upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. *Durham v. Pollard*, 219 N. C. 750, 14 S. E. (2d) 818 (1941).

Applied in Fidelity, etc., Co. v. Massachusetts Mut. Life Ins. Co., 74 F. (2d) 881 (1935).

Quoted in Tucker v. Almond, 209 N. C. 333, 183 S. E. 407 (1936).

Cited in Johnson v. Fry, 195 N. C. 832, 143 S. E. 857 (1928), holding the section not applicable; *Threlkeld v. Malcragson Land Co.*, 198 N. C. 186, 151 S. E. 99 (1930); *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255 (1930); *Tocci v. Nowfall*, 220 N. C. 550, 18 S. E. (2d) 225 (1942); *Ricks v. Batchelor*, 225 N. C. 8, 33 S. E. (2d) 68 (1945); *Carolina Power, etc., Co. v. Bowman*, 228 N. C. 319, 45 S. E. (2d) 531 (1947).

II. REGISTRATION AS BETWEEN PARTIES.

Instruments Are Good between Parties without Registration.—A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787 (1905); *Warren v. Williford*, 148 N. C. 474, 62 S. E. 697 (1908); *Western v. Roper Lumber Co.*, 160 N. C. 263, 75 S. E. 800 (1912); *Glass v. Lynchburg Shoe Co.*, 212 N. C. 70, 192 S. E. 899 (1937).

Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16 (1892).

An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. *Patterson v. Bryant*, 216 N. C. 550, 5 S. E. (2d) 849 (1939).

The manifest purpose of this section is to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands *inter se* to litigate their rights under the rules of evidence in force. *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16 (1892).

Formerly registration was necessary even as between the parties. This was the rule prior to the 1885 amendment, known as the Connor Act. *White v. Holly*, 91 N. C. 67 (1884); *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16 (1892).

Registration after Commencement of Action.—As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence. *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029 (1891).

Comparison with § 47-20.—The Connor Act, the 1885 amendment to this section, has substantially the same legal effect upon deeds that the act of 1829, codified as § 47-20, had upon mortgages and deeds in trust, leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors. *King v. McRackan*, 168 N. C. 621, 84 S. E. 1027 (1915), citing *Robinson v. Willoughby*, 70 N. C. 358 (1874).

The registration laws are not for the protection of the grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. *Patterson v. Bryant*, 216 N. C. 550, 5 S. E. (2d) 849 (1939).

Contract Specifically Enforceable between Parties.—A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchasers for value. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

III. WHAT INSTRUMENTS AFFECTED.

Section Restricted to Instruments in Writing Capable of Registration.—This section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and are required to be in writing. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923).

This section is restricted to written instruments capable of registration. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923); *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925); *Sansom v. Warren*, 215 N. C. 432, 2 S. E. (2d) 459 (1939).

Parol and Implied Trusts Are Not Affected.—Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of this section. *Wood v. Tinsley*, 138 N. C. 507, 51 S. E.

59 (1905); *Sills v. Ford*, 171 N. C. 733, 88 S. E. 636 (1916); *Pritchard v. Williams*, 175 N. C. 319, 95 S. E. 570 (1918); *Roberts v. Massey*, 185 N. C. 164, 116 S. E. 407 (1923); *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923); *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925); *Sansom v. Warren*, 215 N. C. 432, 2 S. E. (2d) 459 (1939).

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section, are not included. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923).

A declaration of trust is not required to be registered as against creditors, by virtue of the provisions of this section. *Crossett v. McQueen*, 205 N. C. 48, 169 S. E. 829 (1933).

A building restriction, being an easement which must be created by a grant, is within this section. *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925).

A contract to convey standing timber constitutes a contract to convey land within the meaning of this section. *Winston v. Williams, etc., Lbr. Co.*, 227 N. C. 339, 42 S. E. (2d) 218 (1947); *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Agreement for Division of Proceeds of Sale.—An instrument which is neither a conveyance of land, nor a contract to convey, nor lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land and authority to one to take entire control and management of sales of land for the parties is not required to be registered. *Lenoir v. Valley River Min. Co.*, 113 N. C. 513, 18 S. E. 73 (1893).

Assignment of Rents.—Rents accrued are choses in action and an assignment thereof need not be recorded. Rents accruing are incorporeal hereditaments and, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. First, etc., *Nat. Bank v. Sawyer*, 218 N. C. 142, 10 S. E. (2d) 656 (1940).

Lost and Unlost Deeds.—This section applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that the plaintiff's grantor deeded the land in controversy to W. in 1891 and that the said deed had been lost before registration, where the plaintiff was purchaser for value of said title under regis-

tered conveyances. *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787 (1905).

Where the corporate seal has not been affixed to a corporate deed, an order admitting it to probate as a conveyance is unauthorized but is sufficient to authorize its registration as a contract to convey. *Haas v. Rendleman*, 62 F. (2d) 701 (1933).

The use of the words "unregistered deed" in the proviso is in their board generic sense and has reference to the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. *McNeill v. Allen*, 146 N. C. 233, 59 S. E. 689 (1907).

Exclusive Right to Sell Given to Broker.—Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by this section, third parties may deal with the locus as if there were no contract, since no notice, however full and formal, will take the place of registration. *Eller v. Arnold*, 230 N. C. 418, 53 S. E. (2d) 266 (1949).

Plaintiff broker alleged that he had been given exclusive contract to sell certain property, that he secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the prospect, after the expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split commission. It was held that the absence of allegation that plaintiff's option was registered the complaint failed to state a cause of action. *Eller v. Arnold*, 230 N. C. 418, 53 S. E. (2d) 266 (1949).

Grants.—This section does not apply to grants, the registration of which is regulated by §§ 146-47 and 146-48. *Wyman v. Taylor*, 124 N. C. 426, 32 S. E. 740 (1899).

Lease in Writing.—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing. *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372 (1920).

Mere Personal Contract.—This section requires recordation of all deeds, contracts to convey, and leases for more than three years affecting the title to real property. But it neither requires nor authorizes the registration of a mere personal contract. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Mortgage.—A mortgage has been held to come within the term "conveyance" as

used in this section. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865 (1922). See § 47-20 and note.

Wills Not Affected.—This section has no application to wills. *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915); *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919).

The general term "conveyance" as used in this section cannot be construed to include wills. *Bell v. Couch*, 132 N. C. 346, 43 S. E. 911 (1903).

It is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. *Harris v. Dudley Lumber Co.*, 147 N. C. 631, 61 S. E. 604 (1908).

Purchaser from Devisee Prevails against Unregistered Deed.—This section requiring conveyances of land, contracts to convey, and leases to be recorded, applies when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value. *Bell v. Couch*, 132 N. C. 346, 43 S. E. 911 (1903).

IV. RIGHTS OF PERSONS PROTECTED.

In General.—By virtue of this section only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years. *Warren v. Williford*, 148 N. C. 474, 62 S. E. 697 (1908); *Gosney v. McCullers*, 202 N. C. 326, 162 S. E. 746 (1932); *Virginia-Carolina Joint Stock Land Bank v. Mitchell*, 203 N. C. 339, 166 S. E. 69 (1932); *Case v. Arnold*, 215 N. C. 593, 2 S. E. (2d) 694 (1939); *Durham v. Pollard*, 219 N. C. 750, 14 S. E. (2d) 818 (1941).

In *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861 (1939), it was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, under this and § 47-20, and as to them the mortgagee is not entitled to reformation.

Right to Easement.—Under this section where a grantor conveys land by registered deed creating an easement in land reserved by grantor his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. *Walker v. Phelps*, 202 N. C. 344, 162 S. E. 727 (1932).

Where a deed provides that it is subject

to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for more than three years and is not recorded. *Hildebrand Machinery Co. v. Post*, 204 N. C. 744, 169 S. E. 629 (1933).

This section protects purchasers for value against an unregistered contract to convey land, that is, where an owner of land contracts to convey land, such contract, until registered in the county where the land lies, is ineffective as against any who purchases for value from him. *Eller v. Arnold*, 230 N. C. 418, 53 S. E. (2d) 266 (1949).

Allegations that third persons conspired to deprive plaintiff of his rights under an unregistered option does not state a cause of action against such third persons, since in the absence of registration such third persons have a legal right to deal with the property as if there were no option and an agreement to do a lawful act cannot constitute a wrongful conspiracy. *Eller v. Arnold*, 230 N. C. 418, 53 S. E. (2d) 266 (1949).

Creditors Put upon the Same Plane as Purchasers.—No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, and against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

Volunteers and Donees Not Protected.—This section for lack of timely registration, only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. *Tyner v. Barnes*, 142 N. C. 110, 54 S. E. 1008 (1906).

While the cancellation of a pre-existing debt may be sufficient consideration to constitute the grantee in a registered deed from the debtor a purchaser for value within the protection of the Connor Act, so as to take free from the claim of the grantee in a prior unregistered deed from the debtor, where the debtor transfers the property without consideration to a third person, who in turn transfers the property to the creditor without any consideration moving from the creditor to such third person, the creditor cannot maintain

that the cancellation of the debt constitutes him a purchaser for value so as to be protected under the Connor Act, since his deed from the third person is not supported by any consideration, and it is required that the creditor be a "purchaser for value from the donor, bargainor, or lessor" in order to be protected. *Sansom v. Warren*, 215 N. C. 432, 2 S. E. (2d) 459 (1939).

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the National Bankruptcy Act, and acquires a valid title as against the holder of the unregistered deed, under this section. *Lynch v. Johnson*, 171 N. C. 611, 89 S. E. 61 (1916).

Dower Where Title Divested Prior to Marriage.—Where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower. She is not a purchaser. *Haire v. Haire*, 141 N. C. 88, 53 S. E. 340 (1906).

Possessor under Unregistered Contract to Convey—Rights to Improvements.—One who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor, under a duly registered deed. *Wood v. Tinsley*, 138 N. C. 507, 51 S. E. 59 (1905). As to a purchaser for value, from the common grantor, the rule applies to one in possession, under an unregistered deed, who has enhanced the value of the land by improvements, although made in good faith. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925). Expressions in *Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674 (1904), conflicting with these views, were obiter and were corrected by *Wood v. Tinsley*, supra.

Tort Feasor neither a Purchaser nor a Creditor.—A tortfeasor, whose negligence has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, §§ 47-18, 47-20, and 47-23, and an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. *Harris v. Seaboard Air Line R. Co.*, 190 N. C. 480, 130 S. E. 319 (1925).

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable con-

sideration. *Brem v. Lockhart*, 93 N. C. 191 (1885).

Priorities between Unregistered Deed and Execution of Judgment.—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. *Wimes v. Hufham*, 185 N. C. 178, 116 S. E. 402 (1923).

Purchaser under Execution Sale—Prior Purchaser in Possession.—The purchaser at execution sale who registers his deed prior to a deed from the defendant in execution to his wife, which was executed before the sale, acquires the title to the land; and the wife in possession of the land conjointly with her husband at the time of the sale and of the execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law. *Cowen v. Withrow*, 109 N. C. 636, 13 S. E. 1022 (1891).

Extent of Judgment Creditor's or Execution Sale Purchaser's Right.—A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. *Bristol v. Hallyburton*, 93 N. C. 384 (1885); *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923).

Rights of Creditor Whose Judgment Docketed between Execution and Registration of Prior Deed.—The grantee, in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed. *Board v. Micks*, 118 N. C. 162, 24 S. E. 729 (1896).

Execution Purchaser with Notice Prior to 1885, Subordinate to Prior Unregistered Deed.—The proviso that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." *Cowen v. Withrow*, 112 N. C. 736, 17 S. E. 575 (1893).

Priority of Judgment Obtained before Registration of Prior Deed.—Where a judgment is obtained against a grantor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. *Maxton Realty Co. v. Carter*, 170 N. C. 5, 86 S. E. 714 (1915).

The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

Same—Agreement between Parties as to Registration.—Under the provisions of this section the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. *Francis v. Herren*, 101 N. C. 497, 8 S. E. 353 (1888); *Bostic v. Young*, 116 N. C. 766, 21 S. E. 552 (1895); *Board v. Micks*, 118 N. C. 162, 24 S. E. 729 (1896); *Colonial Trust Co. v. Sterchie Bros.*, 169 N. C. 21, 85 S. E. 40 (1915).

Same—Judgment against Grantee.—Where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attaches upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. *Colonial Trust Co. v. Sterchie Bros.*, 169 N. C. 21, 85 S. E. 40 (1915).

Collateral Attack by Creditors for Want of Registration.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings, instituted by them and prosecuted to a sale of the prop-

erty or acquirement of a lien, as against all who derive title thereunder. *Brem v. Lockhart*, 93 N. C. 191 (1885); *Boyd v. Turpin*, 94 N. C. 137 (1886); *Francis v. Herren*, 101 N. C. 497, 8 S. E. 353 (1888).

V. NOTICE.

No Notice Will Supply Want of Registration.—No notice, however full or formal, will supply the want of registration of a deed. *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903). See *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929); *Knowles v. Wallace*, 210 N. C. 603, 188 S. E. 195 (1936); *Smith v. Turnage-Winslow Co.*, 212 N. C. 310, 193 S. E. 685 (1937); *Case v. Arnold*, 215 N. C. 593, 2 S. E. (2d) 694 (1939); *Turner v. Glenn*, 220 N. C. 620, 18 S. E. (2d) 197 (1942); *Grimes v. Guion*, 220 N. C. 676, 18 S. E. (2d) 170 (1942); *State Trust Co. v. Braznell*, 227 N. C. 211, 41 S. E. (2d) 741 (1947); *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948); *Eller v. Arnold*, 230 N. C. 418, 53 S. E. (2d) 266 (1949). See note to § 47-20.

This section provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel. *Patterson v. Bryant*, 216 N. C. 550, 5 S. E. (2d) 849 (1939).

Where defendant alleged that she went into possession of the land, paid taxes and made improvements under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff, seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and that defendant was in possession thereunder, it was held that the parol agreement was ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration as required by this section. *Grimes v. Guion*, 220 N. C. 676, 18 S. E. (2d) 170 (1942).

Record of Nonrecordable Instrument Does Not Constitute Notice.—The record of an instrument does not constitute constructive notice, if it is not of a class which is authorized or required by law to be recorded. *Chandler v. Cameron*, 229 N. C.

62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

The registration of an instrument operates as constructive notice only when the statute authorizes its registration; and then only to the extent of those provisions which are within the registration statutes. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Registration Is Not Notice as to After-Acquired Interest.—A written contract executed by a tenant in common, without the knowledge or authorization of his cotenants, to sell the timber on the entire tract, was recorded. The tenant in common later acquired an additional interest in the land. It was held that registration was constructive notice to all subsequent purchasers as to the tenant's original interest, but the vendee's right to demand conveyance of the timber as to the after-acquired interest rested upon the personal contract of the vendor, which was not required to be recorded by this section, and therefore registration was not notice to subsequent purchasers as to such after-acquired title. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Effect of Defective Probate.—See paragraphs under succeeding analysis line.

Doctrine of Estoppel Not Applicable.—The equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under this section, supply the place of registration. *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344 (1915).

Provision as to Possession.—A deed to lands registered under this section, conveys title as against any unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession; the provision of this section as to such possession is restricted to deeds executed prior to December 1, 1885. *Lanier v. Roper Lumber Co.*, 177 N. C. 200, 98 S. E. 593 (1919). See *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903).

A deed executed prior to the act of 1885, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act. *Laton v. Crowell*, 136 N. C. 377, 48 S. E. 767 (1904).

The mere possession of the locus in quo under an unregistered ninety-nine year lease or any other circumstances is not

sufficient notice to the owner of the fee under a valid paper chain of title. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138 (1921).

VI. EFFECT OF DEFECTIVE REGISTRATION.

Registration of Defectively Probated Deed Ineffective.—The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. *Allen v. Burch*, 142 N. C. 524, 55 S. E. 354 (1906).

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929).

Deed Executed Outside of State.—The registration of a deed executed outside of the State with defective probate is without authority and ineffective for any purpose; such a deed previously executed and so registered, unless probated and registered prior to January 1, 1866, takes effect to pass the legal title only from the date of lawful registration, and is invalid as against a conveyance made and registered in the meantime under a decree of court against the grantor which left in him no title to pass thereunder. *United States v. Hiwassee Lumber Co.*, 202 F. 35 (1912).

When Probate Appears in Conformity with Law.—While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in some other state and there is no evidence that the grantee in the commissioner's deed under the foreclosure of a mortgage had actual notice of the defect. *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

VII. UNREGISTERED DEED AS COLOR OF TITLE.

In General.—Formerly an unregistered deed was in all cases color of title if sufficient in form. *Hunter v. Kelly*, 92 N. C. 285 (1885). But after the passage of the Connor Act in 1885 it was held in *Austin*

v. Staten, 126 N. C. 783, 36 S. E. 338 (1900), that an unregistered deed was not color of title.

The question was again considered in *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903), and the ruling in *Austin v. Staten* was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the court has since then consistently adhered to the latter decision. *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863 (1906); *Burwell v. Chapman*, 159 N. C. 209, 74 S. E. 685 (1912); *Gore v. McPherson*, 161 N. C. 638, 77 S. E. 835 (1913); *King v. McRackan*, 168 N. C. 621, 84 S. E. 1027 (1915).

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903). Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by this section. *Roberts v. Massey*, 185 N. C. 164, 116 S. E. 407 (1923); *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

Adverse Possession Under Deeds Foreign to True Title.—The principle, that under this section an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863 (1906), distinguishing *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338 (1900).

As against Subsequent Deed Duly Registered.—Where one makes a deed for land for a valuable consideration and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. *King v. McRackan*, 168 N. C. 621, 84 S. E. 1027 (1915).

As against Judgment Creditors.—The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the

source of title being a common one, nor can the grantee establish his rights to betterments. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

Registration as Affecting Commencement of Limitations.—The statute of limitations does not begin to run in favor

of the lessee in possession under a ninety-nine year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138 (1921).

§ 47-19. Unregistered deeds prior to January, 1890, registered on affidavit.—Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and ninety, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (1885, c. 147, s. 2; 1905, c. 277; Rev., s. 981; 1913, c. 116; 1915, cc. 13, 90; C. S., s. 3310; Ex. Sess. 1924, c. 56.)

Editor's Note.—The 1924 amendment extended the operation of this section to deeds executed between 1885 and 1890.

Affidavit in Case of Corporation.—Where a corporation is the holder of such a deed, the affidavit under this section may properly be made by its president. *Richmond Cedar Works v. Pinnix*, 208 F. 785 (1913).

Affirmation of Belief That Deed Is Bona Fide.—The probate of a deed dated in 1845

upon an affidavit that the affiant claims title under the said deed and that the maker of said deed and the witnesses thereto are dead, and that he cannot make proof of their handwriting, is defective, in that it does not appear by the affidavit that the "affiant believes such a deed to be a bona fide deed and executed by the grantor therein named." *Allen v. Burch*, 142 N. C. 524, 55 S. E. 354 (1906).

§ 47-20. Deeds of trust and mortgages, real and personal.—No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the State, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence. (1829, c. 20; R. C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C. S., s. 3311.)

- I. In General.
- II. Registration as between Parties.
- III. Instruments Affected.
- IV. Rights of Persons Protected.
- V. Notice.
- VI. Place of Registration.

Cross References.

See notes to §§ 47-18, 47-23. As to form of chattel mortgage, see § 45-1. As to discharge of record of mortgages and deeds of trust, see § 45-37.

I. IN GENERAL.

Editor's Note.—As to effect of recordation statutes on mortgages and sales of

automobiles on credit, see 26 N. C. Law Rev. 173. As to mortgages, deeds of trust and other encumbrances created on personal property while such property is located in another state, see § 44-38.1, discussed in 27 N. C. Law Rev. 440.

The object of this section is to prevent fraud, and to that end it requires the registration of incumbrances so that purchasers and creditors may have notice of their existence and nature, and all persons may see for what the incumbrances were created. When the registration is made, the means of knowledge thus furnished enables creditors of the mortgagor to avail

themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditors all the benefit they can reasonably ask or that the law intended. *Starke v. Etheridge*, 71 N. C. 240 (1874).

This section and § 47-18 were intended to uproot all secret liens, trusts, unregistered mortgages, etc. *Hooker v. Nichols*, 116 N. C. 157, 21 S. E. 207 (1895), citing *Robinson v. Willoughby*, 70 N. C. 358 (1874). See § 47-18 and note.

Section Liberally Construed.—This section is liberally construed. *General Motors Acceptance Corp. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928).

Identical Construction with § 47-18.—In view of the practical identity of the terminology of this section and § 47-18, the construction put upon them will be identical. *Francis v. Herren*, 101 N. C. 497, 8 S. E. 353 (1888); *Cowan v. Withrow*, 112 N. C. 736, 17 S. E. 575 (1893).

The courts of this State have adopted a strict policy in regard to notice and registration in order to encourage immediate and proper recording. 15 N. C. Law Rev. 166.

Substantial Compliance Required.—The probate and registration of deeds and mortgages are entirely statutory, and creditors and purchasers are entitled to rely upon at least a substantial compliance with the statute. *National Bank v. Hill*, 226 F. 102 (1915).

Instrument Effective from Time of Registration.—A mortgage deed, not registered within time, when registered operates from the time of registration only, and has no relation back to its date. *Davison v. Beard*, 9 N. C. 520 (1823).

Priority is given to the mortgage first recorded, by virtue of this section. *Wayne Nat. Bank v. National Bank*, 197 N. C. 68, 147 S. E. 691 (1929). As to priority in proceeds of insurance on property, see note under § 58-160.

Determination of Priorities between Mortgages by the Time of Filing.—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72 (1921).

Want of Registration at Any Particular Time Does Not Avoid Instruments.—This section does not avoid a deed of trust for want of registration at any particular time,

but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. *McKinnon v. McLean*, 19 N. C. 79 (1836).

The words "at law" in this section do not mean in a court of law only, but in all courts. "At law" is an expression in a statute which does not mean merely a legal tribunal as distinguished from an equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable. *Hooker v. Nichols*, 116 N. C. 157, 21 S. E. 207 (1895).

Effect of Defective Registration.—A defective registration is no registration and is void; and hence does not prevent the rights of subsequent purchasers for value from attaching upon the property. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155 (1925).

Registration of Chattel Mortgages.—Our statute only requires mortgages of personal property to be reduced to writing and registered as affecting creditors and purchasers for value. *Butts v. Screws*, 95 N. C. 215 (1886).

Under this and § 47-23 where a chattel mortgage is registered prior to the registration of the title-retaining contract the lien of the chattel mortgage is superior to that of the title-retaining contract. *Jordan v. Wetmur*, 202 N. C. 279, 162 S. E. 610 (1932).

Sale of Mortgaged Property Left with Mortgagor — Waiver by Mortgagor.—Where the mortgagor of an automobile sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale. It was held, that an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he required the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which was left with the mortgagor for sale. *Rogers v. Booker*, 184 N. C. 183, 113 S. E. 671 (1922).

Bankruptcy Act.—For cases construing this section in connection with the provisions of the Bankruptcy Act relating to preferences, see *Brigman v. Covington*, 219 F. 500 (1915); *Commercial Cas. Ins. Co. v. Williams*, 37 F. (2d) 326 (1930); *In re Cunningham*, 64 F. (2d) 296 (1933); *In re Finley*, 6 F. Supp. 105 (1933); *Hartford Acci., etc., Co. v. Coggin*, 78 F. (2d) 471 (1935), reversing *Coggin v.*

Hartford Acci., etc., Co., 9 F. Supp. 785 (1935).

Applied in *Ward v. Southern Sand, etc., Co.*, 33 F. (2d) 773 (1929); *First Nat. Bank v. Raleigh Sav. Bank, etc., Co.*, 37 F. (2d) 301 (1930); *Commercial Cas. Ins. Co. v. Williams*, 37 F. (2d) 326 (1930).

Cited in *Hetherington & Sons v. Rudisill*, 28 F. (2d) 713 (1928); *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929); *Threlkeld v. Malcragson Land Co.*, 198 N. C. 186, 151 S. E. 99 (1930); *In re Wallace*, 212 N. C. 490, 193 S. E. 819 (1937); *Freeman v. Morrison*, 214 N. C. 240, 199 S. E. 12 (1938); *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942); *Universal Finance Co. v. Clary*, 227 N. C. 247, 41 S. E. (2d) 760 (1947); *General Finance, etc., Corp. v. Guthrie*, 227 N. C. 431, 42 S. E. (2d) 601 (1947).

II. REGISTRATION AS BETWEEN PARTIES.

Valid without Registration.—As between the parties, a mortgage is valid without registration. *Leggett v. Bullock*, 44 N. C. 283 (1853); *Ellington v. Supply Co.*, 196 N. C. 784, 147 S. E. 307 (1929); *In re Finley*, 6 F. Supp. 105 (1933).

The decisions of the Supreme Court of North Carolina interpreting this statute, which are binding upon federal courts in this respect, clearly hold that an unrecorded mortgage or deed of trust is valid under this section as between the parties and as against general creditors, unless the claims of the general creditors have become fastened upon the property, as by insolvency or bankruptcy proceedings, before the recording takes place. *In re Cunningham*, 64 F. (2d) 296 (1933), citing *National Bank v. Hill*, 226 F. 102 (1915); *Hinton v. Williams*, 170 N. C. 115, 86 S. E. 994 (1915); *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917).

Personal Representative Occupies Intestate's Position.—As between the original parties, the lien of an unregistered mortgage holds priority. *Leggett v. Bullock*, 44 N. C. 283 (1853); *Deal v. Palmer*, 72 N. C. 582 (1875); *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892 (1892). And the personal representative of a deceased mortgagor stands in the shoes of the latter. Hence, the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. *McBrayer v. Harrill*, 152 N. C. 712, 68 S. E. 204 (1910).

Intended Primarily to Protect Creditors and Purchasers.—This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 114 S. E. 478 (1922).

III. INSTRUMENTS AFFECTED.

Absolute Sale.—When the circumstances of a given transaction amount to an absolute sale of goods, rather than a mortgage, such transaction is valid without registration as against the persons protected under this section. *Chemical Co. v. Johnson*, 98 N. C. 123, 3 S. E. 723 (1887).

It is not necessary under this section that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser. *Carolina Coach Co. v. Beggell*, 203 N. C. 656, 166 S. E. 903 (1932).

A bill of sale of property, absolute on its face but intended as a mortgage, is void as against a purchaser for valuable consideration, by force of this section requiring mortgages, etc., to be registered. *Dukes v. Jones*, 51 N. C. 14 (1858).

Road Contractor's Application Contracts as Chattel Mortgages.—Application contracts of road contractor containing a conveyance whereby the contractor as of the date thereof assigns, transfers, and conveys to the surety, all his right, title, and interest in the tools, plant, equipment, and materials that he may then or thereafter have upon the work, authorizing and empowering the surety and its agents to enter upon and take possession thereof, are chattel mortgages within the meaning of this recordation statute. *Hartford Acci., etc., Co. v. Coggin*, 78 F. (2d) 471 (1935), reversing on other grounds *Coggin v. Hartford Acci., etc., Co.*, 9 F. Supp. 785 (1935).

Agreement in Substance a Chattel Mortgage.—A bankrupt, having several textile mills, in order to provide working capital agreed that claimants, who were factors, should advance on its goods, in process of manufacture, in transit, in the hands of finishers, and in the possession of customers until paid for, and that the goods should be subject to advances to him, made generally by claimants against all merchandise in and produced at enumerated mills. It was held that the agreement was to be in effect a chattel mortgage, and not an equitable lien, and hence such contract, not being recorded as required, was not a valid lien against the creditors of the

bankrupt. In re Southern Textile Co., 174 F. 523 (1909).

Instrument Executed in Another State.

—The Uniform Sales Act of the state wherein property was purchased and a conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of this section and § 47-23, since our statutes make no exception in favor of a conditional sales contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 53 S. E. (2d) 520 (1949). See § 44-38.1.

Same—Personal Property in State

Temporarily.—Where personal property subject to a conditional sales contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a situs here within the meaning of our registration statute, and such lien is not required to be registered in any county of this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 53 S. E. (2d) 520 (1949). See § 44-38.

Where a transaction is in effect a pledge of security for borrowed money, it is not a chattel mortgage requiring registration under this section as against creditors and third persons. *Bundy v. Commercial Credit Co.*, 201 N. C. 604, 163 S. E. 676 (1931).

Advancement of Money to Pay Off

Lien.—This section does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. *Wallace v. Benner*, 200 N. C. 124, 156 S. E. 795 (1931).

Preferred Stock Giving Lien.—Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with this section requiring registration. *Ellington v. Supply Co.*, 196 N. C. 784, 147 S. E. 307 (1929).

Purchase-Money Deed of Trust Registered Prior to Deed.—Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the husband alone executes a purchase-money deed of trust on the lands which is registered prior to the registration of the deed in fee to the wife, the records are insufficient to show that the

husband had any interest in the land, and the purchase-money deed of trust is ineffective as against creditors or subsequent purchasers for value from the wife, and where the husband and wife thereafter executed a mortgage, which is duly registered, the mortgagee is entitled to foreclose same upon default as against those claiming title by foreclosure under the purchase-money deed of trust, and this result is not affected by the fact that the mortgage, in the clause warranting title, referred to the purchase-money deed of trust by page number of the registry book, since such reference does not constitute even constructive notice in that the records would not have shown that the husband had any interest in the land, and since no notice, however full and formal, will supply want of registration. *Smith v. Turnage-Winslo*, 212 N. C. 310, 193 S. E. 685 (1937).

IV. RIGHTS OF PERSONS PROTECTED.

Creditors and Purchasers for Value.—

No distinction is made in the statute between creditors and purchasers for value. *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861 (1939).

Same—Reformation of Mortgage.—

Through mistake a mortgage was executed to secure \$15 instead of \$1,500, and was so recorded. Later, creditors of the mortgagor obtained judgments against him which were duly recorded. It was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, and as to them the mortgagee was not entitled to reformation. *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861 (1939).

General Creditors.—It is well settled by the decisions in this State that, unless a general creditor has secured a specific lien on the property of the mortgagor or grantor, before the registration of the deed or mortgage, it is valid as against general creditors from its registration. *National Bank v. Hill*, 226 F. 102 (1915). See *In re Cunningham*, 64 F. (2d) 296 (1933); *In re Finley*, 6 F. Supp. 105 (1933).

In order for a creditor to avail himself of this section, it is very generally understood that he must by some judicial process or method take steps to fasten his claim upon the property. In one or more of the decisions on the subject, it is said that he should be "armed with legal process" for the purpose. *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917).

Before a creditor can defeat the lien

of a mortgage properly registered he must acquire a prior lien by way of judgment, as against land, and by levying an execution against personal property. *Coggin v. Hartford Acci., etc., Co.*, 9 F. Supp. 785 (1935), reversed on other grounds in *Hartford Acci., etc., Co. v. Coggin*, 78 F. (2d) 471 (1935).

A general creditor must yield to the lien of a chattel mortgage from the moment of its registration, unless the lien can be successfully assailed as a fraudulent conveyance. *Coggin v. Hartford Acci., etc., Co.*, 9 F. Supp. 785 (1935), reversed on other grounds in *Hartford Acci., etc., Co. v. Coggin*, 78 F. (2d) 471 (1935).

Same—In Bankruptcy Proceedings.—In *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 S. Ct. 414, 56 L. Ed. 756 (1912), the court discussed a similar statute, holding that, as no creditor had fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy, by which the title passed to the trustee, the mortgage was valid as against him. *Bank v. Hill*, 226 F. 102 (1915).

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same, as required by such statute. In *re Franklin*, 151 F. 642 (1907).

Judgment Creditor.—Under this section a deed of trust is of no validity whatever as against a judgment creditor unless registered. *Bostic v. Young*, 116 N. C. 766, 21 S. E. 552 (1895).

Attachment Creditors.—The registration of a mortgage prior to attachments issued by a creditor makes it superior to the creditors' lien, but only on property situated in the county where the mortgage was registered. *Williamson v. Bitting*, 159 N. C. 321, 74 S. E. 808 (1912).

Creditors of Mortgagor and Not of Mortgagee.—An unregistered mortgage or deed of trust is void as against creditors of the mortgagor, and not of the mortgagee. *Chemical Co. v. Johnson*, 98 N. C. 126, 3 S. E. 723 (1887).

Collateral Attack by Creditors Not Warranted.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. *Brem v. Lockhart*, 93 N. C. 191 (1885); *Boyd v. Turpin*, 94 N. C. 137 (1886); *Francis v. Herron*, 101 N. C. 497, 8 S. E. 353 (1888).

Mortgagee for Future and Contingent Debts.—A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent. The mortgagee in such case is deemed a purchaser for value, and his rights are not affected by a prior unregistered mortgage. *Moore v. Ragland*, 74 N. C. 343 (1876).

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for a valuable consideration. *Brem v. Lockhart*, 93 N. C. 191 (1885).

Subsequent Purchasers Whose Deeds Are Registered.—A mortgage not registered in time is ineffectual against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage. *Cowan v. Green*, 9 N. C. 384 (1823). See analysis line "Place of Registration" in this note.

Priority between Chattel Mortgagee and Creditor Purchasing Property.—While the sale of property to a creditor in possession in partial payment of a pre-existing debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage in view of this section. *Weil v. Herring*, 207 N. C. 6, 175 S. E. 836 (1934).

Priority between Mortgage Filed and Judgment Rendered at Same Term.—G executed a mortgage upon his land; the mortgage was filed for registration during a term of the superior court, at a subsequent day of which a judgment was rendered against him and duly docketed. It was held that the lien of the judgment was prior to that of the mortgage. *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922 (1892).

Mortgagee for Purchase Price Has Priority over Subsequent Mortgage.—A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. *Allen v. Stainback*, 186 N. C. 75, 118 S. E. 903 (1923).

Where mortgagee of automobile permits mortgagor to keep it on display for sale with others, and the mortgage sufficiently describes the property, giving the serial and motor numbers and is duly registered under the provisions of this section, the mortgagee does not lose his right of lien as against a subsequent purchaser from the mortgagor. *Whitehurst v. Garrett*, 196 N. C. 154, 144 S. E. 835 (1928).

Tort Feasor as Purchaser or Creditor.—See *Harris v. Seaboard Air Line R. Co.*, 190 N. C. 480, 130 S. E. 319 (1925).

Trustee in Bankruptcy.—A mortgagee who failed to register his mortgage has no rights to the property mortgaged as against the trustee in bankruptcy of a corporation, to which the mortgagor subsequently conveyed the property in consideration of stock in such corporation. *Holt v. Pick & Co.*, 25 F. (2d) 378 (1928).

Same—When Right of Surety Superior.—Where no creditor has secured a lien upon the property of a road contractor prior to bankruptcy, the transfer of possession of the property to the surety-mortgagee before bankruptcy had the same effect under the North Carolina law as if the mortgage had been recorded. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155 (1925). It follows that the right of the surety to the property transferred is superior to the claim of the trustee in bankruptcy. *Hartford Acci., etc., Co. v. Coggin*, 78 F. (2d) 471 (1935).

Interest of Innocent Party in Unregistered Mortgage Not Subject to Confiscation.—Failure to register purchase-money mortgage on automobile did not subject the interest of an innocent mortgagee to confiscation under statute relating to seizure of automobile engaged in illegal transportation of liquor. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 114 S. E. 478 (1922).

V. NOTICE.

Constructive Notice to All the World.—Under this section deeds of trust and mortgages on real and personal property, when properly probated and registered, are constructive notice to all the world. *Whitehurst v. Garrett*, 196 N. C. 154, 144 S. E. 835 (1928).

Putting Third Persons upon Inquiry.—Record of unsatisfied mortgage is sufficient notice to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts which such inquiry would have disclosed. *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903).

Registration upon a defective probate

does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. *Todd, etc., Co. v. Outlaw*, 79 N. C. 235 (1878).

Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. *National Bank v. Hill*, 226 F. 102 (1915).

No Notice Will Supply Registration.—The Supreme Court has consistently held that no notice, however full and formal, will supply the place of registration required by this section. *Robinson v. Willoughby*, 70 N. C. 358 (1874); *Hooker v. Nichols*, 116 N. C. 157, 21 S. E. 207 (1895); *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72 (1921); *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215 (1923); *Whitehurst v. Garrett*, 196 N. C. 154, 144 S. E. 835 (1928); *Mills v. Kemp*, 196 N. C. 309, 145 S. E. 557 (1928); *Salassa v. Mortgage Co.*, 196 N. C. 501, 146 S. E. 83 (1929); *Weeks v. Adams*, 196 N. C. 512, 146 S. E. 130 (1929); *Ellington v. Supply Co.*, 196 N. C. 784, 147 S. E. 307 (1929); *Duncan v. Gulley*, 199 N. C. 552, 155 S. E. 244 (1930); *Lawson v. Key*, 199 N. C. 664, 155 S. E. 570 (1930).

Instrument First Registered Prevails.—A registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. *Duncan v. Gulley*, 199 N. C. 552, 155 S. E. 244 (1930).

Where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice aliunde advantage the holder of the mortgage first executed. *Story v. Slade*, 199 N. C. 596, 155 S. E. 256 (1930), distinguishing *Williams v. Lewis*, 158 N. C. 571, 74 S. E. 17 (1912).

A mortgage given for the purchase money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99 (1894).

Where Fraud Is Used.—Where one

who knows of a prior unregistered deed of trust or mortgage, procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. *Traders Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363 (1887).

When Subsequent Mortgage Recites Prior Incumbrance.—Where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of the prior incumbrance; and it establishes a trust in equity in favor of the prior incumbrancer even though the prior mortgage is not registered. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215 (1923), citing *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72 (1921), and distinguishing *Piano Co. v. Spruill*, 150 N. C. 168, 63 S. E. 723 (1909).

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgagee is entitled to the possession of the land. *Bank v. Vass*, 130 N. C. 590, 41 S. E. 791 (1902).

Where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference to a first and second deed of trust, and contained a warranty against incumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. *Lawson v. Key*, 199 N. C. 664, 155 S. E. 570 (1930).

Mortgage for Future Advances—Effect of Actual Notice.—Where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B defectively registered, it was held that if after the execution of the plaintiff's mortgage, and before they had

made any part of or all the advancements stipulated, they had been fixed with actual notice of prior mortgages in equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. *Todd, etc., Co. v. Outlaw*, 79 N. C. 235 (1878).

VI. PLACE OF REGISTRATION.

County of Actual Personal Residence.—The mere fact that a person has personal property in a certain county does not constitute residence. The purpose of the statute is to have the deed of trust or mortgage of personalty registered in the county where the donor, bargainor, or mortgagor has actual personal residence. *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127 (1889); *Bank v. Cox*, 171 N. C. 76, 87 S. E. 967 (1916); *Industrial Discount Corp. v. Radecky*, 205 N. C. 163, 170 S. E. 640 (1933).

Registration in County Where Land Lies.—A mortgage, not registered in the county where the land lies, is not valid as against creditors or purchasers for value. *King v. Portis*, 77 N. C. 25 (1877).

Where Land Lies in Two or More Counties.—A mortgage of a tract of land described by metes and bounds and registered in one county only, both mortgagor and mortgagee believing the whole tract to be situated in such county, when in fact a part of said tract is situated in an adjoining county, is inoperative as against creditors and purchasers for value beyond the limits of the county in which it was registered. *King v. Portis*, 77 N. C. 25 (1877).

Where the mortgagor of personal property changes his residence, a new registration of the mortgage is not required. *Weaver v. Chunn*, 99 N. C. 431, 6 S. E. 370 (1888); *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127 (1889).

Where a mortgage on personal property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute. *Bank v. Cox*, 171 N. C. 76, 87 S. E. 967 (1916).

§ 47-21. **Blank or master forms of mortgages, etc., embodiment by reference in instruments later filed.**—It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other

instrument conveying an interest in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed with the register of deeds, he shall record the same, and shall index the same in the manner now provided by law for the indexing of instruments recorded in his office, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be five (\$5.00) dollars.

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Chowan, Stanly, Iredell, Gates, Watauga, Guilford, Camden, Transylvania, Jackson, Washington, Alleghany, Bladen, Halifax, Ashe, Dare, Beaufort, Moore, Swain, Orange, Granville, Perquimans, Martin, Vance, Columbus, Cartaret, Cleveland, Avery and Sampson counties. (1935, c. 153.)

Editor's Note.—For a discussion of this section, see 13 N. C. Law Rev. 395, where it is stated that the statute covers bills of sale, conditional sales and various other security devices, such as trust receipts.

§ 47-22. Counties may provide for photographic or photostatic registration.—The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in the office of the clerk of the superior court and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose leaf binders. (1941, c. 286.)

Editor's Note.—For comment on this section, see 19 N. C. Law Rev. 513. For subsequent statute providing for photo-

graphic recording, see §§ 153-9.1 to 153-9.7.

§ 47-23. Conditional sales of personal property.—All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the State, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides. (1883, c. 342; Code, s. 1275; 1891, c. 240; Rev., s. 983; C. S., s. 3312.)

I. In General.

II. As between Parties.

III. Instruments Affected.

IV. Rights of Persons Protected.

V. Place of Registration.

Cross References.

See § 47-20 and note. As to foreclosure of conditional sales, see § 45-24. As to chattel mortgages generally, see § 45-1 et seq.

I. IN GENERAL.

Editor's Note.—As to effect of recordation statutes on mortgages and sales of

automobiles on credit, see 26 N. C. Law Rev. 173.

Validity of Conditional Sales Prior to Section.—Prior to this section, conditional sales contracts were valid without writing or registration, not only between the parties but also as against all the world. *Empire Drill Co. v. Allison*, 94 N. C. 548 (1886); *Perry v. Young*, 105 N. C. 463, 11 S. E. 511 (1890).

Section Liberally Construed.—This section is liberally construed. *General Motors Acceptance Corp. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928).

Not Retroactive.—This section has no retroactive effect. *Harrell v. Godwin*, 102 N. C. 330, 8 S. E. 925 (1889).

Sufficiency of Form.—The certificate of registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration. *Manufacturers' Finance Co. v. Amazon Cotton Mills Co.*, 182 N. C. 408, 109 S. E. 67 (1921).

Where the certificate for registration of a contract of sale of personal property appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it has been registered, and by reference to the certificate and the paper to which it relates the names of the parties sufficiently appear, the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged. The fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. *Manufacturers' Finance Co. v. Amazon Cotton Mills Co.*, 182 N. C. 408, 109 S. E. 67 (1921).

Notice Will Not Take Place of Registration.—No notice, however formal, is sufficient to supply that of registration required by the statute. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925); *Whitehurst v. Garrett*, 196 N. C. 154, 144 S. E. 835 (1928); *Brown v. Burlington Hotel Corp.*, 202 N. C. 82, 161 S. E. 735 (1932).

Forfeiture or Confiscation Proceedings.—The failure to register a conditional sales contract does not render the seller's lien void as against the federal government's claim of forfeiture under the National Prohibition Act. *General Motors Acceptance Corp. v. United States*, 23 F. (2d) 799 (1928).

Failure to register purchase-money mortgage on automobile was held not to subject interest of innocent mortgagee to confiscation under statute relating to seizure of automobiles engaged in illegal transportation of liquor. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 114 S. E. 478 (1922).

Cited in *Ward v. Southern Sand, etc., Co.*, 33 F. (2d) 773 (1929); *Standard Motors Finance Co. v. Weaver*, 199 N. C. 178, 153 S. E. 861 (1930).

II. AS BETWEEN PARTIES.

No Registration or Writing Required as

between Parties.—As between the parties, conditional sales contracts are binding without being reduced to writing and registered. *Deal v. Palmer*, 72 N. C. 582 (1875); *Gay v. Nash*, 78 N. C. 100 (1878); *Reese & Co. v. Cole*, 93 N. C. 87 (1885); *Butts v. Screws*, 95 N. C. 215 (1886); *Cutter Realty Co. v. Dunn Moneyhun Co.*, 204 N. C. 651, 169 S. E. 274 (1933).

This section does not require probate and registration as between the parties to a conditional sales contract. *General Motors Acceptance Corp. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928); *National Furn. Mfg. Co. v. Price*, 195 N. C. 602, 143 S. E. 208 (1928); *Pick & Co. v. Morehead Bluffs Hotel Co.*, 197 N. C. 110, 147 S. E. 819 (1929); *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929).

It is no part of the purpose of this section to render a conditional sale of personal property, whether in writing or not, invalid as between the parties to it. As between them, such sale has the same qualities and is just as effectual as it would have been, and may be proven by the like evidence as before the statute was enacted, and the parties may have the like remedies against each other. *Brem v. Lockhart*, 93 N. C. 191 (1885); *Empire Drill Co. v. Allison*, 94 N. C. 548 (1886); *Kornegay v. Kornegay*, 109 N. C. 188, 13 S. E. 770 (1891).

Receivership of Corporate Party.—While a conditional sale to a corporation does not require registration as between the parties, after receivership of the corporation its validity as to the rights of creditors depends upon its registration. *General Motors Acceptance Corp. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928); *National Furniture Mfg. Co. v. Price*, 195 N. C. 602, 143 S. E. 208 (1928); *Hetherington & Sons v. Rudisill*, 28 F. (2d) 713 (1928).

Where the bargainor under a conditional sale to a corporation has not recorded the instrument, as required by this section and a receiver has been appointed, under the provisions of § 55-149, his right to a preferential lien has been lost by his failure to register the instrument, the receiver representing the rights of the other creditors, and he is only entitled as any other general distributee of the funds. *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917). But see *Union Trust Co. v. Southern Sawmills, etc., Co.*, 166 F. 193 (1908), where it is held that contracts of conditional sales of loose personal property, such as live stock, to a corporation, although not recorded as re-

quired by this section, where the property passes into the hands of a receiver for the corporation and is sold together with its other property, entitle the sellers to priority of payment from the proceeds over the holders of a prior mortgage upon the property of the corporation containing an after-acquired property clause.

III. INSTRUMENTS AFFECTED.

Conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration. *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917).

Transactions Constituting Conditional Sales.—Where the vendor of personalty ships to itself as consignee, order notify the purchaser, and the latter has received money from another with which to pay the draft and obtain the goods from the common carrier, under an agreement that the title to the goods shall vest in such third person until the goods are paid for, the effect of the contract is a conditional sale falling within the meaning of this section. *General Motors Acceptance Corp. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928).

A contract under which the seller ships to the purchaser certain goods, to which the latter acquires title upon the payment of the specified purchase price, is a conditional sale, requiring registration as against the rights of creditors. *National Furniture Mfg. Co. v. Price*, 195 N. C. 602, 143 S. E. 208 (1928). See *Hetherington & Sons v. Rudisill*, 28 F. (2d) 713 (1928).

Contract for Lease in Effect Conditional Sale.—A contract for the "lease" of personal property upon payments of rent, the property to belong to the lessee upon the last payment of rent, is in effect a conditional sale, and unless registered its stipulation for the retention of title by the vendors is invalid as to third parties. *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91 (1895).

Transaction in Effect Absolute Sale.—Where goods were sold and delivered under a contract in which it was stipulated that the vendee should deliver to the vendor the notes taken by the vendee from purchasers of such goods, to be held by the vendor "as collateral security for the payment of the purchase money to him," and further, that such "goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of the price to the vendor." It was held that this agreement was not a mortgage, nor a conditional sale, but an absolute

sale of the goods, and its registration was not necessary. *Chemical Co. v. Johnson*, 98 N. C. 123, 3 S. E. 723 (1887).

Conditional Sale and Conditional Hiring Distinguished.—A contract of "conditional sale" and a contract of hiring, conditional in its provisions, are essentially different in their respective natures and purposes. The latter need not be in writing, and when it is, it need not be registered. The former, to be effectual against creditors and subsequent purchasers for value, must be in writing and registered. *Foreman v. Drake*, 98 N. C. 311, 3 S. E. 842 (1887).

Contract Registered in Another State.—The Uniform Sales Act of the State wherein property was purchased and the conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of our registration statutes, § 47-20 and this section since our statutes make no exception in favor of a conditional sale contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought in this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 53 S. E. (2d) 520 (1949). See § 44-38.1.

Same—Property Subject to Contract Temporarily in State.—Where personal property subject to a conditional sale contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a situs here within the meaning of our registration statute, and such lien is not required to be registered in any county of this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 53 S. E. (2d) 520 (1949). See § 44-38.1.

An automobile purchased by a nonresident in another state and subject to a conditional sale contract, registered in accordance with the laws of such other state, was brought into this State by the nonresident while on a temporary visit. The automobile was seized under execution of a judgment obtained here against the nonresident. It was held that the lien of the conditional sale contract is superior to the lien obtained by levy under execution. *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 53 S. E. (2d) 520 (1949).

IV. RIGHTS OF PERSONS PROTECTED.

The purpose of this section requiring conditional sales of personal property to be reduced to writing and registered is to protect creditors and purchasers for value.

Brem v. Lockhart, 93 N. C. 191 (1885); Empire Drill Co. v. Allison, 94 N. C. 548 (1886); Butts v. Screws, 95 N. C. 215 (1886); Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. 770 (1891); General Motors Acceptance Corp. v. United States, 23 F. (2d) 799 (1928).

The effect of this section is to render inoperative, as against creditors and purchasers for value, so much of the conditional sales contract as reserves the title in the vendor, unless and until the contract is registered. Brem v. Lockhart, 93 N. C. 191 (1885).

A conditional sales contract, not reduced to writing and registered, is void only as against creditors and purchasers for value. Deal v. Palmer, 72 N. C. 582 (1875); Gay v. Nash, 78 N. C. 100 (1878); Reese & Co. v. Cole, 93 N. C. 87 (1885); Butts v. Screws, 95 N. C. 215 (1886); Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 169 S. E. 274 (1933).

Where a conditional sale contract has not been registered, a subsequent purchaser for value acquires title free from its lien. Brown v. Burlington Hotel Corp., 202 N. C. 82, 161 S. E. 735 (1932).

Priority over Subsequent Chattel Mortgage.—A conditional sale requires registration in respect to its priority of lien over chattel mortgages subsequently given to others upon the same property and registered in the proper county. Commercial Inv. Trust v. Albemarle Motor Co., 193 N. C. 663, 137 S. E. 874 (1927).

Priority between Vendor and Mortgagee of After-Acquired Property.—Under this section conditional sale contracts of personal property are in effect chattel mortgages, and are required to be recorded as such, and such contracts covering machinery or fixtures sold to a corporation and attached by the purchaser to realty which is subject to a mortgage containing an after-acquired property clause, unless recorded, are not effective as against the mortgagee. Union Trust Co. v. Southern Sawmills, etc., Co., 166 F. 193 (1908).

Priority between Widow's Year's Allowance and Vendor's Rights.—A conditional sale of personal property made to the husband, registered after his death, like a mortgage, takes precedence over an allotment of a year's allowance, made to his widow after the registration. Williams v. Jones, 95 N. C. 504 (1886); Hinkle, etc., Co. v. Greene, 125 N. C. 489, 34 S. E. 554 (1899).

Priority over Attachment.—A title retaining contract in the sale of personalty is in the nature of a chattel mortgage, and when registered prior to an attachment of

the property it is superior to the claim of the attaching creditor. And this is true though the purchaser falsely entered into the contract under an assumed name. Weeks v. Adams, 196 N. C. 512, 146 S. E. 130 (1929).

Creditor Fastening Claim upon Property.—In order for a creditor to avail himself of this section and § 47-20, it is very generally understood that he must by some judicial process or method take steps to fasten his claim upon the property. In one or more of the decisions on the subject, it is said that he should be "armed with legal process" for the purpose. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1917). See note to § 47-20.

Tort Feasor as Purchaser or Creditor.—See Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319 (1925).

Statute Relating to Automobile Certificate of Title.—Chapter 236, Public Laws of 1923, requiring certificate of transfer of title to automobile to be issued to purchaser by the Secretary of State, did not repeal this section so as not to require the registration of title retaining contract to secure balance due on purchase price of automobile, as against subsequent purchaser for value. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414 (1925). See Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835 (1928).

Seller's Right to Possession upon Default in Payment.—Where personal property is sold under a registered conditional sales contract and the purchase price is not paid in accordance with the agreement, the seller is the owner thereof and is entitled to possession as against the purchaser and all persons claiming under him. Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 204 N. C. 609, 169 S. E. 186 (1933).

Question for Jury.—Upon conflicting evidence as to whether one was a purchaser for value from the vendee in a conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39 (1929).

V. PLACE OF REGISTRATION.

Registration in County of Residence at Time of Purchase.—The provision of this section requiring conditional sales to be reduced to writing and registered in the county where the purchaser resides, refers to the county in which he resides at the time the contract is made, and as con-

strued by the Supreme Court of the State the contract is valid if there recorded, although the property is thereafter removed into another county to which the purchaser changes his residence. *In re Franklin*, 151 F. 642 (1907).

Removal to Another County.—An instrument constituting a conditional sale of personal property is properly registered in the county where the purchaser resides, and in case of the latter's removal to another county with the property, need not be again recorded in the latter county. *Barrington v. Skinner*, 117 N. C. 47, 23

S. E. 90 (1895). See *In re Franklin*, 151 F. 642 (1907).

Where No Fixed Place of Residence Acquired.—A bankrupt at the time of purchasing property under a conditional sale contract had acquired no fixed place of residence in the State but was then residing and receiving his mail in the county where the contract was made and to which the property was shipped. It was held that the recording of the contract in that county was sufficient to preserve the seller's lien. *In re Franklin*, 151 F. 642 (1907).

§ 47-24. **Conditional sales or leases of railroad property.**—When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

1. The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three. (1883, c. 416; Code, s. 2006; Rev., s. 984; 1907, c. 150, s. 1; C. S., s. 3313.)

§ 47-25. **Marriage settlements.**—All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (1785, c. 238; R. C., c. 37, ss. 24, 25; 1871-2, c. 193, s. 12; Code, ss. 1269, 1270, 1281; 1885, c. 147; Rev., s. 985; C. S., s. 3314.)

Cross Reference.—As to marriage settlements, void as to existing creditors, see § 39-18.

Place of Registration.—Registration of a marriage settlement, embracing the slaves of a feme, was held to be properly made in the county where the feme resided and the slaves were, at the time the instrument was executed. *Latham v. Bowen*, 52 N. C. 337 (1860).

Registration in Another State.—An antenuptial contract entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband, although the property was

removed to North Carolina and changed from what it originally was when the contract was signed. *Hicks v. Skinner*, 71 N. C. 539 (1874).

Registration Three Years after Execution.—A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors, whose debts were contracted after such registration. *Johnston v. Malcom*, 59 N. C. 120 (1860).

Law at Time of Execution Governs.—Where a marriage took place, and a deed was made between husband and wife prior to 1868, it was governed by the law as it then existed and was not affected by the changes in the marital relations brought

about by the Constitution of 1868 and the statutes passed in pursuance thereof, although the deed was not registered until 1884. *Walton v. Parish*, 95 N. C. 259 (1886).

Deed of Dual Character.—A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered. *Johnston v. Malcom*, 59 N. C. 120 (1860).

§ 47-26. **Deeds of gift.**—All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration. (1789, c. 315, s. 2; R. C., c. 37, s. 18; Code, s. 1252; 1885, c. 147; Rev., s. 986; C. S., s. 3315.)

A deed of gift is absolutely void when not registered within two years after its making. *Booth v. Hairston*, 195 N. C. 8, 141 S. E. 480 (1928), affirming 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186 (1927); *Ferguson v. Ferguson*, 225 N. C. 375, 35 S. E. (2d) 231 (1945).

After two years the legislature is without power to bring a deed to life again by the enactment of a statute lengthening the period in which it may be registered. *Booth v. Hairston*, 195 N. C. 8, 141 S. E. 480 (1928), affirming 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186 (1927). See *Cutts v. McGhee*, 221 N. C. 465, 20 S. E. (2d) 376 (1942).

The time of the registration of deeds of gift under this section was not affected by § 146-64 which extended the time in which certain instruments could be registered until September 1, 1926. *Booth v. Hairston*, 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186 (1927), affirmed in 195 N. C. 8, 141 S. E. 480 (1928).

Title Vests in Grantor.—Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void ab initio and title vests in grantor. *Winstead v. Woolard*, 223 N. C. 814, 28 S. E. (2d) 507 (1944).

"Making" as used in this section means date of execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered. *Turlington v. Neighbors*, 222 N. C. 694, 24 S. E.

Agreement Not a Marriage Settlement.—An agreement by which the husband consents that the wife may convert one tract of land, which is in nowise subject to the claims of his creditors, into another tract of land, and in which, in order to enable her to make the conversion, he stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land, is not a marriage settlement falling within the section. *Teague v. Downs*, 69 N. C. 280 (1873).

(2d) 648 (1943).

Unregistered Deed Void Regardless of Fraud.—Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by this section, it is void, and may be set aside in an action by creditors of the grantor regardless of whether it was executed in fraud of creditors. *Reeves v. Miller*, 209 N. C. 362, 183 S. E. 294 (1936).

Acknowledgment after Lapse of Period Not Re-execution.—Where the owner of lands executed a deed of gift thereto and delivered same to the grantee, and some three and a half years thereafter he acknowledged the deed and filed same for registration, the acknowledgment was not a re-execution of the deed, and the deed of gift, not having been registered within two years of its execution, was void, and may not be revived by curative act of the legislature. *Cutts v. McGhee*, 221 N. C. 465, 20 S. E. (2d) 376 (1942).

Registration as Notice.—The registration of the prior voluntary deed is notice to the subsequent purchaser. *Taylor v. Eatman*, 92 N. C. 602 (1885).

Evidence held to show instrument executed for valuable consideration and therefore not void under this section. *Cannon v. Blair*, 229 N. C. 606, 50 S. E. (2d) 732 (1948).

Applied in *Allen v. Allen*, 209 N. C. 744, 184 S. E. 485 (1936).

Cited in *Blades v. Wilmington Trust Co.*, 207 N. C. 771, 178 S. E. 565 (1935).

§ 47-27. **Deeds of easements.**—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been

made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

1. It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.

2. It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to chapter 291 of the Public Laws of 1935 [G. S. §§ 117-6 to 117-27], to record any deeds or agreements for rights of way acquired subsequent to one thousand nine hundred and thirty-five, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750.)

Local Modification.—Alleghany, Harnett, Lee, Surry, Wilkes: C. S. 3316; Halifax, Martin: 1939, c. 45.

Editor's Note.—The 1943 amendment added the last two paragraphs, and struck out a former provision making a violation of this section a misdemeanor.

The provision of this section exempting decrees of condemnation from the requirement of registration is not repealed by the 1919 and 1943 amendments, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration.

Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531 (1947).

The provision of this section exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration supersedes the provisions of § 40-19 that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of § 1-228 that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds. Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531 (1947).

§ 47-28. **Powers of attorney.**—Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or

estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Code, s. 1249; 1899, c. 235, s. 15; Rev., s. 987; C. S., s. 3317.)

Cross Reference.—As to form for acknowledgment of instrument executed by attorney in fact, see § 47-43.

§ 47-29. **Recording of bankruptcy records.**—A copy of the petition with the schedules omitted beginning a proceeding under the United States Bankruptcy Act, or of the decree of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in such proceeding, shall be recorded in the office of any register of deeds in North Carolina, and it shall be the duty of the register of deeds, on request, to record the same. The register of deeds shall be entitled to the same fees for such registration as he is now entitled to for recording conveyances. (1939, c. 254.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 344.

§ 47-30. **Plats and subdivisions.**—Any person, firm or corporation owning land in this State may have a plat thereof recorded in the office of the register of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. Such plat, when so proven and probated as deeds and other conveyances, shall be recorded either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book to be designated the "Book of Plats"; and when so recorded shall be duly indexed. Reference in any instrument heretofore or hereafter executed to the record of any plat herein authorized or validated shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

Where any map or plat has been recorded, either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats," such map or plat shall be deemed to have been recorded in full compliance with this section, notwithstanding the fact that the same has not been probated in accordance with the provisions hereof; and the registration of all plats and maps which have been recorded by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats" is hereby validated as fully as if the statute had been fully and completely complied with. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249.)

Editor's Note.—The 1935 amendment rewrote this section, and the 1941 amendment added the provision as to recording a plat when the surveyor making it is dead. For comment on the 1941 amendment, see 19 N. C. Law Rev. 513.

This section was designed to regulate priorities as between two conflicting dedications, and does not affect the general principles of dedication and acceptance and the owner's right of revocation. *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18 (1920).

This section was enacted in view of the decision in *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344 (1915), in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18 (1920).

§ 47-31. **Certified copies may be registered; used as evidence.**—A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the State. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319.)

Cross References.—As to court records as proof of destroyed instruments, see §§ 98-12, 98-13. As to certified copies of registered instruments as evidence, see § 8-18. As to certified copies of deeds, mortgages, etc., as evidence and for registry, see § 8-20.

Registration of Copies in Proper County Allowed.—This section allows certified copies of deeds erroneously registered to be recorded in the proper counties. *Weston v. Roper Lumber Co.*, 160 N. C. 263, 75 S. E. 800 (1912).

Proper Registration of Original Presumed.—It is to be assumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. *Starke v. Etheridge*, 71 N. C. 240 (1874); *Love v. Hardin*, 87 N. C. 249 (1882); *Strickland v. Draughan*, 88 N. C. 315 (1883).

Copy of Contract Used in Evidence to Prove Lost Original.—For proof of the

loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. *Mauney v. Crowell*, 84 N. C. 314 (1881).

Certified Copy 100 Years Old May Be Registered though Mutilated.—Under this section a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to probate and registration, though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions. *Richmond Cedar Works v. Stringfellow*, 236 F. 264 (1916).

Cited in *United States v. 7,405.3 Acres of Land*, 97 F. (2d) 417 (1938).

§ 47-32. **Photostatic copies of plats, etc.; fees of clerk.**—In all special proceedings in which a plat, map or blueprint shall be filed as a part of the papers, the clerk of the superior court may have a photostatic copy of said plat, map or blueprint made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blueprint. The clerk of superior court shall be allowed a fee to be fixed by the county commissioners not exceeding the sum of five dollars to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1931, c. 171.)

Cross Reference.—For subsequent statute providing for photographic recording, see §§ 153-9.1 to 153-9.7.

§ 47-33. **Certified copies of deeds made by alien property custodian may be registered.**—Any copy of a deed made, or purporting to be made, by the United States alien property custodian duly certified pursuant to title twenty-eight, section six hundred sixty-one of United States Code by the department of justice of the United States, with its official seal impressed thereon, when the said certified copy reveals the fact that the execution of the original was acknowledged by the alien property custodian before a notary public of the District of Columbia, and that the official seal of the alien property custodian by recital was affixed or impressed on the original, and further reveals it to have been approved, as to form, by general counsel, and the copy also shows that the original was signed and approved by the acting chief, division of trusts, and was witnessed by two witnesses, shall, when presented to the register of deeds of any county wherein the land described therein purports to be situate, be recorded by the register of deeds of such county without other or further proof of the execution and/or delivery of the

original thereof, and the same when so recorded shall be indexed and cross indexed by the register of deeds as are deeds made by individuals upon the payment of the usual and lawful fees for the registration thereof. (1937, c. 5, s. 1.)

§ 47-34. Certified copies of deeds made by alien property custodian admissible in evidence.—The record of all such recorded copies of such instruments authorized in § 47-33 shall be received in evidence in all the courts of this State and the courts of the United States in the trial of any cause pending therein, the same as though and with like effect as if the original thereof had been probated and recorded as required by the law of North Carolina, and the record in the office of register of deeds of such recorded copy of such an instrument shall be presumptive evidence that the original of said copy was executed and delivered to the vendee, or vendees therein named, and that the original thereof has been lost or unintentionally destroyed without registration, and in the absence of legal proof to the contrary said so registered copy shall be conclusive evidence that the United States alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-35. Register to fill in deeds on blank forms with lines.—Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1; C. S., s. 3320.)

§ 47-36. Errors in registration corrected on petition to clerk.—Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases. (1790, c. 326, ss. 2, 3, 4; R. C., c. 37, s. 28; Code, s. 1266; Rev., s. 1008; C. S., s. 3321.)

Cross Reference.—As to correction of grants, see § 146-55 et seq.

Proceedings Exclusive.—The proceedings provided for by this section are exclusive. *Hopper v. Justice*, 111 N. C. 418, 16 S. E. 626 (1892).

Grantor Cannot Call upon Grantee to Correct Mistake.—Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under this section and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum.

Oldham v. First Nat. Bank, 85 N. C. 241 (1881).

Register May Correct Own Mistake.—The order of registration by the clerk is a continuous one, with which the register of deeds may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302 (1911).

The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302 (1911).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. **Adjudication and order of registration.**—The form of adjudication and order of registration required by § 47-14 shall be substantially as follows:

North Carolina, County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This day of, A. D.....

(Official seal.)

.....
(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered." (1899, c. 235, s. 7; 1905, c. 344; Rev., ss. 1001, 1010; C. S., s. 3322.)

It is a sufficient compliance with this section for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to

be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N. C. 635, 66 S. E. 663 (1910).

§ 47-38. **Acknowledgment by grantor.**—Where the instrument is acknowledged by the grantor or maker, or where a married woman is a grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the day of (year).

(Official seal.)

.....
(Signature of officer.)

(Rev., s. 1002; C. S., s. 3323; 1945, c. 73, s. 13.)

Editor's Note.—The 1945 amendment made this section applicable to married women.

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. *Freeman v. Morrison*, 214 N. C. 240, 199 S. E. 12 (1938).

"**Acknowledgment**" describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. *Freeman v. Morrison*, 214 N. C. 240, 199 S. E. 12 (1938).

An acknowledgment taken over a telephone does not meet the statutory require-

ments. *Southern State Bank v. Summer*, 187 N. C. 762, 122 S. E. 848 (1924).

Position of Name of Justice.—It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302 (1911).

Cited in *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929).

§ 47-39. **Form of acknowledgment of conveyances and contracts between husband and wife.**—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the pro-

visions of § 52-12 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the contract or instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this (day of month), A. D. (year).

.....
(Signature of officer.)

(Official seal.)

(1899, c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14.)

Cross Reference.—As to conveyances by husband and wife, see § 39-7 et seq. examination of married women. For repeal of laws requiring private examination of married women, see § 47-116.

Editor's Note.—Prior to the 1945 amendment this section related to the private

§ 47-40. **Husband's acknowledgment and wife's acknowledgment before the same officer.**—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

I (here give name of official and his official title), do hereby certify that (here give names of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument.

(1899, c. 235, s. 8; 1901, c. 299; Rev., s. 1004; C. S., s. 3325; 1945, c. 73, s. 15.)

Cross Reference.—As to necessity of seal of probating officer when such officer has an official seal, see § 47-5. ment the certificate contained a provision as to the private examination of a married woman.

Editor's Note.—Prior to the 1945 amend-

§ 47-41. **Corporate conveyances.**—The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the deed or other instrument is executed by the president or vice president of the corporation, is sealed with its common, or corporate seal, and is attested by its secretary or assistant secretary, or, in case of a bank, by its secretary, assistant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

.....
(State and county, or other description of place where acknowledgment is taken)

I,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)

certify that personally
(Name of secretary, assistant secretary, cashier or assistant cashier)

came before me this day and acknowledged that he (or she) is
(Secretary, assistant secretary, cashier or assistant cashier)

of, a corporation, and that by authority duly given
(Name of corporation)

and as the act of the corporation, the foregoing instrument was signed in its name by its , sealed with its corporate seal, and attested (President or vice-president)

by himself (or herself) as its (Secretary, assistant secretary, cashier or assistant cashier)

My commission expires (Date of expiration of commission as notary public)

Witness my hand and official seal, this the day of (Month) (Year)

(Official seal, if officer taking acknowledgment has one)

..... (Signature of officer taking acknowledgment)

(a) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(b) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment.

(c) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.

If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, County.

This day of, A. D., personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this day of (year).

(Official seal.)

..... (Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, County.

This day of, A. D., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary)

of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the day of (year).

(Official seal.)

.....
 (Signature of officer.)

North Carolina, County.

This is to certify that on the day of, 19....., before me personally came (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that is the president (or vice-president), and is the secretary (or assistant secretary) of the, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the day of (year).

(Official seal.)

.....
 (Signature of officer.)

If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This day of A. D....., personally came before me (here give name and official title of officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

.....
 (Signature of officer.)

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

The following forms of probate for contracts in writing for the purchase of

personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina

..... County

I,, do hereby certify that,
(name of president, secretary or treasurer)
personally came before me this day and acknowledged that he is
..... of and acknowledged,
(president, secretary or treasurer) (name of corporation)
on behalf of, the grantor, the due
(name of corporation)
execution of the foregoing instrument.

Witness my hand and official seal, this day of,
19.....

(Official seal)

.....
(Title of officer)

North Carolina

..... County

The due execution of the foregoing instrument by,
the grantor therein named, for the purposes therein expressed, was this day duly
proven before me by the oath and examination of,
the subscribing witness thereto.

Witness my hand and official seal, this day of,
19.....

(Official seal)

.....
(Title of officer)

(1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; Rev., s. 1005; 1907, c. 927,
s. 1; C. S., s. 3326; 1939, c. 20, ss. 1, 2; 1943, c. 172; 1947, c. 75, s. 1; 1949, c.
1224, s. 1.)

Cross References.—As to validation of certain corporate acknowledgments, see §§ 47-70, 47-71, 47-72, 47-73. As to probate of deeds by examination of subscribing witness in certain cases where corporation has ceased to exist, see § 47-16.

Editor's Note.—The 1943 amendment inserted the first form of acknowledgment and paragraphs (a), (b) and (c).

The 1947 amendment inserted "vice president" in the third form from the end of the section and in the paragraph preceding the form. Section 2 of the amendatory act validated the recordation of all corporate conveyances probated and recorded prior to July 1, 1947, which had been executed and admitted to registration in accordance with the above rewritten provisions, and which were otherwise regular.

The 1949 amendment added the last

paragraph and forms of probate for contracts for the purchase of personal property. For brief comment on amendment, see 27 N. C. Law Rev. 440.

Power of Directors to Mortgage Corporate Property.—This section appears to recognize inferentially the power of a board of directors to mortgage the corporate property. *Wall v. Rothrock*, 171 N. C. 388, 88 S. E. 633 (1916).

Reference to Forms of Probate Sufficient in Law.—This section providing that it shall not exclude "other forms of probate which would be deemed sufficient in law," can only refer to forms of probate deemed sufficient by the common law, under which a certificate, showing that the officer whose duty it was to affix the seal acknowledged that he did so, is sufficient. *National Bank v. Hill*, 226 F. 102 (1915).

Substantial Compliance Sufficient.—The probate of a deed of a corporation is sufficient if it substantially shows the facts required by this section which expressly provides that the form prescribed “shall not exclude other forms of probate.” Board v. Wills & Sons, 236 F. 362 (1916).

Where the probate of a corporation’s deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166 (1922).

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. Merchants, etc., Bank v. Pearson, 186 N. C. 609, 120 S. E. 210 (1923).

Same—Seal of Corporation.—It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as “the grantor, for the purpose therein expressed,” it is sufficient;

and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word “seal” enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the “seal” seems to be cured under the provisions of § 47-72, and as to signatures of the officials by § 47-73. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166 (1922).

What Does Not Constitute Substantial Compliance.—When it does not appear from the probate of a corporation’s deed to lands that the seal affixed is the common seal of the corporation, or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with this section, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748 (1910).

A corporation’s deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be “his” act and deed, as such. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748 (1910).

Acknowledgment of Individuals Instead of Officers.—The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers, is fatally defective and its registration, in consequence, is a nullity. Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884 (1898).

§ 47-42. Attestation of banking corporation conveyances by cashier.—In all forms of proof and certificate for deeds and conveyances executed by banking corporations, which corporations have no secretary, the cashier of said banking corporation shall attest such instruments; all deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated. (1939, c. 20, s. 2½.)

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.—When an instrument purports to be signed by parties acting through another by virtue of the execution of a power of attorney, the following form of certificate shall be deemed sufficient, but shall not exclude other forms which would be deemed sufficient in law :

North Carolina,County.

I (here give name of the official and his official title), do hereby certify that (here give name of attorney in fact), attorney in fact for (here give names of parties who executed the instrument through attorney in fact), personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of

parties who executed the instrument through attorney in fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and the county and state of recordation), on the (day of month, month, and year of recordation), and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said (here give name of attorney in fact) acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney in fact).

WITNESS my hand and official seal, this day of, (year)

(Official seal.)

.....
Signature of Officer

(1941, c. 238.)

Cross References.—For amendment of registration of power of attorney, see § this section, see § 47-43.1 and note. As to 47-28.

§ 47-43.1. Execution and acknowledgment of instruments by attorneys or attorneys in fact.—When an instrument purports to be executed by parties acting through another by virtue of a power of attorney, it shall be sufficient if the attorney or attorney in fact signs such instrument either in the name of the principal by the attorney or attorney in fact or signs as attorney or attorney in fact for the principal; and if such instrument purports to be under seal, the seal of the attorney in fact shall be sufficient. For such instrument to be executed under seal, the power of attorney must have been executed under seal. (1949, c. 66, s. 1.)

Editor's Note.—Section 1 of the act inserting the above section provides that § 47-43 is amended by adding § 47-43.1 at the end thereof. Section 2 of the act, read in conjunction with section 4, provides that all instruments executed prior to

February 11, 1949, which satisfy the requirements of the act, and are otherwise valid as to form and substance, shall be deemed sufficient and valid in law.

For brief comment on this section, see 27 N. C. Law Rev. 421.

§ 47-44. Clerk's certificate upon probate by justice of peace.—When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this State, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of and State (or territory) of, and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this day of, A. D.

(Official seal.)

.....
(Signature of officer.)

(1899, c. 235, s. 8; Rev., s. 1006; C. S., s. 3327.)

§ 47-45. Clerk's certificate upon probate by nonresident official without seal.—When the proof or acknowledgment of any instrument is had be-

fore any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

.....County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of and state of (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this day of, A. D.

(Official seal.)

.....
(Signature of Clerk.)

(1899, c. 235, s. 8; Rev., s. 1007; C. S., s. 3328.)

§ 47-46. **Verification; form of entry.**—The registers of deeds in the several counties of the State shall, after each instrument or document has been transcribed on the record, verify the record with the original and the entry of record shall read “Recorded and Verified,” and the same shall be without extra charge. (1929, c. 320, s. 1.)

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. **Defective order of registration; “same” for “this instrument.”**—Where instruments were admitted to registration prior to March 2, 1905, and the clerk’s order for the registration used the word “same” in place of “this instrument,” the said registrations are good and valid. (1905, c. 344; Rev., s. 1010; C. S., s. 3329.)

§ 47-48. **Clerk’s certificate failing to pass on all prior certificates.**—When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to January first, one thousand nine hundred and forty-five. (1917, c. 237; C. S., s. 3330; 1945, c. 808, s. 1.)

Editor’s Note.—The 1945 amendment added the second sentence.

§ 47-49. **Defective certification or adjudication of clerk, etc., admitting to registration.**—In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered,

with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the State of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgment of said instruments were correct or in due form. (1919, c. 248; C. S., s. 3331.)

§ 47-50. Order of registration omitted.—In all cases prior to March 3, 1949, where it appears from the records in the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly acknowledged, as required by the laws of the State of North Carolina, and the clerk or deputy clerk of the superior court of such county has properly proved and adjudged that the certificate or certificates of the official before whom such acknowledgment was taken is in due form, except that the order for registration by said clerk was omitted, any and all such probates and registration are hereby validated, and the record of such deeds of conveyance, or other, instruments authorized or required to be registered, may be read in evidence upon the trial or hearing of any cause with the same force and effect as if the same had been duly ordered registered. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C. S., s. 3332; 1941, cc. 187, 229; 1949, c. 493.)

Editor's Note.—The 1949 amendment changed the date from January 1, 1941 to March 3, 1949.

§ 47-51. Official deeds omitting seals.—All deeds executed prior to July 1, 1939, by any sheriff, commissioner, receiver, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C. S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13.)

Editor's Note.—The 1924 and 1941 amendments each changed the date mentioned in this section.

§ 47-52. Defective acknowledgment on old deeds validated.—The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bears date prior to January first, one thousand nine hundred and seven (1907) where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal, and where the certificate of said officer appears otherwise to be genuine. (1933, c. 439.)

§ 47-53. Probates omitting official seals, etc.—In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner,

clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C. S. C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, one thousand nine hundred and forty-five: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C. S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2.)

Editor's Note.—The 1945 amendment inserted the words "or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto." It also in-

serted the words "or where the officer uses 'notarial' in his or her certificate and signature shows that 'C. S. C.,' or 'clerk of superior court,' or similar exchange of capacity, and the word 'seal' follows the signature."

§ 47-54. Registrations by register's clerks or deputies.—All registration of deeds and other instruments heretofore made by the several registers of deeds of the several counties of the State by their deputies and clerks, and signed in the name of the register of deeds by a deputy or clerk, and when said registration is in all other respects regular, are hereby validated and declared of the same force and effect as if signed in the name of the register and not by a deputy or clerk. (1911, c. 184, s. 1; C. S., s. 3335.)

§ 47-55. Before officer in wrong capacity or out of jurisdiction.—All deeds, conveyances, or other instruments permitted by law to be registered in this State, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the State, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1; C. S., s. 3336.)

Deeds, etc., Ordered to Be Registered by Certain Justices Validated.—Public Laws 1927, c. 189, s. 2, provides that all deeds, conveyances, or other instruments permitted by law to be registered in this State which have been probated or ordered to be registered by any of the several justices of the peace appointed under Public Laws 1921, c. 237, since the first Monday in April, nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said chapter, are hereby declared to have been duly

proved, probated and recorded, and to be valid.

Validating Acts Not to Affect Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates, while good, as between the parties and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. *Gordon v. Collett*, 107 N. C. 362, 12 S. E. 332 (1890); *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501 (1893).

§ 47-56. Before justices of peace, where clerk's certificate or order of registration defective.—In every case where it appears from the record of the office of any register of deeds in this State that a justice of the peace in this State has taken and certified the proof of any instrument required by law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered, prior to the first day of January, one thousand nine hundred and seven, in the county where the lands described in the instrument are located, without or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are validated; but as against creditors or purchasers from donor, bargainor or lessor, only from February first, nineteen hundred and seven. (1907, c. 83, s. 1; C. S., s. 3337.)

Local Modification.—Clay: 1933, c. 530.

§ 47-57. Probates on proof of handwriting of maker refusing to acknowledge.—All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (1897, c. 28; Rev., s. 1026; C. S., s. 3338.)

§ 47-58. Before judges of Supreme Court or superior courts or clerks before 1889.—Wherever the judges of the Supreme Court or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of *femes covert*, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (1871-2, c. 200, s. 1; Code, s. 1260; 1889, c. 252; 1891, c. 484; Rev., s. 1009; C. S., s. 3339.)

In General.—This section was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. *Weston v. Roper Lumber Co.*, 160 N. C. 263, 75 S. E. 800 (1912).

Constitutionality.—This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. *Gordon v. Collett*, 107 N. C. 362, 12 S. E. 332 (1890).

Liberal Construction.—The statutes validating defective probates and registrations of deeds are remedial, and must be liberally construed to embrace all cases fairly within their scope. *Weston v. Roper Lumber Co.*, 160 N. C. 263, 75 S. E.

800 (1912).

Defective Probates of County Courts Embraced.—Where it is argued by counsel that this section does not refer to probates taken by the county courts, but to those of the clerks of said courts, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. *Weston v. Roper Lumber Co.*, 160 N. C. 263, 75 S. E. 800 (1912).

Intentional Breaches of Authority Not Validated.—There was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the extent of the power affirmatively conferred by law, but in disregarding a plain prohibition of the statute, and committing a breach of propriety in break-

ing over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. *Freeman v. Person*, 106 N. C. 251, 10 S. E. 1037 (1890).

Probate of Interested Officer.—This section has been considered in *Freeman v. Person*, 106 N. C. 251, 10 S. E. 1037 (1890), and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Acts of Deputy Clerks.—At the time, and prior to the enactment of this section, deputy clerks could not take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they and the judges of the courts had authority to do so, and in many instances they under-

took to exercise such authority. To cure errors in this respect, and render effectual many official acts done by honest misapprehension of the law, the legislature enacted this section. *Tatom v. White*, 95 N. C. 453 (1886). As to authority of deputy clerks to take probate on instruments, see § 47-1.

This section validates probates of deeds and privy examinations taken before a deputy clerk prior to January 1, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. *Gordon v. Collett*, 107 N. C. 362, 12 S. E. 332 (1890).

Scope of Original Section.—This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to February 12, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code in 1883. *Tatom v. White*, 95 N. C. 453 (1886).

§ 47-59. **Before clerks of inferior courts.**—All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Buncombe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, one thousand eight hundred and ninety-three. (1885, cc. 105, 108; 1889, cc. 143, 463; Rev., ss. 1020, 1021; C. S., s. 3340.)

§ 47-60. **Order of registration by judge, where clerk party.**—All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the Supreme Court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid. (1893, c. 3, s. 2; Rev., s. 1011; C. S., s. 3342.)

§ 47-61. **Order of registration by interested clerk.**—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to which the clerks of the superior courts are parties, or in which they have an interest, and which have been registered on the order of such clerks or their deputies, or by assistant clerks of the superior courts, on proof of acknowledgment taken before such clerks, assistant clerks, deputy clerks, justices of the peace or notaries public, be, and the same are declared valid. (1891, c. 102; 1899, c. 258; 1905, c. 427; Rev., s. 1015; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; C. S., s. 3343; 1935, c. 235.)

Editor's Note.—The 1935 amendment changed the date from "prior to the fourth day of March, 1908" to "prior to the fif-

teenth day of January, 1935." It also validated registration on the order of deputies or assistant clerks.

§ 47-62. **Probates before interested notaries.**—The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments. (Ex. Sess. 1908, c. 105, s. 2; C. S., s. 3344.)

Cross Reference.—See § 47-95.

§ 47-63. **Probates before officer of interested corporation.**—In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C. S., s. 3345.)

Cross Reference.—See § 47-92.

The grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, but a chattel mortgage to a bank

will not be declared void because the acknowledgment thereof was taken by its cashier. *Bank of Duplin v. Hall*, 203 N. C. 570, 166 S. E. 526 (1932).

§ 47-64. **Probates before officers, stockholders or directors of corporations prior to January 1, 1945.**—No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and forty-five, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. (Ex. Sess. 1913, c. 41; C. S., s. 3346; 1929, c. 24, s. 1; 1943, c. 135; 1945, c. 860.)

Editor's Note.—The 1929 amendment rewrote this section. The 1943 amendment changed the year named in this section

from 1929 to 1943, and the 1945 amendment changed the year to 1945.

§ 47-65. **Clerk's deeds, where clerk appointed himself to sell.**—All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, one thousand nine hundred and five, in any proceeding before him in which he has appointed himself or his deputy to make the sale of real property or other property are hereby validated. (1911, c. 146, s. 1; C. S., s. 3347.)

§ 47-66. **Certificate of wife's "previous" examination.**—All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed. (1893, c. 130; Rev., s. 1016; C. S., s. 3348.)

§ 47-67. **Probates of husband and wife in wrong order.**—All probates prior to March 6, 1893, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy

examination of his wife are validated. (1893, c. 293; Rev., s. 1017; C. S., s. 3349.)

Cross Reference.—As to order of acknowledgment being immaterial, see § 39-8.

Rights of Third Parties Acquired before Statute Cannot Be Divested.—If third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. *Smith v. Castrix*, 27 N. C.

318 (1844); *Robinson v. Willoughby*, 70 N. C. 358 (1874); *Gordon v. Collett*, 107 N. C. 362, 12 S. E. 332 (1890); *Long v. Crews*, 113 N. C. 256, 18 S. E. 499 (1893); *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501 (1893); *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99 (1894); *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691 (1897).

Applied in *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691 (1897).

§ 47-68. **Probates of husband and wife before different officers.**—Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this State or one in this State and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this State, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word "probate," as used in this section, shall include privy examination of the wife. (1895, c. 120; Rev., s. 1018; 1907, c. 34, s. 1; C. S., s. 3350.)

Cross Reference.—As to acknowledgment before different officers at different times and places, see § 39-8.

§ 47-69. **Wife free trader; no examination or husband's assent.**—In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. (Ex. Sess. 1913, c. 54, s. 1; C. S., s. 3351.)

Applied in *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834 (1921).

§ 47-70. **By president and attested by treasurer under corporate seal.**—All deeds and conveyances for lands in this State, made by any corporation of this State, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the State of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this State where the title

of said lands shall come in controversy. (1905, c. 307; Rev., s. 1028; C. S., s. 3352.)

§ 47-71. By president and attested by witness before January, 1900.—Any deed or conveyance for land in this State, made prior to January first, one thousand nine hundred, by the president of any corporation duly chartered under the laws of this State, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be admitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this State at the date of the execution of said deed. (1909, c. 859, s. 1; C. S., s. 3353.)

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1927.—In all cases prior to the first day of January, one thousand nine hundred and twenty-seven, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; C. S., s. 3354; 1927, c. 126.)

§ 47-73. Probated and registered on oath of subscribing witness.—In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2; C. S., s. 3355.)

§ 47-74. Certificate alleging examination of grantor instead of witness.—Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated. (1925, c. 84.)

§ 47-75. Proof of corporate articles before officer authorized to probate.—All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages, are ratified. (1901, c. 170; Rev., s. 1027; C. S., s. 3356.)

§ 47-76. Before officials of wrong state.—In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument

has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probates and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. (1905, c. 505; Rev., s. 1013; C. S., s. 3357.)

§ 47-77. Before notaries and clerks in other states.—All deeds and conveyances made for lands in this State which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of Congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (1883, c. 129, ss. 1, 2; Code, ss. 1262, 1263; 1885, c. 11; Rev., ss. 1022, 1023; 1915, c. 213; C. S., s. 3358.)

Constitutionality.—The legislature has the constitutional right to enact statutes making valid deeds theretofore invalid by reason of defective probate, when no vested rights are impaired. *Penland v. Barnard*, 146 N. C. 378, 59 S. E. 1109 (1907).

Registration upon Certificate of Commissioner of Deeds from Another State.—A deed registered in the proper county upon the certificate of a commissioner of

deeds from another state must have the fiat from the clerk ordering it to be registered, or the registration will be invalid. This defect is not cured by this section. *Cozard v. McAden*, 148 N. C. 10, 61 S. E. 633 (1908). See § 47-81.

Applied, as to deed probated in Tennessee in 1869, in *Penland v. Barnard*, 146 N. C. 378, 59 S. E. 1109 (1907).

§ 47-78. Acknowledgment by resident taken out of State.—When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this State has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (1895, c. 181; Rev., s. 1019; C. S., s. 3359.)

§ 47-79. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this State, executed prior to January first, one thousand nine hundred and thirteen, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this State, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this State in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon are validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C. S., s. 3360.)

§ 47-80. Sister state probates without governor's authentication.

—In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this State then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (1901, c. 39; Rev., s. 1014; C. S., s. 3361.)

§ 47-81. **Before commissioners of deeds.**—Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. (1913, c. 39, s. 2; C. S., s. 3362.)

Section Cannot Interfere with Vested Rights.—This section is remedial in character and beneficent in purpose, yet it will not be permitted to impair or to interfere with the vested rights of others. *Champion Fibre Co. v. Cozard*, 183 N. C. 600, 112 S. E. 810 (1922).

This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. *Champion Fibre Co. v. Cozard*, 183 N. C. 600, 112 S. E. 810 (1922).

§ 47-81.1. **Before commissioner of oaths.**—All deeds, mortgages or other instruments required to be registered, which prior to March 5, 1943, have been probated by a commissioner of oaths and ordered registered, are hereby validated and confirmed as properly probated and registered instruments. (1943, c. 471, s. 2.)

§ 47-81.2. **Before army, etc., officers.**—In all cases where instruments and writings have been proved or acknowledged before any officer of the army of the United States or United States marine corps having the rank of captain or higher, before any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, such proofs or acknowledgments, where valid in other respects, are hereby ratified, confirmed and declared valid. (1943, c. 159, s. 2.)

§ 47-82. **Foreign probates omitting seals.**—In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice consul, vice consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this State, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office,

or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. (1913, c. 69, s. 1; C. S., s. 3363.)

§ 47-83. **Before consuls general.**—Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen hundred and thirteen, been proved or acknowledged before a “consul general,” is validated; and its registration is authorized and validated. (Ex. Sess. 1913, c. 72, s. 2; C. S., s. 3364.)

§ 47-84. **Before vice consuls and vice consuls general.**—The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this State prior to January first, one thousand nine hundred and five, upon the certificate of any vice consul or vice consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice consul or vice consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (1905, c. 451, s. 2; Rev., s. 1024; C. S., s. 3365.)

Applied in *Powers v. Baker*, 152 N. C. 718, 68 S. E. 203 (1910).

§ 47-85. **Before masters in chancery.**—All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registrations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this State in force at the time and as registrations thereof and certified copies of such registrations. Nothing in this section contained shall have effect to deprive anyone of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered. (1911, c. 10; C. S., s. 3366.)

§ 47-86. **Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted.**—In all cases where, prior to the first day of January, one thousand eight hundred and ninety-one, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this State and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and

hereby is to all intents and purposes validated. (1921, c. 15, ss. 1, 2; C. S., s. 3366(a).)

§ 47-87. Validation of probates by different officers of deeds by wife and husband.—In all cases where, prior to the second day of March, one thousand eight hundred and ninety-five, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C. S., s. 3366(b).)

§ 47-88. Registration without formal order validated.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this State, under the provisions of section twenty of chapter thirty-five of Battle's Revisal, during the time said chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby are, to all intents and purposes validated. (1921, c. 19, ss. 2, 4; C. S., s. 3366(c).)

§ 47-89. Same.—In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of §§ 47-87 and 47-88, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is to all intents and purposes validated. (1921, c. 19, ss. 3, 4; C. S., s. 3366(d).)

§ 47-90. Validation of acknowledgments taken by notaries public holding other office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1921, c. 21; C. S., s. 3366(e).)

§ 47-91. Validation of certain probates of deeds before consular agents of the United States.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time chapter thirty-five of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said chapter thirty-five of Battle's Revisal. (1921, c. 157; C. S., s. 3366(f).)

§ 47-92. **Probates before stockholders and directors of banks.**—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred and twenty-three (1923), shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation. (1923, c. 17; C. S., s. 3366(g).)

Editor's Note.—A provision for a similar purpose is found in § 47-63.

§ 47-93. **Acknowledgments taken by stockholder, officer, or director of bank.**—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation. (Ex. Sess. 1924, c. 68.)

§ 47-94. **Acknowledgment and registration by officer or stockholder in building and loan association.**—All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association prior to the first day of January, one thousand nine hundred and twenty-nine, shall not be, nor held to be, invalid by reason of the fact that the clerk of the superior court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the superior court, or by any deputy or assistant clerk of the superior court, be or held to be invalid by reason of the fact that the clerk of the superior court, or deputy, or assistant clerk of the superior court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any building and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1.)

Editor's Note.—The 1929 amendment changed the date in the first paragraph from August 10, 1924 to January 1, 1929.

§ 47-95. **Acknowledgments taken by notaries interested as trustee or holding other office.**—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1939, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C. S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321.)

Editor's Note.—The 1931 amendments changed the date in this section and made it applicable to justices of peace. The 1939 amendment merely changed the date.

It is suggested in 1 N. C. Law Rev. 302, that this section should be considered as an addition to § 47-62.

§ 47-96. **Validation of instruments registered without probate.**—In every case where it shall appear from the records in the office of the register of

deeds of any county in the State that any instrument of writing required or allowed by law to be registered prior to January first, eighteen hundred and sixty-nine, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this State, if otherwise competent. (1923, c. 215, s. 1; C. S., s. 3366(i).)

Local Modification.—Cherokee, Graham: 1935, c. 92.

made prior to 1869, and that this and § 47-98 should be considered as amendments or additional sections to chapter 8, article 2 of the General Statutes.

Editor's Note.—It is suggested in 1 N. C. Law Rev. 302, that this section probably means that the registration must have been

§ 47-97. Validation of corporate deed with mistake as to officer's name.—In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 47-98. Registration on defective probates beyond State.—In every case where it shall appear from the records in the office of the register of deeds of any county in this State that any instrument required or allowed by law to be registered, bearing date prior to the year one thousand eight hundred and thirty-five, executed by any person or persons residing in any of the United States, other than this State, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken thereto, before any officer or person authorized by any of the laws of this State in force prior to the said year one thousand eight hundred and thirty-five to take such proofs, privy examinations and acknowledgments, and the said instrument has been registered in the proper county without the certificate of the governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the Secretary of State of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as aforesaid, and without an order of registration made by a court or judge in this State having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this State. (1923, c. 215, ss. 2, 3; C. S., s. 3366(j).)

Cross Reference.—See note to § 47-96.

§ 47-99. Certificate of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the superior court of the State prior to March 1, 1945, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248; 1945, c. 798.)

Editor's Note.—The 1945 amendment substituted "March 1, 1945" for "March 10, 1925."

§ 47-100. Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, 1910, purporting to convey lands, have been registered in the office of the register of deeds

of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, nineteen hundred and ten, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1.)

Editor's Note.—By express provision this section does not affect actions and proceedings pending at the time of its ratification, which was on the 21st of February, 1929.

§ 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence.—In all cases where deeds appear to have been executed for land prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this State, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this State as if the same had been properly probated and recorded: Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this section shall not apply to creditors or purchasers, but as to them the same shall stand as if this section had not been passed, and shall only apply to deeds executed prior to January first, nineteen hundred. (1929, c. 14, s. 1.)

§ 47-102. Absence of notarial seal.—Any deed executed prior to the first day of January, nineteen hundred and forty-five, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472; 1945, c. 808, s. 3.)

Editor's Note.—The 1943 amendment from 1910 to 1935, and the 1945 amendment changed the year named in this section changed it to 1945.

§ 47-103. Deeds probated and registered with notary's seal not affixed, validated.—Any deed conveying or affecting real estate executed prior to January 1, 1932, and ordered registered and recorded in the county in which the land lies prior to said date, from which deed and the acknowledgment and privy examination thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to be sufficient and valid, and the probate and registration thereof are hereby in all respects validated and confirmed to the same effect as if the seal of said notary was affixed to the acknowledgment or privy examination thereof. (1941, c. 20.)

§ 47-104. Acknowledgments of notary holding another office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such

acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1935, c. 133; 1937, c. 284.)

Editor's Note.—The 1937 amendment re-enacted this section without change.

§ 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor.—In all cases where a deed or deeds of mortgages or other conveyances of land dated prior to the first (1st) day of January, one thousand nine hundred and twenty-six (1926), purporting to convey lands have been registered in the office of the register of deeds of the county where the lands conveyed in said deeds are located prior to said first (1st) day of January, one thousand nine hundred and twenty-six (1926), and the acknowledgments or proof of execution of such deed or deeds and the private examination of any married woman who is a grantor in such deed or deeds have been taken as to some of the grantors, and the private examination of any married woman grantor in such deed has been taken by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment, proof of execution and the private examination of such married woman, evidenced by the certificate thereof on such deed and the registration thereof as above described and set forth, shall be and the same are hereby declared to be in all respects valid, and such deed or deeds or other conveyances of land are declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution or taking the private examination of such married woman and certifying thereto upon such deed or deeds had not been named as grantor therein and had not been interested therein in any way whatsoever. (1937, c. 91.)

§ 47-106. Certain instruments in which clerk of superior court was a party, validated.—In all cases where a deed, or other conveyance of land dated prior to the first day of January, one thousand nine hundred and eighteen, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution, privy examination of a married woman, and, or, order of registration had and taken before a deputy clerk of the superior court of said county, and the instrument registered upon the order of said deputy clerk of the superior court in the office of the register of deeds of said county, within two years from the date of said instrument, such instrument and its probate are hereby in all respects validated and confirmed; and such instrument, together with such defective acknowledgment, proof of execution, privy examination of a married woman, order of registration, and the certificate of such deputy clerk of the superior court, and the registration thereof, are hereby declared in all respects to be valid and binding upon the parties of such instrument and their privies, and such instrument so probated and recorded together with its certificates may be read in evidence as a muniment of title, for all intents and purposes, in any of the courts of this State. (1939, c. 261.)

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.—All deeds, deeds of trust, conveyances or other instruments permitted by law to be registered in this State, which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which a clerk of the superior court has adjudged the certificate of the officer before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, are hereby declared to have been duly proved, probated and recorded and to be valid. (1941, c. 30.)

§ 47-108. **Acknowledgments before notaries under age.**—All acts of notaries public for the State of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

§ 47-108.1. **Certain corporate deeds, etc., declared validly admitted to record.**—Deeds, conveyances and other instruments of writing of corporations entitled to registration, which have been heretofore duly executed in the manner required by law, by the proper officers of the corporation, and which have prior to March 8, 1943, been admitted to registration, on the acknowledgment or proof of the proper executing officer, in the manner required by law, shall be, and the same are hereby declared to be, in all respects validly admitted to record, although such officer at the date of such acknowledgment or proof had ceased to be an officer of such corporation, or such corporation at the date of such acknowledgment or proof had ceased to exist. (1943, c. 598.)

§ 47-108.2. **Acknowledgments and examinations before notaries holding some other office.**—In every case where deeds or other instruments have been acknowledged, and where privity examination of wives had, before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been otherwise duly probated and recorded, such acknowledgment taken by, and such privity examination had before such notary public is hereby declared to be sufficient and valid. (1945, c. 149.)

§ 47-108.3. **Validation of acts of certain notaries public prior to November 26th, 1921.**—In all cases where prior to November 26th, 1921, instruments by law, or otherwise, required, permitted or authorized to be registered, certified, probated, recorded or filed with certificates of notaries public showing the acknowledgments or proofs of execution thereof as required by the laws of the State of North Carolina have been registered, certified, probated, recorded or filed, such registration, certifications, probates, recordations and filings are hereby validated and made as good and sufficient as though such instruments had been in all respects properly registered, certified, probated, recorded or filed, notwithstanding there are no records in the office of the Governor of the State of North Carolina or in the office of the clerk of the superior court of the county in which such notaries public were to act that such persons acting as such notaries public had ever been appointed or subscribed written oaths or received any certificates or commissions or were qualified as notaries public at the time of the performance of the acts hereby validated. (1947, c. 102.)

Editor's Note.—The act inserting this provides that it shall not apply to pending section, which was ratified Feb. 19, 1947, litigation.

§ 47-108.4. **Acknowledgments, etc., of instruments of married women made since February 7, 1945.**—All acknowledgments, probates and registrations of instruments wherein any married woman was a grantor, including deeds and mortgages on land, made since February 7th, 1945, are hereby validated, approved and declared of full force and effect. (1947, c. 991, s. 2.)

Editor's Note.—The act from which this provides that it shall not apply to pending section was codified, effective April 5, 1947, litigation.

§ 47-108.5. **Validation of certain deeds executed in other states where seal omitted.**—All deeds to lands in North Carolina, executed prior to January 1, 1948, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds

have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 475.

§ 47-108.6. Validation of certain conveyances of foreign dissolved corporations.—In all cases when, prior to the first day of January, 1947, any dissolved foreign corporation has, prior to its dissolution, by deed of conveyance purported to convey real property in this State, and said instrument recites a consideration, is signed by the proper officers in the name of said corporation, sealed with the corporate seal and duly registered in the office of the register of deeds of the county where the land described in said instrument is located, but there is error in the attestation clause and acknowledgment in failing to identify the officers signing said deed and to recite that authority was duly given and that the same was the act of said corporation, said deed shall be construed to be a deed of the same force and effect as if said attestation clause and acknowledgment were in every way proper. (1949, c. 1212.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 440.

§ 47-108.7. Validation of acknowledgments, etc., by deputy clerks of superior court.—All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probating wills, deeds and other instruments required or permitted by law to be recorded are hereby validated: Provided, nothing in this section shall affect pending litigation. (1949, c. 1072.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.8. Acts of registers of deeds or deputies in recording plats and maps by certain methods validated.—All acts heretofore performed by a register of deeds, or a deputy register of deeds in recording plats and maps by transcribing a correct copy thereof or permanently attaching the original to the records in a book designated "Book of Plats" is hereby validated the same as if said plats had been recorded as required by G. S. § 47-30: Provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 1073.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.9. Validation of probate of instruments pursuant to § 47-12.—The probates of all instruments taken on and after February 7, 1945, in accordance with the provisions of G. S. § 47-12, as amended by § 11 of chapter 73 of the Session Laws of 1945 and § 1 of chapter 991 of the Session Laws of 1947 and as further amended by §§ 2 and 3 of chapter 815 of the Session Laws of 1949, are hereby in all respects validated; provided, however, that this section shall not apply to pending litigation. (1949, c. 815, s. 3.)

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the army, navy, marine corps and other branches of the armed forces of the United States. Said

book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; C. S., s. 3366(k); 1945, c. 659, s. 2.)

Editor's Note.—The 1945 amendment substituted in the first sentence the words “army, navy, marine corps and other branches of the armed forces” for the words “military and naval forces.”

§ 47-110. Registration of official discharge or certificate of lost discharge.—Upon the presentation to the register of deeds of any county of any official discharge, or official certificate of lost discharge, from the army, navy, marine corps, or any other branch of the armed forces of the United States he shall record the same without charge in the book provided for in § 47-109. (1921, c. 198, s. 2; C. S., s. 3366(1); 1943, c. 599; 1945, c. 659, s. 1.)

Local Modification.—Alleghany: 1945, c. 877. fee for registration, and the 1945 amendment provided that the recordation shall be without charge.

Editor's Note.—The 1943 amendment struck out the former provision relating to

§ 47-111. Inquiry by register of deeds; oath of applicant.—If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy, or marine corps of the United States, or an official certificate of lost discharge, he shall have power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

“I,, being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the Government of the United States; and that no alterations have been made therein by me, or by any person to my knowledge.

.....

Subscribed and sworn to before me this day of 19.....

.....

(1921, c. 198, s. 3; C. S., s. 3366(m).)

§ 47-112. Forgery or alteration of discharge or certificate; punishment.—Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the Government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1921, c. 198, s. 4; C. S., s. 3366(n).)

§ 47-113. Certified copy of registration; fee.—Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents therefor: Provided, that the register of deeds shall furnish such certified copy without charge to any member or former member of the armed forces of the United States who applies therefor. (1921, c. 198, s. 5; C. S., s. 3366(o); 1945, c. 659, s. 3.)

Editor's Note.—The 1945 amendment added the proviso.

§ 47-114. **Payment of expenses incurred.**—The county commissioners of each county are hereby authorized and empowered in their discretion to appropriate from the general fund of the county an amount sufficient to cover any additional expense incurred by the register of deeds of the county in carrying out the purposes of this article. (1945, c. 659, s. 3½.)

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115. **Execution in name of either principal or attorney in fact; indexing in names of both.**—Any instrument in writing executed by an attorney in fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed in the name of the principal by the attorney in fact or by the attorney in fact designating himself as attorney in fact for the principal, from which it will appear that it was the purpose of the attorney in fact to be acting for and on behalf of the principal mentioned or referred to in the instrument. This section shall not affect any pending litigation or the status of any matter heretofore determined by the courts. This section shall apply to all such instruments heretofore or hereafter executed. Registers of deeds shall be required to index all such instruments filed for registration both in the name of the principal or principals executing the power of appointment and in the name of the attorney in fact executing the instrument: Provided, that instruments heretofore registered and indexed only in the name of the attorney in fact shall be valid and in all respects binding upon the principal or principals insofar as validity or registration is concerned. (1945, c. 204.)

ARTICLE 7.

Private Examination of Married Women Abolished.

§ 47-116. **Repeal of laws requiring private examination of married women.**—All deeds, contracts, conveyances, leaseholds or other instruments executed from and after the ratification of this section shall be valid for all purposes without the separate, privity, or private examination of a married woman where she is a party to or a grantor in such deed, contract, conveyance, leasehold or other instrument, and it shall not be necessary nor required that the separate or privity examination of such married woman be taken by the certifying officer. From and after the ratification of this section all laws and clauses of laws contained in any section of the General Statutes requiring the privity or private examination of a married woman are hereby repealed. (1945, c. 73, s. 21.)

Division IX. Domestic Relations.

	PAGE
Chap. 48. Adoption of Minors	589
49. Bastardy	602
50. Divorce and Alimony	612
51. Marriage	649
52. Married Women	662

Chapter 48.

Adoption of Minors.

Sec.	Sec.
48-1. Legislative intent; construction of chapter.	48-19. Report on placement after interlocutory decree.
48-2. Definitions.	48-20. Dismissal of proceeding.
48-3. Who may be adopted.	48-21. Final order of adoption; termination of proceeding within three years.
48-4. Who may adopt children.	48-22. Contents of final order.
48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.	48-23. Effect of final order.
48-6. When consent of father not necessary.	48-24. Recordation of adoption proceedings.
48-7. When consent of parents or guardian necessary.	48-25. Record not to be made public; violation a misdemeanor.
48-8. Capacity of parents to consent.	48-26. Procedure for opening record for necessary information.
48-9. When consent may be given by persons other than parents.	48-27. Procedure when appeal is taken.
48-10. When child's consent necessary.	48-28. Questioning validity of adoption proceeding.
48-11. Consent not revocable.	48-29. Change of name; report to State Registrar; new birth certificate to be made.
48-12. Nature of proceeding; venue.	48-30. Guardian appointed when custody granted of child with estate.
48-13. Reference to parental status.	48-31. Rights of adoptive parents.
48-14. Use of original name of child unnecessary; name used in proceedings for adoption.	48-32. Readoption of child previously adopted.
48-15. Petition for adoption.	48-33. Procuring custody of child by forfeiting parents declared crime.
48-16. Investigation of conditions and antecedents of child and of suitability of foster home.	48-34. Past adoption proceedings validated.
48-17. Interlocutory decree of adoption.	48-35. Prior proceedings not affected.
48-18. Effect of interlocutory decree.	

§ 48-1. **Legislative intent; construction of chapter.**—The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—

(1) The primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure.

(2) The secondary purpose of this chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect foster parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

(3) When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed. (1949, c. 300.)

Editor's Note.—The 1949 act rewrote this chapter of the General Statutes as amended by Session Laws 1945, cc. 155, 787 and 788, and inserted the present thirty-five sections in lieu of the former fifteen sections. For discussion of the 1949 act, see 27 N. C. Law Rev. 418.

The original chapter relating to the adoption of minors was codified from Public Laws 1935, c. 243, as amended by Public Laws 1937, c. 422; 1939, cc. 32, 132; 1941, c. 281; 1943, c. 735.

For critical analysis and appraisal of the former chapter, see 13 N. C. Law Rev.

355. For article entitled "Thwarting Adoptions," see 19 N. C. Law Rev. 127.

Act Rewriting Chapter Inoperative.—Chapter 885 of the Session Laws of 1947, purporting to rewrite this chapter, was held inoperative and void by reason of the fact that the enacting clause prescribed by Art. II, § 21, of the Constitution of North Carolina was omitted. In re Advisory Opinion, 227 N. C. 708, 43 S. E. (2d) 73 (1947). For discussion of the invalid act, see 25 N. C. Law Rev. 392, 408.

Construction of Former Chapter.—Under this chapter as it formerly stood, it was held that since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620 (1940).

Construction Should Be Fair and Reasonable.

sonable.—The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statute should not be narrow or technical, but rather fair and reasonable, where all material provisions of the statute have been complied with. *Locke v. Merrick*, 223 N. C. 798, 28 S. E. (2d) 523 (1944).

Juvenile Court Act Not an Amendment.—The Juvenile Court Act was not an amendment to the former adoption law, and did not affect the procedure therein prescribed for the adoption of minors. *Ward v. Howard*, 217 N. C. 201, 7 S. E. (2d) 625 (1940).

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, was not an adoption of a minor under the former chapter. *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398 (1938).

§ 48-2. **Definitions.**—In this chapter, unless the context or subject matter otherwise requires—

(1) "Adult person" means any person who has attained the age of twenty-one years.

(2) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the State Board of Public Welfare, or in the event that such agency is in another state or territory or in the District of Columbia, operating under a license to place children for adoption issued by a governmental authority of such state, territory, or the District of Columbia, empowered by law to issue such licenses.

(3) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child.

(4) "Readoption" means an adoption by any person of a child who has been previously legally adopted. (1949, c. 300.)

§ 48-3. **Who may be adopted.**—Any minor child, irrespective of place of birth or place of residence, may be adopted in accordance with the provisions of this chapter. (1949, c. 300.)

§ 48-4. **Who may adopt children.**—(a) Any person over twenty-one years of age may petition in a special proceeding in the superior court to adopt a minor child and may also petition for a change of the name of such child. If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.

(b) Provided, however, that if the spouse of the petitioner is a natural parent of the child to be adopted, such spouse need not join in the petition but need only to give consent as provided in G. S. § 48-7 (d).

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for one year next preceding the filing of the petition. (1949, c. 300.)

Cross Reference.—For cases decided under § 48-4 as it stood prior to the 1949 revision of this chapter, see note to § 48-7.

§ 48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.—(a) In all cases where a court of competent jurisdiction has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this chapter nor shall their consent be required.

(b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than ten days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place.

(c) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G. S. § 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk.

(d) A copy of the order of the court declaring a child abandoned must be filed in the proceeding with the petition in which case consent must be given or withheld in accordance with G. S. § 48-9, subsection (2). (1949, c. 300.)

Editor's Note.—All of the cases in the following note were decided under former § 48-10, to which this section corresponds, or under earlier provisions of the law.

Abandonment Judicially Determined.—Under the former law, the existence of abandonment as ground for an adoption without parental consent must be judicially determined. *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926).

Abandonment Must Be Willful.—Where there was evidence in behalf of the defendant father tending to show that the plaintiff took possession of his children against his will and prevented him from performing his parental duty, as well as evidence to the contrary, it was held that when the jury found for the defendant, the case did not fall within the meaning of the former section. *Howell v. Solmon*, 167 N. C. 588, 83 S. E. 609 (1914).

Purpose to Forego Parental Duties.—To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the

parent which evinces a purpose to forego the parental duties. *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926).

No abandonment was shown of an illegitimate child. *In re Jones*, 153 N. C. 312, 69 S. E. 217 (1910).

Parents Declared Unfit.—Former § 48-10, to which this section corresponds, provided that parents or guardians who had been declared by a juvenile court to be unfit to have the custody of the child were not necessary parties to adoption proceedings. It was held that this provision was intended to apply only to final, absolute and unconditional determination of unfitness, and not to a judgment of unfitness retained "for further orders as the continued welfare of said child and changing conditions may require." *In re Morris*, 224 N. C. 487, 31 S. E. (2d) 539 (1944).

Death by Wrongful Act.—The former section did not deprive the parent of the right to recover for the wrongful death of the child. *Avery v. Brantley*, 191 N. C. 396, 131 S. E. 721 (1926).

§ 48-6. When consent of father not necessary.—In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding. (1949, c. 300.)

Cross Reference.—For cases decided under § 48-6 as it stood prior to the 1949 revision of this chapter, see notes to § 48-23.

§ 48-7. When consent of parents or guardian necessary.—(a) Except as provided in G. S. § 48-5, and G. S. § 48-6, and if they are living and have not released all rights to the child and consented generally to adoption as provided in G. S. § 48-9, the parents or surviving parent or guardian of the person of the child

must be a party or parties of record to the proceeding and must give written consent to adoption, which must be filed with the petition.

(b) In any case where the parents or surviving parent or guardian of the person of the child whose adoption is sought are necessary parties and their address is known, or can by due and diligent search be ascertained, that fact must be made known to the court by proper allegation in the petition or by affidavit and service of process must be made upon such person as provided by law for service of process on residents of the State or by service of process on nonresidents as provided in G. S. § 1-104.

(c) If the address of such person cannot be ascertained for the purpose of service of process or service of process cannot be made as hereinbefore provided, that fact must be made known to the court by proper allegation in the petition or by affidavit to the effect that after due and diligent search such person cannot be found for the purpose of service of process. Service of process upon such person may then be made by publication of summons as provided by G. S. § 1-98 et seq., and as provided by law.

(d) When a stepparent petitions to adopt a stepchild, consent to the adoption must be given by the spouse of the petitioner, and this adoption shall not affect the relationship of parent and child between such spouse and the child. (1949, c. 300.)

Editor's Note.—As to revocability of consent in adoption proceedings, see 26 N. C. Law Rev. 293.

All of the cases in this note were decided under former § 48-4, to which this section corresponds, or under earlier provisions of the law.

Noncompliance Deprives Clerk of Jurisdiction.—In *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926), decided under similar provisions of a former law, it is said: "Upon the record in this case it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of

their person, [consequently] he had no jurisdiction of the subject matter." See note of this case in 5 N. C. Law Rev. 67.

Mother of illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption, or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. In *re Holder*, 218 N. C. 136, 10 S. E. (2d) 620 (1940).

Parent's consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child. In *re Holder*, 218 N. C. 136, 10 S. E. (2d) 620 (1940).

§ 48-8. Capacity of parents to consent.—A parent who has not reached the age of twenty-one years shall have legal capacity to give consent to adoption and to release such parent's rights in a child, and shall be as fully bound thereby as if said parents had attained twenty-one years of age. (1949, c. 300.)

§ 48-9. When consent may be given by persons other than parents.—(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person.

(1) When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a superintendent of public welfare of a county or to a licensed child placing agency and at the same time in writing has consented generally to adoption of the child, the superintendent of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county superintendent of public welfare may accept the surrender of a child who was born in the county or whose parent or parents have established residence in the county.

(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county

superintendent of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(b) The surrender of the child and consent for the child to be adopted given by the parent or guardian of the person to the superintendent of public welfare or to the licensed child placing agency shall be filed with the petition along with the consent of the superintendent of public welfare or of the executive head of the agency to the adoption prayed for in the petition.

(c) Where the child has been surrendered to an agency operating under the laws of another state, and authorized by such state to place children for adoption, the written consent of such agency shall be sufficient for the purposes of this chapter. (1949, c. 300.)

§ 48-10. When child's consent necessary.—In any proceeding under this chapter, a child who is twelve years of age or over or who becomes twelve years of age before the granting of the final order must also consent to the proposed adoption. (1949, c. 300.)

Cross Reference.—For cases decided under § 48-10 as it stood prior to the 1949 revision of this chapter, see note to § 48-5.

§ 48-11. Consent not revocable.—No consent described in G. S. §§ 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree or a final order of adoption when entering of an interlocutory decree has been waived in accordance with the provisions of G. S. § 48-21: Provided, no consent shall be revocable after six months from the date of the giving of the consent; provided further, that when the consent has been given generally to a superintendent of public welfare or to a duly licensed child placing agency, it shall not be revocable after thirty days from the date of the giving of the consent. When the consent of any person or agency is required under the provisions of this chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding. (1949, c. 300.)

Cross Reference.—For case decided under § 48-11 as it stood prior to the 1949 revision of this chapter, see note to § 48-34.

§ 48-12. Nature of proceeding; venue.—Adoption shall be by a special proceeding before the clerk of the superior court. The petition may be filed in the county:

- (1) Where the petitioners reside; or
- (2) Where the child resides; or
- (3) Where the child resided when it became a public charge; or
- (4) In which is located any licensed child placing agency or institution operating under the laws of this State and having custody of the child or to which the child shall have been surrendered as provided in G. S. § 48-9. (1949, c. 300.)

Child Committed to Children's Home Society.—In a case arising under this chapter before the 1949 revision, the evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court committed it to the custody of a children's home society having its home

office in another county of the State, but that the child was immediately taken by the persons seeking to adopt it to their residence in another state. It was held that the child never resided in the county in which is located the home office of the children's home society, its mere commitment to the children's home not having the effect of making the child's construc-

tive residence there, and adoption proceedings in that county are void since the child was never within its jurisdiction. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620 (1940).

§ 48-13. Reference to parental status.—No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the natural parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.

In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G. S. § 48-6 is necessary shall be filed with and become a part of the report provided for in G. S. § 48-16. (1949, c. 300.)

§ 48-14. Use of original name of child unnecessary; name used in proceedings for adoption.—(a) Only in the report required by G. S. § 48-16 on the investigation of the conditions and antecedents of the child sought to be adopted shall the original name of the child given by the natural parent or parents be necessary.

(b) In the petition, interlocutory decree, and final order of adoption and in all other papers related to the case the name selected by the petitioner or petitioners as the name for the child may be used as the true and legal name and the original name shall not be necessary. (1949, c. 300.)

§ 48-15. Petition for adoption.—(a) The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE SUPERIOR COURT

..... COUNTY
BEFORE THE CLERK

.....
(Full name of adopting father)
and
.....
(Full name of adopting mother)
FOR THE ADOPTION OF
.....
(Full name of child as used in proceeding) } PETITION FOR ADOPTION

(b) The petition may be prepared on a standard form to be supplied by the State Board of Public Welfare, or may be typewritten, giving all the information hereinafter required.

(c) Such petition must state:

- (1) The full names of the petitioners;
- (2) The information necessary to show that the court to which the petition is addressed has jurisdiction;
- (3) When the petitioners acquired custody of the child, and from what person or agency;
- (4) The birth date and state or county of birth of the child, if known;
- (5) The name used for the child in the proceeding;
- (6) That it is the desire of the petitioners that the relationship of parent and child be established between them and said child;
- (7) Their desire, if they have such, that the name of the child be changed together with the new name desired;
- (8) The desire of the petitioners that the said child shall, upon adoption, inherit

real and personal property in accordance with the statutes of descent and distribution;

(9) The value of the personal property and of the real estate owned by the child as far as can be ascertained;

(10) That the petitioners are fit persons to have the care and custody of the child;

(11) That they are financially able to provide for him; and

(12) That there has been full compliance with the law in regard to consent to adoption.

(d) The petition must be signed and verified by the petitioners and must be filed in triplicate. The original of the petition shall be held in the office of the clerk of the superior court, a copy sent to the State Board of Public Welfare, and a copy sent to the superintendent of public welfare or to the licensed child placing agency concerned with the order of reference.

(e) The names of the adopting parents must be indexed on the plaintiffs' or petitioners' side of the cross index of special proceedings. The child's name as used in the proceeding must be indexed on the defendants' or respondents' side of such index. (1949, c. 300.)

§ 48-16. Investigation of conditions and antecedents of child and of suitability of foster home.—(a) Upon the filing of a petition for adoption the court shall order the county superintendent of public welfare, or a licensed child placing agency through its authorized representative, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child, and to investigate any other circumstances or conditions which may have a bearing on the adoption and of which the court should have knowledge.

(b) The court may order the superintendent of public welfare of one county to make an investigation of the condition and antecedents of the child and the superintendent of public welfare of another county or counties to make any other part of the necessary investigation.

(c) The county superintendent or superintendents of public welfare of the authorized representative of such agency described hereinbefore must make a written report within sixty days of his or their findings, on a standard form or following an outline supplied by the State Board of Public Welfare, for examination by the court of adoption. Such report shall be filed with the clerk as a part of the official papers in the adoption proceeding but shall not be retained permanently in the office of the clerk. The clerk shall in no wise be responsible for the permanent custody of the report and said report shall not be open to public inspection except upon order of the court as provided in G. S. § 48-26. (1949, c. 300.)

§ 48-17. Interlocutory decree of adoption.—(a) Upon examination of the written report, required in G. S. § 48-16, the court may issue in triplicate an interlocutory decree of adoption giving the care and custody of the child to the petitioners. Such interlocutory decree must be issued within six months of the filing of the petition unless a final order is entered as provided in G. S. § 48-21 (c). It may be issued on a standard form supplied by the State Board of Public Welfare or may be typewritten, giving all the information hereinafter required.

(b) The interlocutory decree must state:

(1) That all necessary parties are properly before the court and that the time for answering has expired;

(2) The name of the child used in the petition;

(3) The full names of the petitioners and their county of residence;

- (4) The fact and date of filing of the petition;
- (5) When the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;
- (6) That the petitioners are fit persons to have the care and custody of the child;
- (7) That the petitioners are financially able to provide for him;
- (8) That the child is a suitable child for adoption; and
- (9) That the adoption is for the best interests of the child. (1949, c. 300.)

§ 48-18. **Effect of interlocutory decree.**—(a) Upon issuance of the interlocutory decree the child shall remain or be placed in the care and custody of the petitioners pending further orders of the court. Such decree shall be provisional only and may be rescinded or modified at any time prior to the final order. Until the final order is made, the child shall be a ward of the court having jurisdiction.

(b) When a husband and wife have petitioned jointly to adopt and an interlocutory decree has been entered, and the death of one spouse occurs before the time for the entering of the final order, the petition of the living petitioner shall not be invalidated by the fact of the death of the other petitioner, and the court may proceed to grant the adoption to the surviving petitioner. (1949, c. 300.)

§ 48-19. **Report on placement after interlocutory decree.**—When the court enters an interlocutory decree of adoption, it must order the county superintendent of public welfare or a licensed child placing agency through its duly authorized representative to supervise the child in its adoptive home and report to the court on the placement on a standard form or following an outline supplied by the State Board of Public Welfare, such report being for examination by the court before entering any final order. (1949, c. 300.)

§ 48-20. **Dismissal of proceeding.**—(a) If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adoption to the petitioners, the court may dismiss the proceeding.

(b) The court before entering an order to dismiss the proceeding must give notice of not less than five days of the motion to dismiss to the petitioners, to the county superintendent of public welfare or licensed child placing agency having made the investigation provided for in G. S. § 48-16, and to the State Board of Public Welfare, and they shall be entitled to a hearing to admit or refute the facts upon which the impending action of the court is based.

(c) Upon dismissal of an adoption proceeding, the custody of the child shall revert to the county superintendent of public welfare or licensed child placing agency having custody immediately before the filing of the petition. If the placement of the child was made by its natural parents directly with the adoptive parents, the superintendent of public welfare of the county in which the petition was filed shall be notified by the court of such dismissal and said superintendent of public welfare shall be responsible for taking appropriate action for the protection of the child. (1949, c. 300.)

§ 48-21. **Final order of adoption; termination of proceeding within three years.**—(a) If no appeal has been taken from any order of the court, the court must complete or dismiss the proceeding by entering a final order within three years of the filing of the petition. A final order of adoption must not be entered earlier than one year from the date of the interlocutory decree except as hereinafter provided.

(b) If an appeal is taken from any order of the court, the proceeding must be completed by the court by entering a final order of adoption or a final order dismissing the proceeding within two years from the final judgment upon the appeal.

(c) Upon examination of the written report required under G. S. § 48-16, the court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when the child is by blood a grandchild, nephew or niece of one of the petitioners or is the stepchild of the petitioner.

(d) Upon examination of the written report required under G. S. § 48-16, the court may, in its discretion, shorten the probationary period between the granting of the interlocutory decree and the final order of adoption by the length of time the child has resided in the home of the petitioners prior to the granting of the interlocutory decree; provided, that the child was placed in the home of the petitioners by a superintendent of public welfare or by a licensed child placing agency and such fact has been certified to the court by the superintendent of public welfare or the executive head of the child placing agency, but no final order shall be entered until the child shall have resided in the home of the petitioners for a period of one year. (1949, c. 300.)

§ 48-22. Contents of final order.—(a) The final order of adoption must be entered in triplicate and may be made on a standard form furnished by the State Board of Public Welfare or may be typewritten, giving all the information hereinafter required.

(b) The final order of adoption must state:

(1) That all necessary parties are properly before the court and that the time for answering has expired;

(2) The name of the child used in the proceeding;

(3) The full names of the petitioners and their county of residence;

(4) The date when the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;

(5) The fact and date of the filing of the petition;

(6) The fact and date of the interlocutory decree if such decree has been entered;

(7) That the petitioners are fit persons to have the care and custody of the child;

(8) That the petitioners are financially able to provide for him;

(9) That the child is a suitable child for adoption; and

(10) That the adoption is for the best interests of the child.

(c) The order shall thereupon decree the adoption of the child by the petitioners and may order that the name of the child be changed to that requested in the petition. (1949, c. 300.)

§ 48-23. Effect of final order.—The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution. (1949, c. 300.)

Cross References.—For other provisions relating to inheritance by and from adopted children, see § 28-149, subsections 10, 11, § 29-1, Rules 14, 15. As to rights under Workmen's Compensation Act, see § 97-2, paragraph 1.

Editor's Note.—All of the cases in the following note were decided under former § 48-6, to which this section corresponds, or under earlier provisions of the law.

History of Former § 48-6.—For a brief history of former § 48-6, and the effect of

the 1941 amendment thereto, see Phillips v. Phillips, 227 N. C. 438, 42 S. E. (2d) 604 (1947).

For comment on the 1945 amendment to former § 48-6, see 23 N. C. Law Rev. 346.

Construction. — As statutes such as former § 48-6 are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19 (1915); Grimes v. Grimes, 207

N. C. 778, 178 S. E. 573 (1935). But see § 48-1.

Conclusiveness of Proceedings.—Under former § 48-6, it was held that adoption proceedings are conclusive as to persons who were parties thereto, and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding on him, but who does not complain of his nonjoinder. *Locke v. Merrick*, 223 N. C. 798, 28 S. E. (2d) 523 (1944). See § 48-28.

Right of Adopted Child to Inherit.—Under former § 48-6, as it stood prior to the 1941 amendment, the effect of the adoption was simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child might inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. *Phillips v. Phillips*, 227 N. C. 438, 42 S. E. (2d) 604 (1947). See *Grimes v. Grimes*, 207 N. C. 778, 178 S. E. (1935).

Under former § 48-6, as it stood prior to the 1941 amendment, the adopted child could not inherit through the adoptive parent, or from any source other than the "estate of the petitioner." The right to inherit was limited to the property of the adoptive parent, and the adopted child could not inherit from his father's ancestors or other kindred, or be a representative of them. *Grimes v. Grimes*, 207 N. C. 778, 178 S. E. 573 (1935); *Phillips v. Phillips*, 227 N. C. 438, 42 S. E. (2d)

604 (1947). See the 1947 amendments to §§ 28-149, 29-1.

Inheritance from Adopted Child.—As to former law, see *Edwards v. Yearby*, 168 N. C. 663, 85 S. E. 19 (1915). See, now, §§ 28-149, 29-1.

Provisions Applicable Only to Intestacy.—It was held that former provisions, corresponding to this section, had reference to cases of the intestacy of persons standing in loco parentis, and did not apply where the property was disposed of by will. *King v. Davis*, 91 N. C. 142 (1884); *Sorrell v. Sorrell*, 193 N. C. 439, 137 S. E. 306 (1927).

An adopted or legitimated child did not come within the terms of a devise to "heirs lawfully begotten." *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919).

A deed to the grantor's daughter conveyed lands to be held, with remainder over as designated thereafter, with habendum to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, "should any child or children born unto her predecease her the other such children should take in fee," with an ultimate and further contingent limitation over. It was held that a child adopted by the grantee after the death of the grantor, no other child having been born, was excluded as against the ultimate takers of the blood of the grantor provided by the deed. *Tankersley v. Davis*, 195 N. C. 542, 142 S. E. 765 (1928).

§ 48-24. Recordation of adoption proceedings.—(a) Only the final order of adoption or the final order dismissing the proceeding, and no other papers relating to the proceeding, shall be recorded in the office of the clerk of the superior court in the county in which the adoption takes place.

(b) A copy of the petition, the consent, the report on the condition and antecedents of the child and the suitability of the foster home, a copy of the interlocutory decree, the report on the placement, and a copy of the final order must be sent by the clerk of the superior court to the State Board of Public Welfare in the following order:

(1) Within ten days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition, and the consent must be filed by the clerk with the State Board of Public Welfare.

(2) Within ten days after an interlocutory decree is entered, a copy of the interlocutory decree giving the date of the issuance of the decree and the report to the court on the condition and antecedents of the child and the suitability of the foster home must be filed by the clerk with the State Board of Public Welfare. When the interlocutory decree is waived, as provided in G. S. § 48-21 the said report and the recommendation to waive the interlocutory decree shall be so filed by the clerk.

(3) Within ten days after the final order of adoption is made the clerk must file with the State Board of Public Welfare the report on the supervision of the placement during the interlocutory period, and a copy of the final order.

(c) The said Board must cause all papers and reports related to the proceeding to be permanently indexed and filed. (1949, c. 300.)

§ 48-25. Record not to be made public; violation a misdemeanor.—

(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the State Board of Public Welfare shall be open for general public inspection.

(b) With the exception of the information contained in the petition, the interlocutory decree, and the final order, it shall be a misdemeanor for any person having charge of the file or of the record to disclose, except as provided in G. S. § 48-26, any information concerning the contents of any other papers in the proceeding. (1949, c. 300.)

§ 48-26. Procedure for opening record for necessary information.—

(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction who may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.

(b) The original order to open the record must be filed with the proceedings in the office of the clerk of the superior court. If the clerk shall refuse to issue such order, the party requesting such order may appeal to the judge who may order that the record be opened, if, in his opinion, it be to the best interest of the child or of the public. (1949, c. 300.)

§ 48-27. Procedure when appeal is taken.—(a) In the event of an appeal from ruling of the clerk in an adoption proceeding, the clerk must impound all papers and reports not open to the public pending final determination of the appeal. Within ten days after final determination of the appeal, the clerk must forward all papers and reports as specified in G. S. § 48-24.

(b) The clerk must not at any time furnish to anyone copies or certified copies in the proceeding other than the petition, the interlocutory decree, and the final order. (1949, c. 300.)

§ 48-28. Questioning validity of adoption proceeding.—(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a natural parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county superintendent of public welfare, or the executive head of a licensed child placing agency to perform any of the duties or acts within the time required by the provisions of this section shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300.)

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.—(a) For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition. When the name of any child is so changed, the court shall forthwith report such change to the Bureau of Vital Statistics of the State Board of Health. Upon receipt of the report, the State Registrar of the Bureau of Vital Statistics shall

prepare a new birth certificate for the child named in the report which shall contain the following information: full adoptive name of child, sex, race, date of birth, full name of adoptive father, full maiden name of adoptive mother, and such other pertinent information not inconsistent herewith as may be determined by the State Registrar. The city and county of residence of the adoptive parents shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted. No reference shall be made on the new certificate to the adoption of the child, nor shall the adopting parents be referred to as foster parents.

(b) The State Registrar shall place the original certificate of birth and all papers in his hand pertaining to the adoption under seal which shall not be broken except in the manner provided in G. S. § 48-26 for the opening of the record of adoption. Thereafter when a certified copy of the certificate of birth of such person is issued it shall be in the form of a birth registration card containing only the full name, birth date, state of birth, race, sex, date of filing, and birth certificate number, except when an order of a court shall direct the issuance of a copy of the original certificate of birth in the manner hereinbefore provided.

(c) The State Registrar shall send a copy of the new birth certificate to the register of deeds of the county where the adoption proceedings were instituted. Upon receipt of the said certificate the register of deeds shall cause it to be filed and indexed in the same manner as provided by law in the case of original birth certificates. Whenever a record of the original birth certificate of the adopted child is also on file in the same county the register of deeds of said county is authorized, empowered, and directed, upon filing the new certificate, to remove and destroy such record of the said original certificate. (1949, c. 300.)

§ 48-30. Guardian appointed when custody granted of child with estate.—When the court grants the petitioners custody of a child, if the child is an orphan and without guardian and possesses any estate to be administered, the court must appoint a guardian as provided by law. (1949, c. 300.)

§ 48-31. Rights of adoptive parents.—When a child is adopted pursuant to the provisions of this chapter, the adoptive parents shall not thereafter be deprived of any rights in the child, at the instance of the natural parents or otherwise, except in the same manner and for the same causes as are applicable in proceedings to deprive natural parents of the children. (1949, c. 300.)

§ 48-32. Readoption of child previously adopted.—Any minor child may be readopted in accordance with the provisions of this chapter. All provisions relating to the natural parent or parents shall apply to the adoptive parent or parents, except that in no case of readoption shall a natural parent be made a party to the proceedings nor shall the consent of a natural parent be necessary. For the purposes of service of process, necessary parties, and consent, the adoptive parent shall be substituted for the natural parent. (1949, c. 300.)

§ 48-33. Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by G. S. § 48-5 and who shall, otherwise than by legal process, procure the possession and custody of such child with respect to whom his rights and privileges have been forfeited shall be guilty of a crime, and shall be punished as for abduction. (1949, c. 300.)

§ 48-34. Past adoption proceedings validated.—All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding

upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law; provided that this section shall not apply to litigation pending on the effective date of this chapter in which the validity of a prior adoption proceeding is involved. (1949, c. 300.)

In an adoption proceeding in 1923, made does not appear in the record, there where the court found that the parents of a minor child had abandoned such child and the evidence on which the finding was is a presumption that it was sufficient to sustain the finding. *Locke v. Merrick*, 223 N. C. 798, 28 S. E. (2d) 523 (1944).

§ 48-35. Prior proceedings not affected.—Adoption proceedings pending on date of ratification shall not be affected, except that the provisions of G. S. § 48-34 shall apply thereto, and such proceedings shall be completed in accordance with provisions of the statutes in effect at the time such proceedings were instituted; provided that the petitioners in proceedings pending on date of ratification may discontinue such proceedings by taking voluntary nonsuits and, upon paying the costs accrued in such discontinued proceedings, may institute new proceedings under the provisions of this chapter, in which cases all of the provisions of this chapter shall apply. (1949, c. 300.)

Chapter 49. Bastardy.

Article 1.

Support of Illegitimate Children.

- Sec.
49-1. Title.
49-2. Nonsupport of illegitimate child by parents made misdemeanor.
49-3. Place of birth of child no consideration.
49-4. When prosecution may be commenced.
49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.
49-6. Mother not excused on ground of self incrimination; not subject to penalty.

Sec.

- 49-7. Jurisdiction of inferior courts; issues and orders.
49-8. Power of court to modify orders; suspend sentence, etc.
49-9. Bond for future appearance of defendant.

Article 2.

Legitimation of Illegitimate Children.

- 49-10. Legitimation.
49-11. Effects of legitimation.
49-12. Legitimation by subsequent marriage.
49-13. New birth certificate on legitimation.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. **Title.**—This article shall be referred to as “An act concerning the support of children of parents not married to each other.” (1933, c. 228, s. 11.)

Stated in *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145 (1944).

§ 49-2. **Nonsupport of illegitimate child by parents made misdemeanor.**—Any parent who wilfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2.)

Editor's Note.—Prior to the 1937 amendment the age specified was ten years. The 1939 amendment repealed the 1937 act, struck out section one of the 1933 act, and re-enacted this section as it appeared when amended by the 1937 act.

For note concerning this chapter, see 22 N. C. Law Rev. 250. For discussion of problems arising under this article, see 26 N. C. Law Rev. 305.

As to whether bastardy proceedings under the former law were criminal or civil in their nature, the early decisions up to and including *State v. Edwards*, 110 N. C. 511, 14 S. E. 741 (1892) held that the proceedings were civil in their nature, and that the statute did not even carry a quasi criminal aspect. As to liberal construction of the act under this theory, see *State v. Roberts*, 32 N. C. 350 (1849). During the period between 1892 and 1904 several decisions were rendered by the

Supreme Court which reversed the former holdings. See *State v. Ostwalt*, 118 N. C. 1208, 24 S. E. 660 (1896). Subsequent to these decisions, in 1904, the court again reverted to the civil theory, and declared that, while it contains some anomalous features, the proceeding is a civil action. See *State v. Liles*, 134 N. C. 735, 47 S. E. 750 (1904). The following decisions, confirming the Liles case, held that bastardy is in its nature a civil action to enforce a police regulation. *State v. Addington*, 143 N. C. 683, 57 S. E. 398 (1907); *State v. McDonald*, 152 N. C. 802, 67 S. E. 762 (1910); *State v. Currie*, 161 N. C. 275, 76 S. E. 694 (1912); *Sanders v. Sanders*, 167 N. C. 319, 83 S. E. 490 (1914); *Payne v. Thomas*, 176 N. C. 401, 97 S. E. 212 (1918); *State v. Carnegie*, 193 N. C. 467, 137 S. E. 308 (1927). As to criminal nature of proceedings under present act, see 11 N. C. Law Rev. 191, 206.

A number of the cases treated in this note were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

The new act operates against both parents, not primarily the father, and it is a criminal, not a civil statute. It is the failure to support, not the bastardy, which is made a crime. The consequence or punishment of the crime is the fixing of a sum to be paid by the parent for the support of the child. 11 N. C. Law Rev. 205.

Purpose of Act.—The object of the Bastardy Act was to shift the burden of maintaining the child from the innocent many to the guilty one. *State v. Roberts*, 32 N. C. 350 (1849).

The sole aim of the proceeding is to ascertain the paternity of the child and impose upon the father the burden of its support, such as he would incur if it were his lawful instead of his illegitimate offspring, and to save the county the expense of its maintenance. *State v. Collins*, 85 N. C. 511 (1881). See also, *State v. Robeson*, 24 N. C. 46 (1841); *State v. Brown*, 46 N. C. 129 (1853); *Ward v. Bell*, 52 N. C. 79 (1859); *State v. Durham*, 52 N. C. 100 (1859).

Duty of Support Not Primarily for Benefit of Child.—The duty of a putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental. Such rights as it may have must be enforced under this section and in accord with the procedure therein prescribed. *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. (2d) 18 (1949).

Constitutionality.—This section does not violate due process of law or impose imprisonment but by the law of the land. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936).

Remedy Is Exclusive.—This chapter and § 7-103 provide an exclusive remedy to compel a father to provide for the support of his illegitimate child, and these 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 (1949).

As stated in *Burton v. Belvin*, 142 N. C. 151, 55 S. E. 71 (1906), the natural obligation of the father to support will be enforced under the statute recognizing the obligation and imposing the duty. *Allen*

v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18 (1949).

The old Bastardy Act is repealed in toto by Laws 1933, c. 228, the provisions of s. 2 that the act should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of s. 9, and in a prosecution under the act of 1933 a demurrer on the grounds that proceedings under the old Bastardy Act were then pending should be overruled. See *State v. Morris*, 208 N. C. 44, 179 S. E. 19 (1935), holding that the act of 1933 was intended to cover the entire subject dealing with bastardy.

Proceeding under Former Law Will Not Bar Proceeding under Present Statute.—Bastardy proceedings against defendant under C. S., § 265, et seq., repealed by s. 9, c. 228, Laws 1933, being civil, will not support a plea of former jeopardy in a prosecution under this and the following sections for willful failure to support an illegitimate child. *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934).

Offense Punishable after Effective Date of Section Although Child Born Before.—A parent may be prosecuted under this section for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute. *State v. Parker*, 209 N. C. 32, 182 S. E. 723 (1935).

Time Child Was Begotten Is Immaterial.—A defendant may be prosecuted under this statute, for willful failure to support his illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is *ex post facto* cannot be sustained, since the offense is the willful failure to support the child, and the time it was begotten is immaterial. *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934), followed in *State v. Morris*, 208 N. C. 44, 179 S. E. 19 (1935).

Violation of Statute Is Continuing Offense.—Defendant was convicted and served the sentence imposed for willfully failing and refusing to support his illegitimate child under this and the following sections. After completion of his term, defendant still willfully failed and refused to support the child, and this prosecution was instituted for breach of this and following sections subsequent to his release. Defendant entered a plea of former jeopardy. It was held that the violation of

the statute constitutes a continuing offense, and the prior prosecution is not a bar to a prosecution for breach of the statute for the period subsequent to defendant's release from the imprisonment imposed in the first prosecution. *State v. Johnson*, 212 N. C. 566, 194 S. E. 319 (1937).

Jurisdiction Determined by Age of Defendant at Time He Is Charged.—Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the superior court and not the juvenile court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. *State v. Bowser*, 230 N. C. 330, 53 S. E. (2d) 282 (1949).

Warrant Must Charge a Crime.—Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record. Thus the failure of the warrant to charge defendant with willful failure to support his illegitimate child is not cured by the charge or verdict, where the warrant fails to charge any criminal offense. *State v. Tyson*, 208 N. C. 231, 180 S. E. 85 (1935).

Amendment of Warrant.—The trial court has authority to permit the solicitor to amend a warrant charging defendant with willful failure to support his illegitimate child by inserting the word "maintain," so as to charge his willful failure to support and maintain his illegitimate child. *State v. Bowser*, 230 N. C. 330, 53 S. E. (2d) 282 (1949).

Sufficiency of Indictment.—In a prosecution for willful failure and refusal to support an illegitimate child, under this and the following sections, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. *State v. Oliver*, 213 N. C. 386, 196 S. E. 325 (1938).

Married Women.—It was held in *State v. Pettaway*, 10 N. C. 623 (1825), and in *State v. Wilson*, 32 N. C. 131 (1849), cited with approval in *State v. Allison*, 61 N. C. 346 (1867), that, though the statute in force at that time specified "any single woman big with child or delivered of the child," the subsequent language in the statute, that the object was to protect the public against the charge of maintaining bastard children, included married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. See *Wilkie v. West*, 5 N. C. 319

(1809); *State v. Liles*, 134 N. C. 735, 47 S. E. 750 (1904).

The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the putative father of an unborn, illegitimate child is insufficient to support a prosecution under this statute, nor is such insufficiency cured by an amendment allowing the word "willful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. *State v. Tyson*, 208 N. C. 231, 180 S. E. 85 (1935).

The only "prosecution" contemplated by this legislation is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145 (1944); *State v. Stiles*, 228 N. C. 137, 44 S. E. (2d) 728 (1947).

The question of paternity is incidental to the prosecution for nonsupport. *State v. Bowser*, 230 N. C. 330, 53 S. E. (2d) 282 (1949).

Willfulness Is Essential Element of Offense.—The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was willful, that is, without just cause, excuse or justification. The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of willfulness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a willful neglect, but it does not raise a presumption of willfulness. *State v. Cook*, 207 N. C. 261, 176 S. E. 757 (1934).

"Willful" Defined.—The word "willful," when used in this section, creating an offense, means that the act is done purposely and deliberately in violation of the law; it means an act done without any lawful justification, reason or excuse. *State v. Stiles*, 228 N. C. 137, 44 S. E. (2d) 728 (1947).

The word "willfully" as used in the statute is used with the same import as in the act relating to willful abandonment of wife by husband (§ 14-322). *State v. Cook*, 207 N. C. 261, 176 S. E. 757 (1934).

Willfulness Must Be Charged in Warrant or Indictment.—Under this section, the neglect or refusal to support an illegitimate child must be willful and it must

be so charged in the warrant or bill of indictment, and the omission of such allegation is fatal. *State v. Vanderlip*, 225 N. C. 610, 35 S. E. (2d) 885 (1945); *State v. Morgan*, 226 N. C. 414, 38 S. E. (2d) 166 (1946).

The warrant in a prosecution under this and the following sections must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed. *State v. McLamb*, 214 N. C. 322, 199 S. E. 81 (1938). See *State v. Tarleton*, 208 N. C. 734, 182 S. E. 481 (1935); *State v. Clarke*, 220 N. C. 392, 17 S. E. (2d) 468 (1941); *State v. Sturdivant*, 220 N. C. 535, 17 S. E. (2d) 661 (1941).

Proof of Willfulness Required.—The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proved beyond a reasonable doubt. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936).

Willfulness Not Presumed from Failure to Support.—Construing the word "willful" in the light of the decided cases, it is clear that one cannot be brought within the meaning of the statute without proving the criminal intent, and that it is error for the court to charge the jury that if the defendant failed to support his illegitimate child "the presumption is he willfully did so." *State v. Cook*, 207 N. C. 261, 176 S. E. 757 (1934).

Instruction as to Willfulness.—Willfulness of the refusal to support one's illegitimate child is an essential ingredient of the offense denounced by this section, and must be proven beyond a reasonable doubt; and instructions, which fail to so charge, deprive defendant of his right to have the jury consider his willfulness as an issuable fact. *State v. Hayden*, 224 N. C. 779, 32 S. E. (2d) 333 (1944).

Verdict Must Find Willful Nonsupport.—Willfulness is an essential element of the offense denounced by this section, and a verdict "guilty of failure to support and maintain his bastard child" is insufficient to support a judgment. *State v. Allen*, 224 N. C. 530, 31 S. E. (2d) 530 (1944).

State Must Prove Paternity of Child and Willful Neglect.—It is not necessary that defendant's paternity of the child should be first judicially determined, but the State must prove on the trial, first, defendant's paternity of the child, and then

his willful neglect or refusal to support the child. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936).

In order to convict defendant under this section the burden is on the State to show not only that he is the father of the child, and that he had refused or neglected to support and maintain it, but further that his refusal or neglect is willful, that is intentionally done, "without just cause, excuse or justification," after notice and request for support. *State v. Hayden*, 224 N. C. 779, 32 S. E. (2d) 333 (1944); *State v. Stiles*, 228 N. C. 137, 44 S. E. (2d) 728 (1947); *State v. Ellison*, 230 N. C. 59, 52 S. E. (2d) 9 (1949).

Presumption of Innocence.—Since the statute raises no presumption against a person accused, the failure to support being evidence of willfulness, but raising no presumption thereof, but to the contrary, the statute requires the State to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936).

Admissibility of Testimony of Prosecutrix as to Nonaccess of Husband.—In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the admission of testimony by the prosecutrix as to the nonaccess of her husband at the time of conception is error entitling defendant to a new trial. *State v. Bowman*, 230 N. C. 203, 52 S. E. (2d) 345 (1949).

Evidence Held Sufficient.—Evidence in prosecution of defendant for willful neglect or refusal to support his illegitimate child held sufficient to overrule motions to nonsuit. *State v. Bowser*, 230 N. C. 330, 53 S. E. (2d) 282 (1949).

Verdict Held Insufficient.—A verdict of "guilty of willful nonsupport of illegitimate child" is insufficient in that it fails to fix the paternity of the child. *State v. Ellison*, 230 N. C. 59, 52 S. E. (2d) 9 (1949).

Extradition.—The proceeding now being a criminal one, probably the defendant is now legally subject to extradition. See 11 N. C. Law Rev. 191.

Applied in *State v. Moore*, 209 N. C. 44, 182 S. E. 692 (1935); *State v. Bradshaw*, 214 N. C. 5, 197 S. E. 564 (1938); *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31 (1942).

§ 49-3. Place of birth of child no consideration.—The provisions of this article shall apply whether such child shall have been begotten or shall have been born within or without the State of North Carolina: Provided, that the child to

be supported is a bona fide resident of this State at the time of the institution of any proceedings under this article. (1933, c. 228, s. 2.)

§ 49-4. When prosecution may be commenced.—The prosecution of the reputed father of an illegitimate child may be instituted under this chapter within any of the following periods, and not thereafter:

1. Three years next after the birth of the child; or
2. Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of fourteen years; or
3. Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment, whether such last payment was made within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of fourteen years.

The prosecution of the mother of an illegitimate child may be instituted under this chapter at any time before the child attains the age of fourteen years. (1933, c. 228, s. 3; 1939, c. 217, s. 3; 1945, c. 1053.)

Editor's Note.—A number of the cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

The 1939 amendment added a proviso. The 1945 amendment rewrote the section. As to effect of the 1945 amendment, see 23 N. C. Law Rev. 331.

In General.—A proceeding to establish the paternity of an illegitimate child and to prosecute the father, who willfully neglects or refuses to support and maintain the same, may be instituted at any time within three years next after the birth of the child. *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31 (1942).

General Limitation on Criminal Prosecutions Not Controlling.—The former statute provided the limitation on bastardy proceedings, and such proceedings were not controlled by the provision limiting criminal prosecutions for misdemeanors to two years. *State v. Hedgepeth*, 122 N. C. 1039, 30 S. E. 140 (1898); *State v. Perry*, 122 N. C. 1043, 30 S. E. 139 (1898).

This section cannot be limited to proceedings to establish paternity. Its language is clear, positive and unbending. It seems to have been taken from C. S., § 274, of the old law, which was held to supersede the general statute of limitations on the subject. *State v. Bradshaw*, 214 N. C. 5, 197 S. E. 564 (1938).

Maximum Time for Prosecution Was Formerly Six Years from Birth.—See *State v. Killian*, 217 N. C. 339, 7 S. E. (2d) 702 (1940).

Where Paternity Established in Proceeding under Old Law.—Under this section as it stood before the 1945 amendment, a prosecution of the father of an illegitimate child for the willful neglect and refusal to support such child, whose paternity had been established under the old law, C. S., §§ 265-279, and which prosecution originated more than 13 years after the birth of the child, was held barred under the terms of this section, since the prosecution was a new and independent proceeding, rather than a motion in the original proceeding to enforce the order of support as contemplated by the 1933 act. *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145 (1944). See paragraph 2 of this section.

Acknowledgment Made More than Three Years from Birth Does Not Prevent Running of Limitation.—Where acknowledgment has been made of the paternity of the child by payments for its support within three years from the date of the birth, prosecution for nonsupport may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. *State v. Hodges*, 217 N. C. 625, 9 S. E. (2d) 24 (1940).

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.—Proceedings under this article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the superintendent of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the

child is found. Indictments under this article may be returned in the county where the mother resides or is found, or in the county where putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in nowise affect any proceedings under this article. Preliminary proceedings under this article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4.)

Editor's Note.—The cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

Death of Child.—What kind of order should be entered where the child dies pending the trial at the next term of court, is in the discretion of the judge. The former statute seemed to require an order in every case. *State v. Beatty*, 66 N. C. 648 (1872).

Consideration for Promise of Father to Support Child.—Where the mother of a bastard child had refrained from enforcing maintenance thereof under the former statute, this was held to constitute con-

sideration to support an action on a promise of the father to support and educate it. *Thyer v. Thyer*, 189 N. C. 502, 127 S. E. 553 (1925).

Rights of Surety.—The surety on the appearance bond of the defendant, who, in bastardy proceedings under the former law, appealed from a justice of the peace to the county court, which remanded the cause for want of jurisdiction, may insist upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability have been discharged. *State v. Carnegie*, 193 N. C. 467, 137 S. E. 308 (1927).

§ 49-6. Mother not excused on ground of self incrimination; not subject to penalty.—No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying, in obedience to a subpoena of any court, in any suit or proceeding based upon or growing out of the provisions of this article, but no such mother shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify. (1933, c. 228, s. 5; 1939, c. 217, s. 5.)

§ 49-7. Jurisdiction of inferior courts; issues and orders.—Proceedings under this article shall be instituted only in the superior court of any county of this State, or in any court inferior to the superior court of this State, except courts of justices of the peace and courts whose criminal jurisdiction does not exceed that of justices of the peace. Justices of the peace may issue warrants for violations of this article made returnable to any court having jurisdiction of such violations under the terms of this article.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is

the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to co-operate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

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 a blood grouping test to pay the cost thereof; that the results of a blood grouping test shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person; provided, that from a finding of the issue of paternity against the defendant, the defendant shall have the same right to an appeal as though he had been found guilty of the crime of willful failure to support a bastard child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1945, c. 40; 1947, c. 1014.)

Editor's Note.—The 1937 and the 1939 amendments rewrote this section. The 1945 amendment added all of the last paragraph of the section except the last proviso, which was added by the 1947 amendment.

For comment on the 1937 amendment, see 15 N. C. Law Rev. 347. For comment on the 1939 amendment, see 17 N. C. Law Rev. 351. For comment on the 1945 amendment, see 23 N. C. Law Rev. 343. For comment on the 1947 amendment, see 25 N. C. Law Rev. 412.

Effect of § 8-50.1.—While the provision of this section as to blood grouping tests is not expressly repealed, it would seem to be superseded by § 8-50.1, which: (1) contains virtually identical provisions applicable to "any criminal action or proceedings in which the question of paternity arises;" and (2) extends legislative approval of use of the blood grouping evidence to "any civil action." 27 N. C. Law Rev. 456.

Modification of Orders.—Where defendant pleaded guilty and orders were made for the support of the child, the court had no authority to strike out a plea of guilty or a judgment at a former term; but, under this section, the court may mod-

ify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support. *State v. Duncan*, 222 N. C. 11, 21 S. E. (2d) 822 (1942).

This and the following section contemplate initial findings and an order of support, subject to modification or increase from time to time, and to be enforced by such prescribed supplemental orders as the exigencies of the case may require. *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145 (1944).

Appeal on Issue of Parentage Where Defendant Acquitted on Charge of Non-support.—Before the 1947 amendment it was held that where the jury found the defendant to be the father of the bastard child, but not guilty of nonsupport, this was an acquittal. The defendant therefore was not entitled to an appeal under § 15-180 for the refusal of the court to allow his motions that the action be dismissed, and that the answer to the issue of parentage be set aside. *State v. Hiatt*, 211 N. C. 116, 189 S. E. 124 (1937). But see the proviso at the end of this section, added by the 1947 amendment.

Cited in *State v. Black*, 216 N. C. 448, 5 S. E. (2d) 313 (1939).

§ 49-8. Power of court to modify orders; suspend sentence, etc.—Upon the determination of the issues set out in the foregoing section and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to co-operate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives:

- (a) Commit the defendant to prison for a term not to exceed six months;

(b) Suspend sentence and continue the case from term to term;

(c) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;

(d) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;

(e) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this article. (1933, c. 228, s. 7; 1939, c. 217, s. 6.)

Cross Reference.—See note to § 49-7.

Editor's Note.—The 1939 amendment struck out former subsection (d) relating to apprenticing defendant to superintendent of county home.

The cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

Constitutionality.—Proceedings in bastardy under the former law, C. S., § 273, for an allowance to be made to the woman were civil and not criminal, for the enforcement of police regulations, and that section was held not to be contrary to the provisions of the Constitution, Art. IV, § 27. *Richardson v. Egerton*, 186 N. C. 291, 119 S. E. 487 (1923). See note to § 49-2.

A judgment for an allowance for the mother of the bastard is not a debt arising out of contract, to which the protection afforded by the inhibition of the Constitution, Art. I, § 16, extend, but is rendered as a means of enforcing a legal obligation and duty imposed by the legislature under the police power of the State upon one who is responsible for bringing into existence a bastard child that may become a burden to society. *State v. Manuel*, 20 N. C. 144 (1838); *State v. Cannady*, 78 N. C. 539 (1878); *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894); *State v. Wynne*, 116 N. C. 981, 21 S. E. 35 (1895); *State v. Nelson*, 119 N. C. 797, 25 S. E. 863 (1896).

Imprisonment of the putative father for failure to obey an order of maintenance, or give the bond, is a matter of legislative discretion, and is not imprisonment for debt. *State v. Green*, 71 N. C. 172 (1874); *State v. Wynne*, 116 N. C. 981, 21 S. E. 35 (1895); *State v. Morgan*, 141 N. C. 726, 53 S. E. 142 (1906).

Effect of Death of Child.—Under the former law, C. S. § 273, the intention was to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born did not affect the right of the mother to "support;" among other things, she was entitled to pay for medical attention and medicine for herself, and the burial expenses of the child, consequent upon the defendant's unlawful act. *State v. Addington*, 143 N. C. 683, 57 S. E. 398 (1907).

Mother as Creditor of Father.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894).

Right of Father to Claim Exemption.—The father was not entitled to the constitutional exemption of \$500 as against the mother's claim for an allowance made to her in bastardy proceedings. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894).

Effect of Discharge.—After the defendant, who had served a twenty-day sentence for failure to pay under the former law, had been discharged, he could not be resentenced to the house of correction at a subsequent term. *State v. Burton*, 113 N. C. 655, 18 S. E. 657 (1893).

Work on Roads.—Under the former law, when there was no house of correction in the county, the court could only commit the putative father to jail until the performance of the order of support. He could not be put to work on roads. *State v. Addington*, 143 N. C. 683, 57 S. E. 398 (1907), overruling *Myers v. Stafford*, 114 N. C. 234, 19 S. E. 764 (1894).

Sentence Held Excessive.—See *State v. Nelson*, 119 N. C. 797, 25 S. E. 868 (1896).

§ 49-9. Bond for future appearance of defendant.—At the preliminary hearing of any case arising under this article it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars, conditioned upon the re-

appearance of the accused at the further hearing under this article. This bond and all other bonds provided for in this article shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. **Legitimation.**—The putative father of any child born out of wedlock may apply by a verified written petition filed in a special proceeding in the superior court of the county in which he resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiffs' side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C. S., s. 277; 1947, c. 663, s. 1.)

Cross Reference.—As to constitutional provision regarding private laws to legitimate persons, see the North Carolina Constitution, Art. II, § 11.

Editor's Note.—The 1947 amendment rewrote this section.

For a brief account of the 1947 amendments to this article, see 25 N. C. Law Rev. 414.

Petition Addressed Directly to Judge.—A decree of legitimation was not void upon the ground that the petition should have been originally addressed to the clerk of the court, instead of directly to the judge. *Dunn v. Dunn*, 199 N. C. 535, 155 S. E. 165 (1930).

Cited in *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

§ 49-11. **Effects of legitimation.**—The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock. (Code, s. 40; Rev., s. 264; C. S., s. 278.)

The plain intent and language of this section is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock." *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919).

Child Cannot Represent or Inherit from Father's Kindred.—In *Love v. Love*, 179 N. C. 115, 117, 101 S. E. 562 (1919), it was said: "This statute limits the right to inherit to the properties of the adopting father, the legitimated child cannot inherit from the father's ancestors or other

kindred, or be representative of them. Such adopted child cannot be issue or heir general."

The word "only" as used in this section qualifies the words "inherit from the father," and not the words "real estate," thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father. *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919).

§ 49-12. **Legitimation by subsequent marriage.**—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall

in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock. (1917, c. 219, s. 1; C. S., s. 279; 1947, c. 663, s. 2.)

Editor's Note.—The 1947 amendment struck out "illegitimate" formerly appearing before the word "child" in line one and inserted after the word "child" the words "born out of wedlock."

Prior to the passage of this section in 1917, marriage of the parents did not legitimate the previous offspring. *Ashe v. Camp Mfg. Co.*, 154 N. C. 241, 70 S. E. 295 (1911). But where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attached at the time of the marriage, he being a minor, and follows him wherever he goes. *Fowler v. Fowler*, 131 N. C. 169, 42 S. E. 563 (1902).

Contesting Constitutionality of Section.—In *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98 (1921), it was held that, upon the evidence in the case, and the theory of the defense, the defendant could not invoke the doctrine of vested rights so as to contest the constitutionality of this section.

Strict Construction.—This section is strictly construed as being in derogation of the common law. In *re Estate of Wallace*, 197 N. C. 334, 148 S. E. 456 (1929).

Section Retroactive.—This section is, by its express terms, retroactive as well as prospective in effect. *Stewart v. Stewart*, 195 N. C. 476, 142 S. E. 577 (1928).

The provisions of this section are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. In *re Estate of Wallace*, 197 N. C. 334, 148 S. E. 456 (1929).

§ 49-13. New birth certificate on legitimation.—A certified copy of the order of legitimation when issued under the provisions of G. S. § 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make a new birth certificate bearing the full name of the father.

When a child is legitimated under the provisions of G. S. § 49-12 the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the marriage license issued to the father and the mother of the child. (1947, c. 663, s. 3.)

Cross Reference.—For further provisions as to change of birth certificates by State Registrar of Vital Statistics on proof

"Reputed Father."—In *Bowman v. Howard*, 182 N. C. 662, 666, 110 S. E. 98 (1921), the court said: "No contention as to the statute was made by the defendant except as the construction of the words 'reputed father,' which the defendant contended should be construed to mean 'actual father.'" The exception is not meritorious. The word 'reputed' means considered, or generally supposed, or accepted by general or public opinion."

Irregularity in divorce proceedings is not ground for declaring children who would otherwise be legitimated by a subsequent marriage illegitimate. *Reed v. Blair*, 202 N. C. 745, 164 S. E. 118 (1932).

Inheritance from Maternal Uncle.—The provisions of this section legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother, do not extend to such inheritance from a maternal uncle dying intestate after the death of the mother, through whom the claim is made as next of kin. In *re Estate of Wallace*, 197 N. C. 334, 148 S. E. 456 (1929).

Evidence of Paternity.—Where a marriage between slaves was validated by § 51-5, declarations as to paternity of a child born subsequent to the marriage, made ante litem motam by the alleged father and mother, were admissible in evidence without regard to this section. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98 (1921).

Cited in *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

of marriage of unwed parents, see § 130-94.

Chapter 50.

Divorce and Alimony.

<p>Sec. 50-1. Jurisdiction. 50-2. Bond for costs unnecessary. 50-3. Venue. 50-4. What marriages may be declared void on application of either party. 50-5. Grounds for absolute divorce. 50-6. Divorce after separation of two years on application of either party. 50-7. Grounds for divorce from bed and board. 50-8. Affidavit to be filed with complaint; affidavit of intention to file complaint.</p>	<p>Sec. 50-9. Effect of answer of summons by defendant. 50-10. Material facts found by jury; parties cannot testify to adultery. 50-11. Effects of absolute divorce. 50-12. Resumption of maiden name authorized; adoption of name of prior deceased husband validated. 50-13. Custody of children in divorce. 50-14. Alimony on divorce from bed and board. 50-15. Alimony pendente lite; notice to husband. 50-16. Alimony without divorce. 50-17. Alimony in real estate, writ of possession issued.</p>
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§ 50-1. **Jurisdiction.**—The superior court and such other courts as are now or may hereafter be so vested by statute shall have concurrent jurisdiction of actions for divorce and alimony, or either. (1868-9, c. 93, s. 45; Code, s. 1282; Rev., s. 1557; C. S., s. 1655; 1949, c. 264, s. 1.)

Cross Reference.—As to power of the General Assembly to pass laws regulating divorce and alimony, see the North Carolina Constitution, art. II, § 10.

Editor's Note.—Prior to the 1949 amendment this section applied only to the superior court.

On the general question of jurisdiction

§ 50-2. **Bond for costs unnecessary.**—It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. (1871-2, c. 193, s. 41; Code, s. 1294; Rev., s. 1558; C. S., s. 1656.)

Cross References.—As to prosecution bonds generally, see § 1-109 et seq. As to costs generally, see § 6-21.

Husband Liable for Own Costs.—In actions for divorce the husband, whether suc-

§ 50-3. **Venue.**—In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides. (1871-2, c. 193, s. 40; Code, s. 1289; Rev., s. 1559; 1915, c. 229, s. 1; C. S., s. 1657.)

Change in Common-Law Rule.—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by Laws 1915, c. 229, making the summons returnable to the county in which either the plaintiff or defendant resides. *Wood v. Wood*, 181 N. C. 227, 106 S. E. 753 (1921).

Section Not Jurisdictional—Waiver.—The provision of this section, that summons

in divorce, see 1 N. C. Law Rev. 95.

Jurisdiction of Superior Court.—Prior to the 1949 amendment to this section the legislature had conferred the sole original jurisdiction in all applications for divorce upon the superior courts. *Williamson v. Williamson*, 56 N. C. 446 (1857); *Barringer v. Barringer*, 69 N. C. 179 (1873).

cessful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases left to the discretion of the court. *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673 (1902).

shall be returnable to the court of the county in which either plaintiff or defendant resides, is not jurisdictional, but relates to venue, and may be waived, and if an action for divorce be instituted in any other county, it may be tried there, unless defendant before the time of answering expires demands in writing that trial be had in the proper county. *Smith v. Smith*, 226 N. C. 506, 39 S. E. (2d) 391 (1946).

How Noncompliance Taken Advantage of.—The provision of this section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270 (1920).

Where Wife Resides.—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his

residence, is bad. *Wood v. Wood*, 181 N. C. 227, 106 S. E. 753 (1921).

Suits for alimony without divorce are within the analogy of divorce laws, and where a wife has been forced by her husband's conduct to leave his residence and live elsewhere, she may bring such a suit in the county in which she resides, notwithstanding the provision of § 50-16 that "the wife may institute an action in the superior court of the county in which the cause of action arose." *Rector v. Rector*, 186 N. C. 618, 120 S. E. 195 (1923).

§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the second proviso contained in § 51-3. (1871-2, c. 193, s. 33; Code, s. 1283; Rev., s. 1560; C. S., s. 1658; 1945, c. 635.)

Cross References.—As to marriage generally, see § 51-1 et seq. As to void and voidable marriages, see § 51-3 and note.

Editor's Note.—The 1945 amendment inserted the word "second" before the word "proviso" near the end of the section.

Marriage Not Void until So Declared by Court.—The court has jurisdiction to declare a marriage in proper cases void ab initio, but the marriage of a lunatic is not so ipso facto, and must be so declared by a decree of the court, for only in the instances set out in the second proviso to § 51-3 can a marriage be treated as void in a collateral proceeding. *Watters v. Watters*, 168 N. C. 411, 84 S. E. 703 (1915). See *State v. Setzer*, 97 N. C. 252, 1 S. E. 558 (1887).

What Marriages Absolutely Void.—Under § 51-3, the only marriages which are absolutely void are those between a white person and one of negro or Indian blood (or descent to the third generation, inclusive,) and bigamous marriages. The others need to be "declared void." *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890).

Formal Decree When Marriage Originally Void.—Though the marriage of a lunatic is absolutely void, without being so declared, yet the court will formally decree its nullity, as well for the sake of the good order of society as for the quiet and relief of the party seeking the relief. *Johnson v. Kincade*, 37 N. C. 470 (1843); *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889).

Effect of Twenty Years' Ratification.—Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of twenty years, the parties acknowledging each other and being recog-

nized as husband and wife, though such marriage in its inception is invalid, by reason of such ratification by the parties it will not be declared void. *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890).

Former Void Marriage.—A former marriage, which has been decreed to be void because induced by duress, was void ab initio, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. *Taylor v. White*, 160 N. C. 38, 75 S. E. 941 (1912).

Subsequent Insanity.—Insanity afterwards afflicting a party to a contract of marriage is not a ground for annulment. *Watters v. Watters*, 168 N. C. 411, 84 S. E. 703 (1915).

How Action for Nullity on Ground of Insanity Brought.—A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian, though the former is, for some reasons, the preferable course. *Crump v. Morgan*, 38 N. C. 91, 40 Am. Dec. 447 (1843).

License Issued upon Fraudulent Representations as to Age—Suit by Parent or Register of Deeds.—Where a register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female between the ages of fourteen and sixteen without conforming with § 51-2 as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void; the

register of deeds may at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929). [This case was decided prior to the 1939 amendment to § 51-2, which amendment makes the parents of the female proper parties plaintiff to an action to annul the marriage.]

Suit by Nonresident.—Under this section the courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929).

Procedure Similar to Divorce Action.—An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889); *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623 (1906).

In *Johnson v. Kincade*, 37 N. C. 470 (1843), the marriage of the parties was declared a nullity because of the mental incapacity of one of the parties at the time of the marriage. In that decision the court declared that the "plaintiff ought to be, and is divorced from the defendant." See *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889); *Taylor v. White*, 160 N. C. 38, 75 S. E. 941 (1912).

Alimony Pendente Lite.—While not technically actions for divorce, actions for annulment come under that heading, in a general way, in that alimony pendente lite may be allowed. *Taylor v. White*, 160 N.

§ 50-5. Grounds for absolute divorce.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Cross Reference.—As to effect of absolute divorce on right to administer, see §§ 28-10, 52-19.

Divorce Is Entirely Statutory.—It has always been the policy of this State to regard marriage as indissoluble except for the causes named in the statute. *Long v. Long*, 77 N. C. 304 (1877). See also *Alexander v. Alexander*, 165 N. C. 45, 80 S. E. 890 (1914).

Legislative Control.—Subject to the constitutional restriction that "it may not grant a divorce nor secure alimony in any individual case," the question of divorce is a matter exclusively of legislative cognizance. *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913).

Facts Must Be Pleaded and Proved.—

C. 38, 75 S. E. 941 (1912). See *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889).

Affidavit Not Necessary.—Actions for annulment under this section will not be dismissed because of failure to make the affidavit prescribed in § 50-8. *Taylor v. White*, 160 N. C. 38, 75 S. E. 941 (1912).

Effect of Decree.—A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage. *Taylor v. White*, 160 N. C. 38, 75 S. E. 941 (1912).

Same—Children Legitimate.—The children of a marriage which is subsequently annulled are made legitimate by § 50-11. *Taylor v. White*, 160 N. C. 38, 75 S. E. 941 (1912).

Motion to Set Aside Judgment.—If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623 (1906).

Same Counsel Cannot Represent Both Parties.—A proceeding to set aside a judgment in an action of annulment will be dismissed where the same counsel jointly make the motion representing both parties to the action. *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623 (1906).

Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. *McQueen v. McQueen*, 82 N. C. 471 (1880); *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707 (1889).

Decree a Mensa Not a Bar.—A decree of divorce a mensa does not bar subsequent action for absolute divorce under this section. *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913).

Recrimination.—The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce. *House v. House*, 131 N. C. 140, 42 S. E. 546 (1902).

Cited in *Hyder v. Hyder*, 210 N. C. 486,

187 S. E. 798 (1936); Burrowes v. Burrowes, 210 N. C. 788, 188 S. E. 648 (1936); Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458 (1946); Norman v. Norman, 230 N. C. 61, 51 S. E. (2d) 927 (1949).

1. If the husband or wife commits adultery.

Adultery Even after Abandonment Sufficient Cause.—Adultery by the wife committed after her husband had wrongfully abandoned her is ground for divorce. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861 (1911). This case overrules Tew v. Tew, 80 N. C. 316 (1879).

Where both parties are found guilty of adultery and no condonation is proven, the petition will be dismissed. Horne v. Horne, 72 N. C. 530 (1875).

Plaintiff Need Not Set Up His Innocence.—A party seeking divorce is not bound to set forth or prove that he has not himself been guilty of adultery or is not in fault. Edwards v. Edwards, 61 N. C. 534 (1868); Toms v. Fite, 93 N. C. 274 (1885); Steel v. Steel, 104 N. C. 631, 10 S. E. 707 (1889).

2. If either party at the time of the marriage was and still is naturally impotent.

Editor's Note.—Since the passage of § 51-3 impotency of either of the contracting parties renders the marriage void, and prior to the passage of that section it was a ground for annulment of the marriage.

Smith v. Morehead, 59 N. C. 360 (1863).

Husband Competent Witness.—The husband is a competent witness to prove the impotency of his wife. Barringer v. Barringer, 69 N. C. 179 (1873).

3. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

Illicit Intercourse Not Resulting in Pregnancy.—Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under this section unless pregnancy resulted. Steel v. Steel, 104 N. C. 631, 10 S. E. 707 (1889).

is induced to marry a woman by her false representation that she is pregnant by him, he cannot secure a divorce under this section. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147 (1916).

Cited in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

Knowledge of Husband.—Where a man

4. If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceeding, and they have lived separate and apart for two successive years, and the plaintiff or defendant in the suit for divorce has resided in this State for six months.

Editor's Note.—A five-year provision was put in by the 1921 amendment, the original paragraph having provided for ten years. The 1929 amendment inserted the words "whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by defendant prior to such divorce proceedings." The period of required living apart was changed from five to two successive years and the residence requirement was changed from five successive years to one year by the 1933 amendment. The 1943

amendment reduced the required period of residence to six months. The words "or defendant," near the end of the subsection, were inserted by the first 1949 amendment.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 347. For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N. C. Law Rev. 453.

Provisions Jurisdictional.—Under this section a divorce upon the ground of desertion cannot be granted unless there be a continuous separation of the parties

for time required preceding the beginning of the case and unless the plaintiff has been a resident of the State for the requisite period of time. These provisions are jurisdictional, and, when they are not complied with, the State court is without authority to grant a divorce. *Sears v. Sears*, 92 F. (2d) 530 (1937).

Necessary Residence Must Be Established.—For the granting of a divorce for the separation of husband and wife under the provisions of this section, there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing a lesser period of residence in this State by the plaintiff is insufficient, and a judgment signed thereon is improvidently rendered. *Ellis v. Ellis*, 190 N. C. 418, 130 S. E. 7 (1925).

Who May Bring Suit.—In *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913), the court held that this subsection, which was first added to the grounds for divorce in 1907, was a new and independent cause and should not be construed in connection with the main part of the section, which provides that the suit can only be brought by the injured party. But in *Sanderson v. Sanderson*, 178 N. C. 339, 100 S. E. 590 (1919), the court construed this subsection to mean that one who has caused the separation by his own misconduct cannot later use that separation to obtain a divorce. And the construction in the *Cooke* case was again refuted in *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921). See also § 50-6 and note.

An action can be maintained under this section only by the party injured. *Reeves v. Reeves*, 203 N. C. 792, 167 S. E. 129 (1933).

Separation Defined.—The word “separation” as used in this section means a voluntary separation by mutual agreement with the intent on the part of at least one of the parties to discontinue all the marital privileges and responsibilities, or a separation under judicial decree, or a separation caused by the abandonment or wrongful act of the party sued. *Woodruff v. Woodruff*, 215 N. C. 685, 3 S. E. (2d) 5 (1939).

The word “separation” as used in matrimonial law is a cessation of cohabitation of husband and wife by mutual agreement, or, in the case of a judicial separation, under decree of court. This statute contemplates the addition of “separation” caused by desertion or abandonment, or other wrongful act of the party sued. It certainly does not intend to give an action to

one spouse for driving the other from home or to one who has voluntarily deserted the home for the specified period. *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921).

Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945).

For the purpose of obtaining a divorce under this or the succeeding section, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such a character as to induce others, who observed them, to regard them as living together in the ordinary acceptance of that descriptive phrase. *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945).

Separation Must Have Been Voluntary in Its Inception.—Where plaintiff's cause of action is couched in the language of this section, he must prove his case by showing that the separation was voluntary in its inception. *Pearce v. Pearce*, 225 N. C. 571, 35 S. E. (2d) 636 (1945).

Assent to Separation Obtained by Fraud.—If the assent of wife is obtained by fraud or deceit, the separation is not voluntary within the meaning of this section. *Pearce v. Pearce*, 225 N. C. 571, 35 S. E. (2d) 636 (1945).

Separation without Fault.—It certainly was not intended that this statute should apply to cases where the separation was without fault on either side. While it is in the power of the legislature to make the misfortune of either party a ground for divorce it has not done so, and the court cannot by judicial construction extend the grounds of divorce beyond the statute. The misconduct of the parties, and not their misfortunes, is the cause which will justify a divorce. *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921).

Separation Caused by Commitment for Insanity.—A physical separation caused by the commitment of one of the parties for insanity is not a “separation” constituting ground for divorce, nor may the party committed consent to a separation during the continuance of the mental incapacity. *Woodruff v. Woodruff*, 215 N. C. 685, 3 S. E. (2d) 5 (1939). See subsection 6.

Period of Separation.—In *Smithdeal v. Smithdeal*, 206 N. C. 397, 174 S. E. 118 (1934), it was held that two years' separa-

tion as a ground for divorce need not have existed six months prior to the commencement of the action under either this subsection or under § 50-6. See 11 N. C. Law Rev. 223. See also the next to the last paragraph of this section, added by the 1933 amendment.

Allegation of Separation Works Estoppel.—If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband she is estopped by this averment, and a verdict that her husband separated himself from her will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence, justifying such separation, be found by a jury. *Wood v. Wood*, 27 N. C. 674 (1845).

Abandonment as Defense Must Be Set Up in Answer.—In an action for divorce a vinculo brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife. *Kinney v. Kinney*, 149 N. C. 321, 63 S. E. 97 (1908).

Abandonment Not Put at Issue.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. *Kinney v. Kinney*, 149 N. C. 321, 63 S. E. 97 (1908).

Sufficiency of Evidence of Residence.—Plaintiff's testimony that he had been continuously a resident of North Carolina up to the time he went to another state for temporary work, and that he returned here once or twice a month and did not intend to make his home in such other state, but

5. If any person shall commit the abominable and detestable crime against nature, with mankind, or beast.

Editor's Note.—This subsection was added by the 1931 amendment to this section.

6. In all cases where a husband and wife have lived separate and apart for ten consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for ten consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution wherein the insane spouse is confined, and one regularly practic-

intended to remain a citizen of North Carolina, is held sufficient to be submitted to the jury on the question of his residence in this State for the period prescribed by this and the following section. *Welch v. Welch*, 226 N. C. 541, 39 S. E. (2d) 457 (1946).

The fact that plaintiff went to another state to engage temporarily in work there, and, upon mistaken advice, instituted an action for divorce in such other state upon allegations of residence therein, is evidence against him on the issue of his residence in this State for the statutory period but is not conclusive and does not constitute an estoppel. *Welch v. Welch*, 226 N. C. 541, 39 S. E. (2d) 457 (1946).

Evidence Held Insufficient.—Evidence of separation by mutual agreement and living separate and apart as contemplated by this and the succeeding section held insufficient. *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945).

Appeal and Error.—Where a husband appeals from a judgment under this section in favor of his wife and assigns error only in the court's refusing his motion to nonsuit upon the evidence, on the ground that he was insane for a part of the time, it is necessary that the evidence should appear in the record and not in the assignment merely. *Brown v. Brown*, 182 N. C. 42, 108 S. E. 380 (1921).

Where a judgment has been entered granting a divorce under this section, in the absence of finding of the necessary issue as to the plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only. *Ellis v. Ellis*, 190 N. C. 418, 130 S. E. 7 (1925).

Cited in *Nelson v. Nelson*, 197 N. C. 465, 149 S. E. 585 (1929); *Keys v. Tuten*, 199 N. C. 368, 154 S. E. 631 (1930).

ing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined.

In all decrees granted under this subsection in actions in which the husband is the plaintiff the court shall require him to provide for the care and maintenance of the insane defendant as long as she may live, compatible with his financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring the plaintiff to furnish the necessary funds for such care and maintenance. In the event of feme defendant's continued confinement in an institution for the mentally disordered, it shall be deemed sufficient support and maintenance if the plaintiff continue to pay and discharge the monthly payments required of him by the institution, such payments to be in amounts equal to those required of patients similarly situated. In all such actions wherein the wife is the plaintiff and the insane defendant has insufficient income and property to provide for his care and maintenance, then in the discretion of the court, the court may require her to provide for the care and maintenance of the insane defendant as long as he may live, compatible with her financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be had upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subsection, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.

Editor's Note.—The 1945 amendment added this subsection. The subsection was rewritten by the first 1949 amendment.

see 23 N. C. Law Rev. 340. For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N. C. Law Rev. 453.

For comment on the 1945 amendment,

It shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subsection 4 of this section that the grounds for divorce have existed at least six months prior to the filing of the complaint, nor to allege or prove such fact.

In any action for absolute divorce upon any of the grounds set forth in this section, allegation and proof that the plaintiff or defendant has resided in North Carolina for at least six months next preceding the filing of the complaint shall constitute compliance with the residence requirements for prosecuting any such action for divorce. (1871-2, c. 193, s. 35; 1879, c. 132; Code, s. 1285; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; Rev., s. 1561; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57; C. S., s. 1659; 1921, c. 63; 1929, c. 6; 1931, c. 397; 933, c. 71, ss. 1, 2; 1943, c. 448, s. 2; 1945, c. 755; 1949, c. 264, ss. 2, 5; c. 417.)

Editor's Note.—The 1933 amendment added the next to the last paragraph to this section. The last paragraph was added by the second 1949 amendment.

For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N. C. Law Rev. 453.

§ 50-6. Divorce after separation of two years on application of

either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3.)

Cross References.—See note to § 50-5, subsection 4. As to effect of absolute divorce on right to administer, see §§ 28-10, 52-19.

Editor's Note.—By the 1933 amendment the time of living apart was changed from five to two years, and the required residence of the defendant in the State was changed from five years to one year. The 1933 amendment also struck out the provision "and no children having been born to the marriage," formerly appearing in this section.

In *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936), the Supreme Court ruled that no divorce could be obtained under this section unless a separation agreement, express or implied, existed. The 1937 amendment, apparently intended to avoid this construction requiring the existence of a separation agreement, amended the statute by striking out the phrase, "either under deed of separation or otherwise." 15 N. C. Law Rev. 348. See *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942).

The 1943 amendment substituted, at the end of the first sentence, "six months" for "one year."

The 1949 amendment inserted the words "or defendant" in the first sentence.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 347.

This section is not made an amendment to § 50-5, which gives the right of action to the injured party, but either party may maintain the action without regard to the cause for separation. 9 N. C. Law Rev. 368.

Effect upon § 50-11.—This section automatically reduced the time in § 50-11 from ten to two years; the two are cognate statutes dealing with similar questions and are to be construed in *pari materia*. *Howell v. Howell*, 206 N. C. 672, 174 S. E. 921 (1934); *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937).

Either party may secure an absolute divorce under this section even though the applicant is the party who commits the wrong, as granting divorces is exclusively statutory and this is an independent act of the General Assembly. *Long v. Long*, 206 N. C. 706, 175 S. E. 85 (1934); *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942).

Either party may bring an action for absolute divorce under this section and the jury's finding that defendant did not abandon plaintiff without cause does not preclude judgment in plaintiff's favor. *Campbell v. Campbell*, 207 N. C. 859, 176 S. E. 250 (1934).

The separation contemplated by this section is apparently unrestricted. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

The expression used in *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942), "that the bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce," should be viewed in the light of its setting, and construed accordingly. It was not intended as a delimitation of the statute. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943).

Intention.—The bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that the husband shall absent himself from the wife for long periods—a situation which was not contemplated by the law as a cause of divorce in fixing the period of separation. *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942).

Separation Must Be Voluntary in Inception.—In an action for divorce, based upon two years' separation by mutual consent, plaintiff must not only show that he and defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception. *Williams v. Williams*, 224 N. C. 91, 29 S. E. (2d) 39 (1944).

"Separation" would not include an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

"Judicial Separation" Included.—A legal separation for the requisite period of two years is ground for divorce under this section. The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them. *Lockhart v. Lockhart*, 223 N. C. 559, 27 S. E. (2d) 444 (1943).

A separation by act of the parties, or one of them, or under order of court a mensa et thoro, suffices to meet the terms of this section. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Section Did Not Apply Where Separation Was without Cause and without Agreement.—While the applicant need not be the injured party, the statute did not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936); *Hyder v. Hyder*, 210 N. C. 486, 187 S. E. 798 (1936); *Reynolds v. Reynolds*, 210 N. C. 554, 187 S. E. 768 (1936), decided prior to the 1937 amendment.

Necessity for Mutual Agreement.—The word "separation," as applied to the legal status of a husband and wife, means more than "abandonment"; it means a cessation of cohabitation of husband and wife, by mutual agreement. *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936), citing *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921). See *Dudley v. Dudley*, 225 N. C. 83, 33 S. E. (2d) 489 (1945).

A charge by the court to the jury that the living separate and apart means living separate and apart under mutual agreement only, was erroneous, entitling plaintiff to a new trial. *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942), distinguishing *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936), as decided under prior wording of section.

Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. *Dudley v. Dudley*, 225 N. C. 83, 33 S. E. (2d) 489 (1945); *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945).

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house. *Dud-*

ley v. Dudley, 225 N. C. 83, 33 S. E. (2d) 489 (1945).

Evidence of Conjugal Relations within Two Years before Action.—Evidence that less than two years before the institution of divorce action defendant visited plaintiff at army camp and plaintiff visited defendant on furloughs, and that at such times they cohabited as man and wife, was sufficient to negative conclusion that conjugal relations had ceased for the period prescribed by this section, and supported verdict in defendant's favor and judgment denying plaintiff's suit for divorce on the grounds of two years' separation. *Mason v. Mason*, 226 N. C. 740, 40 S. E. (2d) 204 (1946).

Question of Resumption of the Conjugal Relation after Separation Is for Jury.—*Reynolds v. Reynolds*, 210 N. C. 554, 187 S. E. 768 (1936).

"Living Apart."—For note on "living apart" where both parties live in the same house, see 18 N. C. Law Rev. 247.

This section does not contemplate, as essential, a repudiation of all marital obligations, and that the husband has supported the wife will not defeat his action. *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942).

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. *Williams v. Williams*, 224 N. C. 91, 29 S. E. (2d) 39 (1944).

Spouse May Not Obtain Divorce Solely on Own Dereliction.—It is not to be supposed the General Assembly intended in enacting this section to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years, without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by complainant's own dereliction. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943); *Pharr v. Pharr*, 223 N. C. 115, 25 S. E. (2d) 471 (1943).

A husband may not ground an action for divorce under this section on his own criminal conduct towards his wife. *Rey-*

nolds v. Reynolds, 208 N. C. 428, 181 S. E. 338 (1935), distinguishing Long v. Long, 206 N. C. 706, 175 S. E. 85 (1934) and Campbell v. Campbell, 207 N. C. 859, 176 S. E. 250 (1934). See Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798 (1936); Byers v. Byers, 223 N. C. 85, 25 S. E. (2d) 466 (1943).

The party in the wrong in the face of a plea in bar based on such wrong cannot obtain a divorce under the provisions of this section. Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471 (1943), following Byers v. Byers, 223 N. C. 85, 25 S. E. (2d) 466 (1943).

Plaintiff's Wrongful Conduct and Recrimination.—Where defendant, in an action for divorce on the grounds of two years' separation, set up plaintiff's wrongful conduct and willful abandonment of defendant and also recrimination, either defense, if established, would defeat plaintiff. The burden, however, rests upon defendant to establish these defenses, which are affirmative. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Where Recrimination Established.—This section does not authorize the granting of a divorce to one spouse where the other pleads and establishes recrimination. Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471 (1943).

Husband's Failure to Support Children Does Not Bar Action.—Under this and the preceding section plaintiff's admission that he had been convicted for failing to support the children of his marriage is not alone sufficient to defeat his action for divorce on the ground of two years' separation. Welch v. Welch, 226 N. C. 541, 39 S. E. (2d) 457 (1946).

Jurisdictional Averments.—In an action for divorce on the ground of two years' separation, brought by either party under this section, as amended, it is not required that the jurisdictional affidavit, required by § 50-8, contain the averment that the facts set forth in the complaint, as grounds for divorce, have existed to the knowledge of plaintiff at least six months prior to the filing of the complaint, the legislative intent to this effect being apparent from the proviso in § 50-8, dispensing with the necessity that the cause of action should have existed for six months when the grounds for divorce is separation, the period of separation then being prescribed as five years, which was reduced to two years by this section. Smithdeal v. Smithdeal, 206 N. C. 397, 174 S. E. 118 (1934).

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties

have lived separate and apart for two years, and that plaintiff has been a resident of the State for one year (now six months). Oliver v. Oliver, 219 N. C. 299, 13 S. E. (2d) 549 (1941).

Allegations Sufficient to Entitle Plaintiff to Divorce.—Where the complaint alleges, and there is evidence tending to show, that husband and wife, "have lived separate and apart for two years" next immediately preceding the institution of the action, and that plaintiff "has resided in the State for a period of six months," nothing else appearing, the establishment of these allegations by proof would entitle plaintiff to a divorce. This section so provides. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

It is unnecessary to set out in the complaint the cause for the separation, or to allege that it was without fault on the part of plaintiff, or to aver that it was by mutual agreement of the parties. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with plaintiff to prove the case secundum allegata. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Statement in Answer.—In an action under this section it was held that the mere statement in the answer that the allegation in complaint "that plaintiff and defendant have not lived together as man and wife since April 1, 1942, is not denied," was not an admission of a "separation." Moody v. Moody, 225 N. C. 89, 33 S. E. (2d) 491 (1945).

Where Issues to Be Passed on by Jury.—In an action under this section, where complaint alleges sufficient facts and defendant in her answer sets up a divorce a mensa with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings is erroneous, as there are issues of fact raised to be tried by a jury. Lockhart v. Lockhart, 223 N. C. 123, 25 S. E. (2d) 465 (1943).

To establish a domicile, there must be a residence, and the intention to make it a home or to live there indefinitely. Bryant v. Bryant, 228 N. C. 287, 45 S. E. (2d) 572 (1947).

Plaintiff must be physically present in this State and have the intention of making his residence here a permanent abiding

place in order to be domiciled here within the meaning of this section, making residence in this State for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years' separation. *Bryant v. Bryant*, 228 N. C. 287, 45 S. E. (2d) 572 (1947).

The fact that a person obtains automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive. *Bryant v. Bryant*, 228 N. C. 287, 45 S. E. (2d) 572 (1947).

Finding of Court as to Residence.—The finding of the court, supported by evidence, that plaintiff was physically present in this State for more than six months prior to instituting action for divorce and that he regarded his residence here as a permanent home, is sufficient to support judgment denying defendant's motion in the cause to set aside the divorce decree on

the ground of want of the jurisdictional requirement of domicile. *Bryant v. Bryant*, 228 N. C. 287, 45 S. E. (2d) 572 (1947).

How Decree Attacked on Ground of Nonresidence.—The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the State for six months preceding the institution of the action is by motion in the cause. *Bryant v. Bryant*, 228 N. C. 287, 45 S. E. (2d) 572 (1947).

Applied in *Hyder v. Hyder*, 215 N. C. 239, 1 S. E. (2d) 540 (1939); *Nall v. Nall*, 229 N. C. 598, 50 S. E. (2d) 737 (1948).

Cited in *Teasley v. Teasley*, 205 N. C. 604, 172 S. E. 197 (1934); *State v. Henderson*, 207 N. C. 258, 176 S. E. 758 (1934); *Goodman v. Goodman*, 208 N. C. 416, 181 S. E. 328 (1935); *Brown v. Brown*, 213 N. C. 347, 196 S. E. 333 (1938); *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

§ 50-7. **Grounds for divorce from bed and board.**—The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

Cross References.—As to effect of divorce a mensa et thoro on right to administer, see § 28-12. As to effect on wife's right to administer and interest in property, see § 52-20. As to effect on husband's right to administer and interest in property, see § 52-21.

Plaintiff Must Petition for Divorce a Mensa.—A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. *Morris v. Morris*, 75 N. C. 168 (1876).

Allegations in a cross action for divorce a mensa et thoro, set up by defendant wife in the husband's action for divorce, held sufficient. *Ragan v. Ragan*, 214 N. C. 36, 197 S. E. 554 (1938).

Grounds Available to Husband as Well as Wife.—The grounds for divorce a mensa given by this section are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party." *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930).

Only the party injured is entitled to a divorce under this section. *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492 (1937). See *Carnes v. Carnes*, 204 N. C. 636, 169 S. E. 222 (1933); *Albritton v. Albritton*, 210 N. C. 111, 185 S. E. 762 (1936); *Lawrence v. Lawrence*, 226 N. C. 624, 39 S. E. (2d) 807 (1946).

When the misconduct of the complaining party is calculated to and does reasonably induce the conduct of defendant relied upon in an action for divorce a mensa et thoro, he or she, as the case may be,

will not be permitted to take advantage of his or her own wrong, and the decree of divorcement will be denied. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943), citing *Page v. Page*, 161 N. C. 170, 76 S. E. 619 (1912).

Effect of Delay in Bringing Action.—An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. *Whittington v. Whittington*, 19 N. C. 64 (1836).

But a delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for divorce, the petitioner was a nonresident of the State, and is now a pauper. *Schonwald v. Schonwald*, 62 N. C. 215 (1867).

Evidence of Acts Occurring "More than Ten Years Ago."—Where a wife sues her husband for divorce a mensa et thoro, under this section, it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to within six months of the beginning of the action. *Page v. Page*, 167 N. C. 346, 83 S. E. 625 (1914).

Condonation.—Evidence merely of forgiveness by the plaintiff, in her action for divorce a mensa et thoro against her husband, is insufficient to establish condonation. *Page v. Page*, 167 N. C. 346, 83 S. E.

625 (1914); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offenses afterwards. If the condition is violated, the original offense is revived. *Lassiter v. Lassiter*, 92 N. C. 130 (1885).

Repetition of the offence nullifies the previous condonation. *Collier v. Collier*, 16 N. C. 352 (1829); *Gordon v. Gordon*, 88 N. C. 45 (1883); *Page v. Page*, 167 N. C. 346, 83 S. E. 625 (1914).

Alimony.—Where in the husband's action for divorce a vinculo, the wife sets up a cross action for divorce a mensa, the court has the power to make an order for the payment of alimony upon the jury's

1. If either party abandons his or her family.

Acts Which Constitute Abandonment.

—Where a husband drives his wife from his house, or obtains her removal by stratagem or withholds from her support while there, he is deemed to have abandoned her. *Setzer v. Setzer*, 128 N. C. 170, 38 S. E. 731 (1901).

It is not necessary that the husband should leave the State. *Witty v. Barham*, 147 N. C. 479, 61 S. E. 372 (1908).

It is not necessary for the husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him, which would constitute abandonment by the hus-

2. Maliciously turns the other out of doors.

This Subsection an Instance of Abandonment in Subsection 1.—The ground for divorce a mensa given the wife under this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment provided by subsection 1. *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918).

Adverse Ruling in Previous Action.—A

3. By cruel or barbarous treatment endangers the life of the other.

Allegation of actual physical violence is not required under this section. *Pearce v. Pearce*, 226 N. C. 307, 37 S. E. (2d) 904 (1946).

Whipping wife held cause for divorce in *Taylor v. Taylor*, 76 N. C. 433 (1877). For further examples, see *Griffith v. Griffith*, 89 N. C. 113 (1883); *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173 (1890).

Communication of Disease.—The communication of an infectious disease by the husband to the wife is not sufficient ground under this subsection. *Long v.*

determination of the issues in favor of the wife. *Norman v. Norman*, 230 N. C. 61, 51 S. E. (2d) 927 (1949).

In an action for divorce, a verified answer and cross action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. *Nall v. Nall*, 229 N. C. 598, 50 S. E. (2d) 737 (1948).

Applied in *Albritton v. Albritton*, 210 N. C. 111, 185 S. E. 762 (1936); *Sumner v. Sumner*, 227 N. C. 610, 44 S. E. (2d) 40 (1947).

Cited in *Brown v. Brown*, 205 N. C. 64, 169 S. E. 818 (1933); *Lockhart v. Lockhart*, 223 N. C. 559, 27 S. E. (2d) 444 (1943); *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946).

band. Blanchard v. Blanchard, 226 N. C. 152, 36 S. E. (2d) 919 (1946), holding evidence insufficient to show abandonment by husband.

Abandonment imports willfulness and maliciously turning the spouse out of doors. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

The lapse of seven years from the time of the separation does not bar a cross action for divorce a mensa on the ground of constructive abandonment, or application for alimony pendente lite, either by laches or any statute of limitation. *Nall v. Nall*, 229 N. C. 598, 50 S. E. (2d) 737 (1948).

denial of alimony in an independent action under § 50-16 brought by the wife, on the ground that her husband maliciously turned her out of doors, will conclude her upon her cross bill setting up the same matter in an action thereafter brought by her husband against her for divorce a vinculo. *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918).

Long, 9 N. C. 189 (1822).

Revival of Cause after Condonation.—Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. *Lassiter v. Lassiter*, 92 N. C. 130 (1885).

Acts Committed More than Ten Years before.—A divorce will not be granted for cruel and barbarous treatment where it appears the acts complained of were committed more than ten years before the commencement of the action, and in the

meanwhile the parties had continued to reside together. *O'Connor v. O'Connor*, 109 N. C. 140, 13 S. E. 887 (1891).

Causes within Six Months.—Nor will a divorce be granted under this section

4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

This Subsection Remedial.—It would seem that the legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute. *Taylor v. Taylor*, 76 N. C. 433 (1877); *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911).

Nature of Indignities.—To entitle a wife to a divorce from bed and board under this section, the indignity offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temper, and must be repeated, or continued, so that it may appear to have been done willfully and intentionally or at least consciously by the husband to the annoyance of the wife. *Miller v. Miller*, 78 N. C. 102 (1878).

Facts in Each Case Determine.—The acts of the husband which will render the wife's condition intolerable and her life burdensome so as to entitle her to a divorce a mensa are largely dependent on the facts in each particular case, such as the station in life, temperament, state of health, habits and feelings of the plaintiff. *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911).

Conduct of Defendant Must Be Set Out with Particularity.—When a wife bases her action for alimony without divorce upon the grounds that her husband has been guilty of cruel treatment of her and of offering indignities to her person within the meaning of the statute pertaining to divorce from bed and board, she "must meet the requisite" of this section and not only set out with particularity the acts on the part of her husband upon which she relies, but she is also required to allege, and consequently to prove, that such acts were without adequate provocation on her part. *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947).

Under this subsection plaintiff must set out with particularity the language and conduct on the part of defendant relied upon, and must allege and prove that such acts were without adequate provocation

for causes arising within six months before the commencement of the action. *O'Connor v. O'Connor*, 109 N. C. 140, 13 S. E. 887 (1891); *Green v. Green*, 131 N. C. 533, 42 S. E. 954 (1902).

on her part. *Lawrence v. Lawrence*, 226 N. C. 624, 39 S. E. (2d) 807 (1946). See *Pearce v. Pearce*, 225 N. C. 571, 35 S. E. (2d) 636 (1945).

Plaintiff's Innocence Must Be Shown.—The complaint must aver, and facts must be found upon which it can be seen, that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. *White v. White*, 84 N. C. 340 (1881); *Garsed v. Garsed*, 170 N. C. 672, 87 S. E. 45 (1915).

In a cross action under this section, the omission of an allegation that plaintiff's conduct was without provocation on defendant's part is fatal. *Pearce v. Pearce*, 225 N. C. 571, 35 S. E. (2d) 636 (1945).

Same—General Allegation Insufficient.—It is essential that the plaintiff shall specifically set forth in her complaint the circumstances under which the violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is insufficient. *Everton v. Everton*, 50 N. C. 202 (1857); *O'Connor v. O'Connor*, 109 N. C. 140, 13 S. E. 887 (1891); *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822 (1902).

Failure to Allege and Prove That Husband's Accusations of Infidelity Were False.—In an action for divorce a mensa et thoro and for subsistence, plaintiff alleged that defendant had repeatedly accused her of having sexual relations with her foster father and other men, and her evidence tended to show that all of the specific acts of abuse and misconduct complained of occurred in connection with this accusation. Plaintiff further alleged that she had been faithful and dutiful, and that defendant's acts of abuse and misconduct were without provocation or justification, but did not specifically allege or testify that the accusation was false. It was held that defendant's motion for judgment as of nonsuit should have been allowed, since even if the allegation denying provocation or justification be taken as denial of the charge of infidelity, plaintiff offered no testimony in support of such denial. *Lawrence v. Lawrence*, 226 N. C. 624, 39 S. E. (2d) 807 (1946).

Examples of Sufficient Cause.—Where a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child, and seek safety and protection at a distance of several miles, this is sufficient cause for divorce under this section. *Scoggins v. Scoggins*, 85 N. C. 348 (1881).

Allegations that the husband had been living in adultery, had repeatedly avowed his loss of affection for and his desire to be rid of his wife, had ejected her from his bed, and finally ordered her from his home, saying that he never intended to live with her again, state a cause of action. *Pearce v. Pearce*, 226 N. C. 307, 37 S. E. (2d) 904 (1946).

A persistent charge of adultery against a virtuous woman, accompanied by a contemptuous declaration that she was no longer his wife, and by an abandonment of her bed, is such an indignity to her person as would entitle her to a partial divorce and to alimony. *Everton v. Everton*, 50 N. C. 202 (1857).

When in an action by a wife for divorce a mensa there is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's

conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the words of this section, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome." *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911).

Where a petitioner alleged that her husband had become jealous of her without cause, had shaken his fist in her face and threatened her, and declared to her face and published to the neighborhood that the child with which she was pregnant was not his; that her condition had from such treatment become intolerable and her life burdensome, and that she had been compelled to quit his house and seek the protection of her father, it was held that she had set out enough to entitle her to alimony pendente lite. *Erwin v. Erwin*, 57 N. C. 82 (1858).

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, and refused to bed with her and denied that she was his wife. *Green v. Green*, 131 N. C. 533, 42 S. E. 954 (1902).

5. Becomes an habitual drunkard. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C. S., s. 1660.)

Allegations of Habitual Drunkenness.—Allegations in complaint that defendant had been an habitual drunkard during the prior three years are sufficient to state a

cause of action for divorce from bed and board under this section. *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947).

§ 50-8. Affidavit to be filed with complaint; affidavit of intention to file complaint.—The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant or defendant has been a resident of the State for six months next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the State, whereby she may be disappointed in her alimony: Provided, however, that if the cause for divorce is two years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of this proviso to permit a divorce after a separation of two years without waiting an additional six months for filing the complaint: Provided, that if the plaintiff is a nonresident the action shall be brought in the county of the defendant's residence and summons personally served upon the defendant. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband. If she fails

to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4.)

Editor's Note.—The requirement that the complainants have been a resident of the State for two years was changed to one year by the 1933 amendment, and to six months by the 1943 amendment.

The 1947 amendment, effective July 1, 1947, struck out a portion of the first sentence, thereby eliminating the necessity for alleging in an affidavit in an action for divorce that there has been no collusion in bringing such action. The amendatory act, which did not apply to pending litigation, validated all judgments rendered before the effective date in actions for divorce where the affidavit failed to allege that there was no collusion between husband and wife. For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 412.

The 1949 amendment inserted the words "or defendant" in the second sentence, and added the second proviso thereto.

Purpose of Section.—The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application, and, if it is wanting, there is no jurisdiction in the courts. *Holloman v. Holloman*, 127 N. C. 15, 37 S. E. 68 (1900); *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

Requirements Mandatory.—All the requisites mentioned in the affidavit required by this section are mandatory, and a failure to set out these averments in the affidavit prevents the superior court from having jurisdiction. *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296 (1901); *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623 (1906).

General Terms Permitted.—The matters in the jurisdictional affidavit in an action for divorce a mensa brought by the wife may be stated in general terms following the language of the statute. *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

Verification According to Statute.—In an application for alimony pendente lite the affidavit and petition must be verified as required by this section. *Clark v. Clark*, 133 N. C. 28, 45 S. E. 342 (1903). See *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. E. 508 (1903). And verification of a pleading that it was "sworn and sub-

scribed to" is not sufficient. *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822 (1902).

Verification of Answer Setting Up Cross Action.—In the husband's action for divorce a vinculo, the wife's answer setting up a cross action must be verified under this section, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous. *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941).

Verification of Subsequent Pleadings May Not Be Waived.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which 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 under this section, 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 (1948).

Affidavit Not Required in Action to Annul Marriage.—The affidavit required under this section is not necessary in an action to annul a marriage upon statutory grounds. *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929).

Supplementary Affidavits.—No order should be made to deprive the defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits. *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911).

Amendment to Affidavit.—It is discretionary with the trial judge to allow an amendment to the affidavit in an action for divorce. *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902). When allowed the facts shown in the amendment must be verified. *Foy v. Foy*, 35 N. C. 90 (1851).

False Affidavit.—In an action for divorce the affidavit, required by this section in connection with the complaint, is jurisdictional, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as

insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the decree would be by motion in the cause. *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945), wherein the plaintiff was held to have practiced imposition upon the court.

Six Months' Prior Knowledge.—By Laws 1925, c. 93, this section was amended so that in cases where the cause for divorce is five years' (now two years') separation, then the six months' prior knowledge need not be alleged in the affidavit, it being the purpose of § 50-5, subsection 4, to permit a divorce after a separation of five years (now two years) without waiting an additional six months for filing the complaint. *Ellis v. Ellis*, 190 N. C. 418, 130 S. E. 7 (1925).

In all other cases the affidavit must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts stated therein. *Clark v. Clark*, 133 N. C. 28, 45 S. E. 342 (1903). And unless it is so stated the divorce will not be granted. *O'Connor v. O'Connor*, 109 N. C. 140, 13 S. E. 887 (1891); *Green v. Green*, 131 N. C. 533, 42 S. E. 954 (1902). But this need not be alleged in the complaint. *Kinney v. Kinney*, 149 N. C. 321, 63 S. E. 97 (1908).

The proviso in this section eliminating the necessity of waiting six months after the expiration of the requisite period of separation, when the ground for divorce is that of separation, still applies with the reduction in time from five to two years. *Smithdeal v. Smithdeal*, 206 N. C. 397, 174 S. E. 118 (1934).

The residence means actual residence, and prior to the 1949 amendment, which allows suit to be brought where defendant has been a resident of the State for six months, a nonresident wife in suing for divorce could not avail herself of the maxim that "her domicile was that of her husband" where she had not actually satisfied the residence requirement. *Schonwald v. Schonwald*, 55 N. C. 367 (1856).

Where husband and wife establish a residence in the State, the wife, by leav-

ing the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship. *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902).

Residence Need Not Be Alleged in Complaint.—It is not required that the two years' (now six months') residence in the State of the plaintiff in an action for absolute divorce be alleged in the complaint to confer jurisdiction, but it is sufficient if it is set out in the accompanying affidavit. *Williams v. Williams*, 180 N. C. 273, 104 S. E. 561 (1920).

Removal of Property by Husband.—In an action by the wife for divorce a mensa, when the allegations are necessary that the defendant is about to remove himself and property from the State to jeopardize the plaintiff's right to alimony, it is not presumed that the wife would have personal knowledge of her husband's plans or purpose in this regard, and an averment thereof in positive terms and of her personal knowledge is not required. *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911); *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

Where the necessary affidavit is made under this section, in reference to the husband's removal of his property from the State, it is not necessary, in order to get a decree for separation, to file another complaint six months after the time the facts (upon which alone the decree could be made) are alleged to have occurred. *Scoggins v. Scoggins*, 85 N. C. 348 (1881); *Sanders v. Sanders*, 157 N. C. 229, 72 S. E. 876 (1911).

Proof Must Correspond to Allegations.—As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise the court cannot decree a divorce. *Foy v. Foy*, 35 N. C. 90 (1851); *Young v. Young*, 225 N. C. 340, 34 S. E. (2d) 154 (1945).

Cited in *Keys v. Tuten*, 199 N. C. 368, 154 S. E. 631 (1930); *Hodges v. Hodges*, 226 N. C. 570, 39 S. E. (2d) 596 (1946).

§ 50-9. Effect of answer of summons by defendant.—In all cases upon an action for a divorce absolute, where judgment of divorce has heretofore been granted and where the plaintiff has caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a judge of the superior court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judg-

ment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1; 1947, c. 393.)

Cross Reference.—As to procedure in trial generally, see § 1-170, et seq.

Editor's Note.—The 1947 amendment

inserted near the beginning of the section the words "where judgment of divorce has heretofore been granted and."

§ 50-10. Material facts found by jury; parties cannot testify to adultery.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C. S., s. 1662.)

Cross Reference.—As to competency of spouse as witness in civil actions, see § 8-56.

Purpose of Section.—The object of this section was to prevent a judgment from being taken by default, or by collusion, and to require the facts to be found by a jury. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920). See *Moss v. Moss*, 24 N. C. 55 (1841); *Hooper v. Hooper*, 165 N. C. 605, 81 S. E. 933 (1914).

Applies to Cross Action.—This section is applicable to a defendant who files a cross action, and prays for a divorce therein from the plaintiff. *Saunderson v. Saunderson*, 195 N. C. 169, 141 S. E. 572 (1928), citing *Cook v. Cook*, 159 N. C. 46, 74 S. E. 639 (1912).

Where the wife's cross action for divorce a mensa is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolute upon consent of the parties, the judgment is a nullity. *Saunderson v. Saunderson*, 195 N. C. 169, 141 S. E. 572 (1928).

Presumption of Denial.—The provisions of this section that the allegation of the complaint in an action for divorce "are deemed to be denied," applies only to the trial upon the merits, since the facts must be found by a jury. *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893).

The denial by the statute of the plaintiff's allegations in an action for divorce presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920).

Same—In Cross Action.—The defendant in an action for divorce a vinculo, may file a cross action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue

is raised by our statute, and upon a verdict on the required issues, a judgment may be rendered upon the cross action if the pleadings and the evidence are sufficient. *Ellis v. Ellis*, 190 N. C. 418, 130 S. E. 7 (1925).

Same—Time for Answering Not Affected.—The provision of this section putting in a denial of the plaintiff's allegations in an action for divorce does not affect the defendant's right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920).

Witnesses in Actions on Ground of Adultery.—The statutory inhibition that the husband and wife will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear that there was no collusion or otherwise; and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. *Hooper v. Hooper*, 165 N. C. 605, 81 S. E. 933 (1914).

It is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men. *Hooper v. Hooper*, 165 N. C. 605, 81 S. E. 933 (1914).

Evidence of Adultery.—In *Vickers v. Vickers*, 188 N. C. 448, 450, 124 S. E. 737 (1924), the court said: "On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the cost of a criminal pros-

ecution against her alleged paramour was competent, not in any sense as a confession of her guilt, but as tending to show interest in and association with him, and as corroborating other testimony as to adulterous intercourse between the parties. *Toole v. Toole*, 112 N. C. 153, 16 S. E. 912 (1893).

Declaration in Presence of Third Person.—A declaration made by a husband to his wife in the presence of a third party is not such a confidential communication, as is privileged. *Toole v. Toole*, 112 N. C. 153, 16 S. E. 912 (1893).

Declaration of Alleged Paramour.—The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce a vinculo matrimonii, tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to the declarations, are admissible as evidence and do not come within the prohibition of this section. *Toole v. Toole*, 112 N. C. 153, 16 S. E. 912 (1893).

Question for Jury.—Where the facts in a divorce action were in dispute the case was one for the jury. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

§ 50-11. **Effects of absolute divorce.**—After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, provided further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in § 50-5 or § 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663.)

Time Reduced to Two Years.—Section 50-6, as amended, reduced the time in this section from ten to two years. *Howell v. Howell*, 206 N. C. 672, 174 S. E. 921 (1934); *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937).

No Permanent Alimony.—Upon the granting of an absolute divorce all rights arising out of the marriage cease and determine, and hence the court has no power in such cases to allow permanent alimony. *Duffy v. Duffy*, 120 N. C. 346, 27 S. E. 28 (1897).

Alimony, both temporary and permanent, may be awarded in statutory proceedings for alimony without divorce and in an action for divorce a mensa et thoro; in an action for absolute divorce temporary alimony pendente lite, but not permanent alimony, may be awarded. *Stanley v. Stanley*, 226 N. C. 129, 37 S. E.

Evidence in divorce action held insufficient to carry case to jury. *Moody v. Moody*, 225 N. C. 89, 33 S. E. (2d) 491 (1945).

Instruction Not at Variance with Section.—In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of this section. *Nelson v. Nelson*, 197 N. C. 465, 149 S. E. 585 (1929).

Verdict of Jury.—In a proceeding for a divorce the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition. *Wood v. Wood*, 27 N. C. 674 (1845).

Same—Eleven Jurors.—In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for the plaintiff. *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562 (1902).

Quoted in State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

Stated in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

(2d) 118 (1946).

Prior Award of Alimony Preserved.—Under the proviso in this section, a prior award of alimony is protected from annulment by a decree in absolute divorce based on two years' separation, which would otherwise probably have resulted. *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946).

But Mere Separation Agreement Is Not Protected.—This section does not protect a mere separation agreement as an award of alimony, and it is not only against public policy, but contrary to this section, that permanent alimony should be the outcome of an action for divorce a vinculo. *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946).

A judgment for subsistence, entered in an action for alimony without divorce, survives a judgment for absolute divorce

obtained under the two-year separation statute. *Simmons v. Simmons*, 223 N. C. 841, 28 S. E. (2d) 489 (1944).

Consent Judgment Not Affected.—Where a consent judgment for alimony without divorce has been entered, a condition of which is that the wife remain unmarried, the subsequent decreeing of a divorce a vinculo to the wife is not a violation of the terms of the consent judgment, and

the judge has no authority to reduce the amount of alimony provided in the consent judgment upon that ground. *Lentz v. Lentz*, 193 N. C. 742, 138 S. E. 12 (1927).

Cited in *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937); *Brown v. Brown*, 224 N. C. 556, 31 S. E. (2d) 529 (1944); *Pearce v. Pearce*, 225 N. C. 571, 35 S. E. (2d) 636 (1945).

§ 50-12. Resumption of maiden name authorized; adoption of name of prior deceased husband validated.—Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county in which said divorce was granted, and the term of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall provide a permanent book in which shall be recorded all such applications herein provided for, which shall be indexed under the name of the former husband of the applicant and under the maiden name of such applicant. The clerk of the court of the county in which said application shall be recorded shall charge a fee of one (\$1.00) dollar for such registration. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. (1937, c. 53; 1941, c. 9.)

Editor's Note.—The 1941 amendment inserted in the first sentence of this section the words "or the name of a prior deceased husband, or a name composed of her given name and the surname of a

prior deceased husband." The amendment also added the words "or a name composed of her given name and the surname of a prior deceased husband," in the last sentence.

§ 50-13. Custody of children in divorce.—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Provided, custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this section or § 17-39 of the General Statutes of North Carolina, may be determined in a special proceeding instituted by either of said 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 child at the time of filing said petition, is a resident. The resident judge of the district wherein the petition is filed may hear

the facts and determine the custody of said children at any place that may be designated in his district after five days' notice of said proceedings to the defendant. Notice of the summons and petition in said proceedings may be served on a non-resident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the petitioner resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice.

In any case where either parent institutes a divorce action when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (1871-2, c. 193, s. 46; Code, ss. 1296, 1570; Rev., s. 1570; C. S., s. 1664; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010.)

Cross Reference.—As to habeas corpus proceeding to determine custody of children of parents who are separated without being divorced, see §§ 17-39, 17-40.

Editor's Note.—The 1939 amendment, commented on in 17 N. C. Law Rev. 352, added the second paragraph.

The 1941 amendment inserted the words "or the respondent or child" in the first sentence of the second paragraph.

The 1943 amendment added the last paragraph.

The 1949 amendment rewrote the first sentence of the second paragraph.

Jurisdiction Exclusive.—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of § 17-39, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or are suing for a decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quaere, whether the statutes relating to the juvenile courts, § 110-21 et seq., confer jurisdiction in such instances. *In re Blake*, 184 N. C. 278, 114 S. E. 294 (1922).

Habeas Corpus Is Not an Appropriate Writ When Parties Are Divorced.—Although statutory habeas corpus is an appropriate writ to determine the custody of children as between married parents living in a state of separation under § 17-39, it is not appropriate when they are divorced. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

Remedy of Plaintiff in Divorce Suit Is by Motion in the Cause.—Where a wife

institutes suit for divorce, her remedy to require the defendant to provide support for a minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. *Winfield v. Winfield*, 228 N. C. 256, 45 S. E. (2d) 259 (1947).

Extent of Jurisdiction.—Upon the institution of a divorce action the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and is subject to the fundamental requirement of notice and opportunity to be heard. If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage, and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. *Story v. Story*, 221 N. C. 114, 19 S. E. (2d) 136 (1942).

Jurisdiction Not Ousted by Decree under § 17-39.—A decree awarding the custody of a child under the provisions of § 17-39 does not oust the jurisdiction of the court 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 (1948).

Proceeding Is In Rem.—The awarding of the custody of the children in an action for divorce is in rem, and the court must have jurisdiction over the children, who are the res, or must have jurisdiction of the person of their custodian, who is given notice and an opportunity to be heard in

order to have authority to enforce its decree by coercive action. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Jurisdiction to Award Custody of Children without the State.—In so far as this section undertakes to vest a judge with authority, without the service of process and without notice, to enter an effective, binding order awarding the custody of an infant beyond the confines of the State, it is invalid. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Domicile of Husband Not Necessarily Domicile of Wife and Children.—Where the husband in his divorce action alleges that he had notified his wife that he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Where Divorce Decree Entered in Another State.—A decree for absolute divorce which awarded the custody of the child of the marriage was entered in another state and the parties thereafter moved to this State. The proper procedure for either party to determine the right to the custody of the child is by a special proceeding under this section. *Hardee v. Mitchell*, 230 N. C. 40, 51 S. E. (2d) 884 (1949).

Necessity for Service.—Where a parent is about to abscond and take her children beyond the jurisdiction of the court for the purpose of avoiding the service of process, the court may act and act promptly. But even then its order becomes effective and binding only upon service. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Five Days' Notice Is for Protection of Parent Who Does Not Have Control of Child.—The provision in the statute dispensing with the notice of five days, when it appears that the parent having possession or control of the infant child of the parties to the action has removed or is about to remove such child from the jurisdiction of the court, is applicable only where the application or motion is made by the parent who does not have possession or control of the child, and is for the protection of the rights of such parent, and not of the parent who has possession or control of the child at the time the application or motion is made. In such case, no notice, to the adverse party is required. *Burrowes v. Burrowes*, 210 N. C. 788, 188 S. E. 648 (1936).

Order Made without Jurisdiction and in Denial of Due Process.—An order of a judge of the superior court awarding cus-

tody of minor children to a plaintiff under this section, is made without jurisdiction and in denial of due process of law, when at the time such order was made there had been neither service of summons upon nor notice to the defendant, and when both the defendant and the minor children were without the State. *Coble v. Coble*, 229 N. C. 81, 47 S. E. (2d) 798 (1948).

Judgment out of Term.—Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority under this section to render such judgment. *Pate v. Pate*, 201 N. C. 402, 160 S. E. 450 (1931).

Judge Is without Jurisdiction to Hear Matter outside District.—Upon application for the custody of the children of the marriage 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. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658 (1949).

Father Primarily Liable for Support.—The liability of the father primarily to support the children remains after the divorce, as well as before such divorce, and even where the custody of the children has been awarded to the mother. And the order may be made a lien on his land. *Sanders v. Sanders*, 167 N. C. 319, 83 S. E. 490 (1914). See *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502 (1900).

Support and Counsel Fees Pendente Lite Where Husband Denies Paternity.—Where, upon the wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, the husband files affidavit denying paternity, and at his instance the issue is transferred to the civil issue docket, the trial court has the discretionary power to order defendant to provide for support of the child and counsel fees pendente lite. *Winfield v. Winfield*, 228 N. C. 256, 45 S. E. (2d) 259 (1947).

The welfare of the child at the time of the contest is controlling in determining the right to the custody of the child as be-

tween its divorced parents. *Hardee v. Mitchell*, 230 N. C. 40, 51 S. E. (2d) 884 (1949).

In applying this statute the question of granting the custody and tuition of the child to the father or mother is discretionary with the court. The welfare of the child is the paramount consideration, or, as stated in *In re Lewis*, 88 N. C. 31 (1883), "the polar star by which the discretion of the court is to be guided." *Brake v. Brake*, 228 N. C. 609, 46 S. E. (2d) 643 (1948).

Court May Disregard Agreement between Husband and Wife Regarding Custody of Child.—A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. *In re Albertson*, 205 N. C. 742, 172 S. E. 411 (1934).

No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; but they cannot thus withdraw children of the marriage from the protective custody of the court. The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty towards its ward—the children of the State whose personal or property interests require protection. *State v. Duncan*, 222 N. C. 11, 21 S. E. (2d) 822 (1942).

Consent Judgments.—Where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for the children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. *Sanders v. Sanders*, 167 N. C. 317, 83 S. E. 489 (1914).

Same—Award of Custody Does Not Affect.—Where a consent judgment in an action for a divorce *a mensa* operates as a gift to the wife of an estate in the husband's land, the fact that the court awards custody of the children does not affect it. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25 (1920).

Without the consent of the parties to vacate or moderate a properly entered consent judgment, the court is without power

to do so. *Lentz v. Lentz*, 193 N. C. 742, 138 S. E. 12 (1927).

Consent Judgment on Issue of Divorce Does Not Divest Jurisdiction as to Custody of Child.—Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with approval of the court, especially where such consent judgment expressly provides that either party may thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children under this section. *Tyner v. Tyner*, 206 N. C. 776, 175 S. E. 144 (1934).

Modification of Decree.—A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent and may be later modified by the court upon change of conditions. *Hardee v. Mitchell*, 230 N. C. 40, 51 S. E. (2d) 884 (1949).

The superior court has jurisdiction under this section to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce, and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce. *Story v. Story*, 221 N. C. 114, 19 S. E. (2d) 136 (1942).

Where, in a decree of divorce the father is ordered to pay a certain sum monthly for the support of his infant daughter, and by its first order the court has retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision the court later, upon the father's insolvency, made the sums assessed a charge on the plaintiff's homestead and personal property exemptions when allotted, the modification is authorized by this section as well as by the order of the courts. *Walker v. Walker*, 204 N. C. 210, 167 S. E. 818 (1933).

Effect of Death of Party.—Under this section as it stood prior to the 1949 amendment, after the death of a mother to whom the custody of a child has been awarded pursuant to this section, the court in which the divorce action was pending had no jurisdiction to determine the custody of the child in a controversy between the father and the parents of the deceased mother. Under § 110-21 (3), jurisdiction of

such a proceeding was vested exclusively in the juvenile branch of the superior court of the county in which the child resided or was to be found. *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906 (1948). The 1949 amendment was intended to overrule this case. 27 N. C. Law Rev. 452.

Custody of Grandparents.—Where the custody of a minor child has been awarded the mother in a divorce proceeding and subsequently, after both parents, who are proper and fit persons to have the custody of such child, have moved out of the State, the child being left by the mother with her parents, residents of the State and highly proper persons to rear the child, upon petition of the father for custody of the child, the court has authority under this section to order that the child continue in the custody of the grandparents. *Walker v. Walker*, 224 N. C. 751, 32 S. E. (2d) 318 (1944).

Findings Sufficient to Sustain Decree.—Findings that the parties have been mar-

ried and divorced, that the wife is a person of good character, resident in this State, that the husband is financially responsible, and that the best interest of the minor child of the marriage would be promoted by awarding its custody to the wife, are sufficient to sustain a decree awarding its custody to her and requiring the husband to make contributions for the support of the child. *Hardee v. Mitchell*, 230 N. C. 40, 51 S. E. (2d) 884 (1949).

Appeals by Both Wife and Children.—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. *Sanders v. Sanders*, 767 N. C. 317, 83 S. E. 489 (1914).

Cited in Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492 (1945); *In re McGraw*, 228 N. C. 46, 44 S. E. (2d) 349 (1947).

§ 50-14. **Alimony on divorce from bed and board.**—When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered. (1871-2, c. 193, s. 37; Code, s. 1290; Rev., s. 1565; C. S., s. 1665.)

Alimony Defined.—See *Rogers v. Vines*, 28 N. C. 293 (1846); *Taylor v. Taylor*, 93 N. C. 418 (1885).

The alimony allowed under this section is incident to and dependent upon a decree of divorce a mensa, and where no divorce a mensa was granted on the verdict no permanent alimony could be allowed. *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941).

Permanent alimony under this section may be allowed only upon decree for divorce a mensa, and is erroneously granted in the wife's cross action in which divorce a mensa is neither prayed nor decreed. *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941).

Effect of Reconciliation or Death of Party.—Alimony is in its nature a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. *Rogers v.*

Vines, 28 N. C. 293 (1846).

A decree of divorce a mensa may assign one third of the husband's estate to the wife. *Davis v. Davis*, 68 N. C. 180 (1873).

Effect of Wife's Abandonment.—The voluntary abandonment by the wife of her husband without legal justification will not entitle her to alimony in her suit for divorce from bed and board. *McManus v. McManus*, 191 N. C. 740, 133 S. E. 9 (1926).

Appeal.—Whether the wife is entitled to alimony is a question of law upon the facts found, and is reviewable upon the appeal by either party. *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902).

Cited in Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278 (1937); *Story v. Story*, 221 N. C. 114, 19 S. E. (2d) 136 (1942); *Lockhart v. Lockhart*, 223 N. C. 559, 27 S. E. (2d) 444 (1943).

§ 50-15. **Alimony pendente lite; notice to husband.**—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the hus-

band to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or § 50-16, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the State or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary. (1871-2, c. 193, s. 38; 1883, c. 67; Code, s. 1291; Rev., s. 1566; C. S., s. 1666.)

- I. In General.
- II. Application and Proceedings Thereon.
- III. Prerequisites to Award.
- IV. Notice.
- V. The Order.
 - A. In General.
 - B. Amount.
- VI. Pleading and Practice.

I. IN GENERAL.

Editor's Note.—It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. *Wilson v. Wilson*, 19 N. C. 377 (1837); *Reeves v. Reeves*, 82 N. C. 348 (1880). In 1852 the legislature passed an act authorizing the courts upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. See *Everton v. Everton*, 50 N. C. 202 (1857). In *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918), the court overruled the former doctrine mentioned above, and stated that the courts possessed the right to grant alimony pendente lite by virtue of the common law—the practice having come down from the English ecclesiastical courts.

The effect of this holding is to make the statute remedial in its nature, affirmative in its terms and cumulative in its effect, not abrogating the common law existent on the subject nor withdrawing from the court any powers already possessed in administering its principles. *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918), overruling *Reeves v. Reeves*, 82 N. C. 348 (1880), on this point.

Purpose of the Section.—The purpose of this section is to afford the wife present pecuniary relief pending the progress of the action, and to afford the husband some measure of protection in a motion so important, which is made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment. *Morris v. Morris*, 89 N. C. 109 (1883).

Alimony When the Wife Is Defendant.

—When the wife is the defendant she has a right to claim alimony pendente lite under this section. *Webber v. Webber*, 79 N. C. 572 (1878); *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904).

And this is true although she may be concluded by the judgment against her in her former and independent action for divorce a mensa under the provisions of the statute. *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918).

Cited in *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937); *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946).

II. APPLICATION AND PROCEEDINGS THEREON.

An application for alimony pendente lite can be made by motion in the cause. *Reeves v. Reeves*, 82 N. C. 348 (1880).

In an action for divorce, a verified answer and cross action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. *Nall v. Nall*, 229 N. C. 598, 50 S. E. (2d) 737 (1948).

Where Motion May Be Heard.—A motion for alimony pendente lite may be heard anywhere in the judicial district. *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902). Also a motion to reduce alimony. *Moore v. Moore*, 131 N. C. 371, 42 S. E. 822 (1902).

But a resident judge holding court in another district cannot hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. *Moore v. Moore*, 131 N. C. 371, 42 S. E. 822 (1902).

Alimony pendente lite may be allowed before the return term if the complaint has been filed. *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902).

When Wife Demands Alimony Pendente Lite and Alimony without Divorce.—In the husband's suit for divorce, in which the wife files answer demanding alimony pendente lite and alimony without divorce, it is error for the court, upon the hearing for

alimony pendente lite under this section, to issue an order for alimony without divorce under § 50-16. *Adams v. Adams*, 212 N. C. 373, 193 S. E. 274 (1937).

Kind of Divorce Warranted Immaterial.—Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo, or only a divorce a mensa et thoro. *Little v. Little*, 63 N. C. 22 (1868).

III. PREREQUISITES TO AWARD.

Prima Facie Case.—Under this section a petitioner for divorce is entitled to alimony pendente lite upon making out a prima facie case. *Sparks v. Sparks*, 69 N. C. 319 (1873).

Finding Facts as Alleged Sufficient.—Upon a motion for alimony it is sufficient for the court to find that the facts are as alleged in the answer and the affidavits filed in support of the motion. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889); *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904); *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492 (1937); *Ragan v. Ragan*, 214 N. C. 36, 197 S. E. 554 (1938).

Necessity for Finding of Facts.—Upon application for alimony pendente lite the trial court is required to find the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon a finding that defendant was the owner of certain properties is error. *Dawson v. Dawson*, 211 N. C. 453, 190 S. E. 749 (1937).

In an application for alimony pendente lite under this section, it is required that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. *Caudle v. Caudle*, 206 N. C. 484, 174 S. E. 304 (1934).

Judge May Leave Charges Open.—Where the allegations of the complaint are sufficient under the terms of this section, and are found to be true and sufficient by the judge of the superior court, in the wife's action for a divorce a mensa et thoro, the court may leave open the charges made by each of the parties against the other, and award alimony pendente lite, including a reasonable attorney's fee, taking into consideration the circumstances of the case. *Hennis v. Hennis*, 180 N. C. 606, 105 S. E. 274 (1920).

Where the wife's action is for a divorce a mensa on the ground of abandonment, stating that she was compelled to leave home by the conduct of her husband, the

judge, in allowing alimony pendente lite, must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. *Horton v. Horton*, 186 N. C. 332, 119 S. E. 490 (1923).

It need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. *Lassiter v. Lassiter*, 92 N. C. 130 (1885).

Adultery Does Not Bar Alimony Pendente Lite.—In action by wife for divorce a mensa, allegation of adultery on part of wife does not bar alimony pendente lite, as provision making adultery of wife bar to alimony is a part of § 50-16, but is not included in this section. *Lawrence v. Lawrence*, 226 N. C. 221, 37 S. E. (2d) 496 (1946).

The lapse of seven years from the time of the separation does not bar a cross action for divorce a mensa on the ground of constructive abandonment or application for alimony pendente lite, either by laches or any statute of limitation. *Nall v. Nall*, 229 N. C. 598, 50 S. E. (2d) 737 (1948).

Wife's Estate Insufficient for Her Support and Expenses of Suit.—A married woman is entitled to alimony pendente lite from her husband's estate, when the income from her separate estate is not sufficient for her support and to defray the necessary expenses in prosecuting her suit. *Miller v. Miller*, 75 N. C. 70 (1876).

Where, in the husband's action for divorce on the ground of adultery, the wife files answer denying the charges and sets up a cross action for divorce from bed and board, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, and that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action, and was without means of support and that the husband was financially able to make the payments ordered, is sufficient to support the court's order of alimony pendente lite. *Covington v. Covington*, 215 N. C. 569, 2 S. E. (2d) 558 (1939).

Where Wife Has Ample Means.—The right of alimony pendente lite, both under this section and under the common law, is predicated upon the justice of affording the wife sufficient means to cope with her husband in presenting their case before the court, and a finding, supported by evidence, that the wife has earnings and means of support equal to that of her husband, sustains the court's order denying her motion for alimony pendente lite.

Oliver v. Oliver, 219 N. C. 299, 13 S. E. (2d) 549 (1941).

When Husband Denies Having Property.—Where the husband denies having any property but admits that he is an able-bodied man, the court may order an allowance without inquiry into the value of his property. *Muse v. Muse*, 84 N. C. 35 (1881).

Allegations Held Sufficient.—In an action by a wife for a divorce a mensa, where acts of cruelty were alleged as the ground of separation, and also an estimate was made of the value of the defendant's estate, it was held that there was sufficient evidence to decree alimony and fix the amount. *Pain v. Pain*, 80 N. C. 322 (1879). Also where acts were alleged which were well calculated to make her condition intolerable and her life burdensome and the bill set forth an estimate of the amount of the defendant's property. *Gaylord v. Gaylord*, 57 N. C. 74 (1858).

Findings Held Sufficient.—Where the facts as found by the judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they per se constitute sufficient ground to award alimony pendente lite. *Lassiter v. Lassiter*, 92 N. C. 130 (1885).

Alimony Granted.—Where the complaint of a feme plaintiff seeking a divorce alleges facts which, if believed, entitled her to the relief demanded, and is supplemented by an affidavit that the husband is trying to dispose of his property and has offered his land for sale with the avowed purpose of leaving the State, and that the children are small and need the mother's care, it is proper to grant an order for alimony pendente lite, and it is also competent for the court to award to the mother the custody of the younger children. *Scroggins v. Scroggins*, 80 N. C. 319 (1879).

IV. NOTICE.

When Five Days' Notice Required.—The provision requiring five days' notice applies only when the motion is heard out of term, and parties are fixed with notice of all motions or orders made during the term of the court. *Coor v. Smith*, 107 N. C. 431, 11 S. E. 1089 (1890); *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

When Five Days' Notice Dispensed with.—An affidavit of the wife that husband had left the State the day after the filing of the complaint, and that she had good reason to believe that he had left to defeat her claim for alimony, having been selling his property for several months

with that purpose in view, dispenses with the necessity for notice. *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904).

Time of Hearing Not Specified.—The fact that a notice of a motion for alimony pendente lite, duly served upon the defendant, did not specify the time of hearing, will not invalidate the order allowing the same, it having been heard at a term of court at which the cause stood regularly for trial. *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893).

An order of court continuing the motion for alimony to a future term of court made in the presence of counsel for both parties is sufficient notice, under the statute, of such motion. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488 (1889).

V. THE ORDER.

A. In General.

An order for support is not final, and may be modified or set aside on a showing of changed conditions. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943).

Effect of Insufficient Finding.—An order allowing the wife alimony pendente lite may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void. *Moody v. Moody*, 118 N. C. 926, 23 S. E. 933 (1896); *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

If Allegations Not Controverted.—If the allegations in the complaint are not controverted, it is sufficient if the judge finds that no answer was filed and adjudges alimony to be paid. *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893).

Enforcement.—An order to pay alimony may be enforced by imprisonment for contempt. *Pain v. Pain*, 80 N. C. 322 (1879); *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893).

Alimony May Be Decreed a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situated here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502 (1900); *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

B. Amount.

Discretion of Court.—While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. *Schonwald v. Schonwald*, 62 N. C. 215 (1867); *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733

(1904). This is subject to the limitation that the amount is not in excess of the net income of the defendant. *Davidson v. Davidson*, 189 N. C. 625, 127 S. E. 682 (1925). See *Wright v. Wright*, 216 N. C. 693, 6 S. E. (2d) 555 (1940).

Usually One Third of Net Income.—Excepting attorney's fees and expenses, the amount ordinarily allowed pendente lite under this section is not in excess of the amount prescribed by § 50-14 upon a final judgment for divorce from bed and board; that is, one third of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. But this rule is not inflexible, and the amount to be allowed is not arbitrarily fixed by the statute. *Davidson v. Davidson*, 189 N. C. 625, 127 S. E. 682 (1925).

Amount May Be Altered by Court.—Alimony regularly ordered to be paid a wife pendente lite may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

Allowance for Children.—Where in passing upon a motion of feme plaintiff in her action for divorce a mensa for alimony, etc., pendente lite, if the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

Not Reviewable Unless Abuse Shown.—The question of the amount allowed, in proper instances, by the superior court judge to the wife, in her action for divorce a mensa et thoro, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused. *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917); *Hennis v. Hennis*, 180 N. C. 606, 105 S. E. 274 (1920).

VI. PLEADING AND PRACTICE.

How Allegations Controverted.—In application for alimony pendente lite, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer. *Griffith v. Griffith*, 89 N. C. 113 (1883); *Lassiter v. Lassiter*, 92 N. C. 130 (1885); *Easeley v. Easeley*, 173 N. C. 530, 92 S. E. 353 (1917).

Effect of Demurrer.—In an action for divorce a vinculo, the admissions of parties are not competent evidence; but a de-

murrer to the petition for divorce admits that the facts alleged are true and can and will be proved, so as to secure the verdict of a jury. *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707 (1889).

Deed of Separation May Be Bar.—A deed of separation, in conformity with §§ 52-5, 52-12, and 52-13, approved by a consent judgment, may be pleaded as complete bar to the wife's application for alimony pendente lite and for reasonable counsel fees, as provided by this section. *Brown v. Brown*, 205 N. C. 64, 169 S. E. 818 (1933).

Whether the wife is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party. *Morris v. Morris*, 89 N. C. 109 (1883); *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943 (1902); *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904).

Court Must Find Facts, upon Request.—On a motion for alimony pendente lite and counsel fees in an action instituted by a wife against her husband under the provisions, of this section, whether the wife is entitled to alimony is a question of law upon the facts found, and the court below must find the facts, upon request. *Holloway v. Holloway*, 214 N. C. 662, 200 S. E. 436 (1939).

Facts Found Must Be Set Out for Purpose of Appeal.—The superior court judge, in allowing alimony to the wife pendente lite, under the provisions of this section, must find the essential and issuable facts and set them out in full for the purpose of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient. *Morris v. Morris*, 89 N. C. 109 (1883); *Easeley v. Easeley*, 173 N. C. 530, 92 S. E. 353 (1917); *Horton v. Horton*, 186 N. C. 332, 119 S. E. 490 (1923).

Where Husband Appeals, Injunction Should Issue.—Where alimony pendente lite is allowed the wife, and the husband appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal. *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904).

New Motion after Failure of Original.—Where a motion to reduce alimony pendente lite has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing. *Moore v. Moore*, 131 N. C. 371, 42 S. E. 822 (1902).

§ 50-16. **Alimony without divorce.**—If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days' notice thereof; but if the husband shall have abandoned his wife and left the State, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in § 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees. (1871-2, c. 193, s. 39; Code, s. 1292; Rev., s. 1567; 1919, c. 24; C. S., s. 1667; 1921, c. 123; 1923, c. 52.)

- I. General Consideration.
- II. When Wife Entitled to Relief.
- III. Jurisdiction and Venue.
- IV. Pleadings.
- V. Subsistence Pendente Lite and Counsel Fees.
 - A. In General.
 - B. Counsel Fees.
- VI. The Order and Enforcement Thereof.
 - A. In General.
 - B. Amount of Allowance.
 - C. Enforcement.

Cross References.

As to the criminal aspect of abandonment of family by husband, see §§ 14-322, 14-323, 14-324, 14-325. As to abandonment by husband as forfeiture of right and interest in wife's property and estate, see § 52-21.

I. GENERAL CONSIDERATION.

Editor's Note.—Prior to the year 1872 there was no statute regulating the question of alimony without divorce, but in this State it was held that this relief in proper cases could be granted by courts of

equity. See *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918). By Laws 1872, c. 193, the legislature provided for this relief, but in that act there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. See *Hodges v. Hodges*, 82 N. C. 122 (1880). In 1919 an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. Laws 1919, c. 24.

The 1919 amendment made other radical changes in this section. In addition to adding the last four sentences in toto, this amendment added the clauses allowing subsistence for failure to support the children of the marriage or for guilty conduct which would constitute grounds for divorce.

The 1923 amendment changed this section by allowing the husband to plead the adultery of the wife in bar of her right to such alimony. See 1 N. C. Law Rev. 294.

This section is one solely for support. It provides a remedy for an abandoned wife

to obtain support from the estate or earnings of her husband. *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (1942).

Two separate remedies are provided by this section, one for alimony without divorce, and one for reasonable subsistence and counsel fees *pendente lite*. The amounts allowed are determined by the trial court in its discretion and are not reviewable. Either party may apply for a modification at any time before the trial of the action. *Oldham v. Oldham*, 225 N. C. 476, 35 S. E. (2d) 332 (1945).

In considering this section it must be noted that two distinct remedies are there-in provided—first the action for alimony without divorce—second the application for an allowance for subsistence *pendente lite*. See *McFetters v. McFetters*, 219 N. C. 731, 14 S. E. (2d) 833 (1941).

Section Applies Only to Actions Instituted by Wife.—A child of divorced parents is not entitled to an allowance of counsel fees and suit money *pendente lite* in her action against her father to force him to provide for her support, this section and § 50-15 applying only to actions instituted by the wife, and such right not existing at common law. *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936).

This section applies only to independent suits for alimony. *Reeves v. Reeves*, 82 N. C. 348 (1880); *Skittletharpe v. Skittletharpe*, 130 N. C. 72, 40 S. E. 851 (1902); *Dawson v. Dawson*, 211 N. C. 453, 190 S. E. 749 (1937).

It may not be used by the wife as the basis of a cross action in a suit for divorce instituted by the husband. *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941); *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (1942).

If alimony without divorce, under this section, were the nature and purpose of the pleading, it could not be maintained by cross action in a suit for divorce instituted by the husband. *Ericson v. Ericson*, 226 N. C. 474, 38 S. E. (2d) 517 (1946).

The only material facts at issue in the action for alimony without divorce are the questions of the existence of the marriage relation and whether the husband abandoned the wife. *Skittletharpe v. Skittletharpe*, 130 N. C. 72, 40 S. E. 851 (1902); *Hooper v. Hooper*, 164 N. C. 1, 80 S. E. 64 (1913).

Effect of § 14-322.—Section 14-322, requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies under the provisions of this section. *State v.*

Falkner, 182 N. C. 793, 108 S. E. 756 (1921).

Issues of Fact for Jury.—In actions under this section, when there are issues of fact raised, they should be found by a jury. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918). See also, *Barber v. Barber*, 217 N. C. 422, 8 S. E. (2d) 204 (1940).

And the trial judge may not pass upon the issuable facts in proceedings for alimony without divorce, under this section, upon evidence introduced before him theretofore upon a trial of the husband for criminal abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918), distinguishing *Cooper v. R. R.*, 170 N. C. 490, 87 S. E. 322 (1915).

Applied in *Lawrence v. Lawrence*, 226 N. C. 221, 37 S. E. (2d) 496 (1946); *Lamm v. Lamm*, 229 N. C. 248, 49 S. E. (2d) 403 (1948).

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928); *Rodman v. Rodman*, 198 N. C. 137, 150 S. E. 874 (1929) (fees based on the defendant's means and condition in life); *Black v. Black*, 198 N. C. 809, 150 S. E. 925 (1929); *Brown v. Brown*, 205 N. C. 4, 169 S. E. 818 (1933); *Caudle v. Caudle*, 206 N. C. 484, 174 S. E. 304 (1934); *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935); *Hagedorn v. Hagedorn*, 210 N. C. 164, 185 S. E. 768 (1936); *Adams v. Adams*, 212 N. C. 373, 193 S. E. 274 (1937); *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937); *Story v. Story*, 221 N. C. 114, 19 S. E. (2d) 136 (1942); *Lockhart v. Lockhart*, 223 N. C. 559, 27 S. E. (2d) 444 (1943); *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946); *Norman v. Norman*, 230 N. C. 61, 51 S. E. (2d) 927 (1949).

II. WHEN WIFE ENTITLED TO RELIEF.

Grounds Stated in §§ 50-5, 50-7.—Under this section there are available to the wife not only the grounds specifically set forth, but also any ground that would constitute cause for divorce from bed and board under § 50-7, or cause for absolute divorce under § 50-5. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Plaintiff Must Meet Requirements of § 50-7.—Plaintiff, in order to obtain affirmative relief under the provisions of this section, must meet the requirements of § 50-7 for divorce from bed and board. *Blanchard v. Blanchard*, 226 N. C. 152, 36 S. E. (2d) 919 (1946).

Adultery Revived after Condonation.—Under this section an allegation of adul-

tery cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation, which revive the old grounds. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Cruelty Causing Wife to Leave Home.—When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. *Eggleston v. Eggleston*, 228 N. C. 668, 47 S. E. (2d) 243 (1948).

Indignities.—If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and life burdensome, his acts constitute in law an abandonment of the wife by the husband, and allegations to this effect are sufficient to state a cause of action for alimony without divorce. *Barwick v. Barwick*, 228 N. C. 109, 44 S. E. (2d) 597 (1947).

The acts of a husband which will constitute such indignities to the person of his wife as to render her condition intolerable and life burdensome largely depend upon the facts and circumstances in each particular case. And such facts and circumstances are for the jury to pass upon unaffected by any temporary order entered for subsistence and attorney's fees. *Barwick v. Barwick*, 228 N. C. 109, 44 S. E. (2d) 597 (1947).

Habitual Drunkenness.—Allegations in a complaint that defendant had been an habitual drunkard during the prior three years are sufficient to state a cause of action for alimony without divorce under the term "shall be a drunkard" within the meaning of this section. *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947).

Establishing of One Cause for Divorce Is Sufficient Although Three Alleged.—In a suit for alimony without divorce where three separate grounds for divorce *a mensa et thoro* were alleged in the complaint, it was held not necessary for the plaintiff to establish all of them in order to sustain her action, it being sufficient under this section if she established the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in § 50-7. *Albritton v. Albritton*, 210 N. C. 111, 185 S. E. 762 (1936). See also, *Hagedorn v. Hagedorn*, 211 N. C. 175, 189

S. E. 507 (1937); *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Wrongful Abandonment by Wife.—This section does not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees. *Byerly v. Byerly*, 194 N. C. 532, 140 S. E. 158 (1927).

Where in his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house, paid bills for necessities and given them cash weekly, and had theretofore furnished them with necessary subsistence in accordance with his means in life, the answer raises issues of fact determinative of the right to the relief sought, which issues must be submitted to the jury, and the granting of plaintiff's motion for judgment on the pleadings was error. *Masten v. Masten*, 216 N. C. 24, 3 S. E. (2d) 274 (1939).

Previous Contract of Separation.—Where the defendant resists his wife's application for alimony without divorce under this section, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the written contract of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. *Moore v. Moore*, 185 N. C. 332, 117 S. E. 12 (1923).

Suit Held Not Barred by Separation Agreement.—Jurisdiction of the court invoked under this section was not barred by separation agreement pleaded, where wife sued for alimony and support without divorce on grounds of specific acts of cruelty by husband and declared intention to sue for divorce in two years. *Butler v. Butler*, 226 N. C. 594, 39 S. E. (2d) 745 (1946).

Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several installments, discontinued the payments, he cannot set up the agreement in bar of her action for support under this section, even though he discontinued the payments because she demanded that the allowance

be increased. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197 (1895).

Effect of Decree of Divorce.—Where the husband's action for divorce on the ground of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife in the second action upon the verdict of the jury and the wife appealed in both actions, the decree of absolute divorce terminates all the rights arising out of marriage, including the right to alimony, and upon dismissal of the appeal from the judgment of divorce, the judgment in the action for alimony will be affirmed. *Hobbs v. Hobbs*, 218 N. C. 468, 11 S. E. (2d) 311 (1940).

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that the court of a state having jurisdiction over the parties has declared them not husband and wife. *Bidwell v. Bidwell*, 139 N. C. 402, 52 S. E. 55 (1905).

III. JURISDICTION AND VENUE.

Jurisdiction Depends on Statute.—Jurisdiction over the subject matter of divorce or an action for alimony without divorce is given only by statute. *Hodges v. Hodges*, 226 N. C. 570, 39 S. E. (2d) 596 (1946).

Jurisdiction of Judge.—The fact that the summons, in a proceeding under this section, of which a judge of the superior court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197 (1895).

Section Does Not Prescribe Exclusive Venue.—The provision that a wife may institute action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action. *Dudley v. Dudley*, 219 N. C. 765, 14 S. E. (2d) 787 (1941).

The phrase "may institute an action" as used in this section is permissive and not mandatory. *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934). See *Rector v. Rector*, 186 N. C. 618, 120 S. E. 195 (1923).

Suits for alimony without divorce are within the analogy of divorce laws, and where a wife has been forced by her husband's conduct to leave his residence, she may bring an action for alimony with-

out divorce in the county where she resides, notwithstanding the provision of § 50-16 that "the wife may institute an action in the superior court of the county in which the cause of action arose." *Rector v. Rector*, 186 N. C. 618, 120 S. E. 195 (1923).

Husband Not Entitled to Removal.—A wife who has been forced by her husband to leave his home and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right under the provisions of this section and §§ 1-82, 50-3. *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934).

IV. PLEADINGS.

The Complaint Must Be Verified.—The court does not obtain jurisdiction in an action brought for relief under the provisions of the statutes relating to divorce, alimony, or divorce and alimony, unless the complaint is verified, and the form of the verification depends upon the character of the relief sought. *Hodges v. Hodges*, 226 N. C. 570, 39 S. E. (2d) 596 (1946).

The provision of this section is mandatory as to the verification of pleadings, but relieves the wife of the necessity of filing the affidavit required by § 50-8, and substitutes therefor the form prescribed for the verification of pleadings in ordinary civil actions. *Hodges v. Hodges*, 226 N. C. 570, 39 S. E. (2d) 596 (1946).

Complaint Must Allege Good Cause.—The complaint must allege facts sufficient to constitute a good cause of action under the provision of this section, when the wife proceeds thereunder, for the court to allow her from the estate or earnings of her husband a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. *McManus v. McManus*, 191 N. C. 740, 133 S. E. 9 (1926).

The essential elements required to be alleged in an action for alimony without divorce under this section are (1) separation of the husband from the wife, and (2) his failure to provide her with necessary subsistence according to his means and condition in life. *Trull v. Trull*, 229 N. C. 196, 49 S. E. (2d) 225 (1948).

Plaintiff must meet the requirements of the statute for divorce from bed and board, and must allege with particularity the acts of defendant constituting the basis of the charge that he offered such

indignities to her person as to render her condition intolerable, and allege that such acts were without adequate provocation on her part. *Pollard v. Pollard*, 221 N. C. 46, 19 S. E. (2d) 1 (1942); *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947).

Allegation That Acts of Husband Were without Provocation.—An allegation in an action for alimony without divorce that the separation of defendant from plaintiff wife was without fault or misconduct on her part, is a sufficient allegation that his acts were without provocation on her part. *Trull v. Trull*, 229 N. C. 196, 49 S. E. (2d) 225 (1948).

In an action under this section, as in an action for divorce a mensa et thoro by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer will be properly sustained. *Howell v. Howell*, 223 N. C. 62, 25 S. E. (2d) 169 (1943); *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947).

Such Allegation Unnecessary Where Adultery Is Charged.—Where complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Complaint Praying for Subsistence and Other Relief.—Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage, and for such other relief as may be just and proper, without prayer for divorce, the cause is an action for alimony without divorce under this section. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Indefinite Allegations in Answer.—Vague and indefinite allegations of infidelity on the part of a wife made by a husband in his answer to her complaint in a proceeding for support and maintenance, will not be allowed to affect the question of the husband's liability in such proceedings. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197 (1895).

V. SUBSISTENCE PENDENTE LITE AND COUNSEL FEES.

A. In General.

Allowance of Subsistence Pendente Lite Is Constitutional.—Defendant's contention that the provisions of this section empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in her action for alimony without divorce are unconstitutional as depriving him of a property right without trial by jury is untenable, since he is under duty to support plaintiff until the adjudication of issues relieving him of that duty, and since such allowance by the court does not form any part of the ultimate relief sought nor affect the final rights of the parties. *Peele v. Peele*, 216 N. C. 298, 4 S. E. (2d) 616 (1939).

What Must Be Proved to Obtain Subsistence and Counsel Fees Pendente Lite.—Subsistence and counsel fees pendente lite may now be allowed under this section, and although plaintiff does not ask for divorce, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce a mensa et thoro, at least. Abandonment, failure to support, and adultery, are sufficient to satisfy the statute. *Phillips v. Phillips*, 223 N. C. 276, 25 S. E. (2d) 848 (1943).

Where complaint states a cause of action it is a sufficient basis for an order allowing alimony pendente lite. *Brooks v. Brooks*, 226 N. C. 280, 37 S. E. (2d) 909 (1946).

Allowance as a Legal Right.—Generally, excluding statutory grounds for denial, allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under this section is so strongly entrenched in practice as to be considered an established legal right. *Butler v. Butler*, 226 N. C. 594, 39 S. E. (2d) 745 (1946).

Countercharges Immaterial.—Under the provisions of Laws 1919, c. 24, amending this section, it is immaterial what countercharges the defendant makes against the plaintiff, his wife, in her application for necessary "subsistence" pendente lite, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury. *Allen v. Allen*, 180 N. C. 465, 105 S. E. 11 (1920).

Only Adultery Is Absolute Bar.—There is no defense that limits the power of the trial court to award subsistence pendente lite, under this section, except the defense

of wife's adultery, so that the reasonableness of a separation agreement need not be determined before the court can award temporary allowances. *Oldham v. Oldham*, 225 N. C. 476, 35 S. E. (2d) 332 (1945).

Validity of Separation Agreement Need Not Be First Determined.—Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under this section it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issues." *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1929).

Issue Involving Validity of Marriage.—The effect of this section has been changed by Laws 1919, c. 24, and thereunder it is not now required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue relating to the validity of the marriage. *Barbee v. Barbee*, 187 N. C. 538, 122 S. E. 177 (1924).

Finding of Facts.—On motion for alimony pendente lite and counsel fees made in an action instituted by the wife against her husband under the provisions of this section, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice would be to do so. *Holloway v. Holloway*, 214 N. C. 662, 200 S. E. 436 (1939). See *Vincent v. Vincent*, 193 N. C. 492, 137 S. E. 426 (1927).

Where the complaint alleges facts sufficient to entitle plaintiff to alimony pendente lite under this section, it is not error for the court to grant plaintiff's motion therefor and refuse to find the facts upon which the order is based, since it will be presumed that the court found the facts as alleged in the complaint for the purposes of the hearing. *Southard v. Southard*, 208 N. C. 392, 180 S. E. 665 (1935).

Same — Presumption on Appeal.—Where, in an action by the wife under this section, she has duly moved the court for alimony pendente lite and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandoned him, and that he had not abandoned her, and the record on appeal does not disclose any

findings of fact upon the question but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact. *Byerly v. Byerly*, 194 N. C. 532, 140 S. E. 158 (1927).

The allowance of subsistence and counsel fees pendente lite is in the discretion of the trial court, who is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife; and the court's ruling will not be disturbed in the absence of abuse of discretion. *Phillips v. Phillips*, 223 N. C. 276, 25 S. E. (2d) 848 (1943).

Discretion Is Not Absolute and Unreviewable.—The allowance of support and counsel fees pendente lite in a suit by wife against husband for divorce or alimony without divorce is not an absolute discretion to be exercised at the pleasure of the court and unreviewable, but is to be exercised within certain limits and with respect to factual conditions. *Butler v. Butler*, 226 N. C. 594, 39 S. E. (2d) 745 (1946). But see *Tiedemann v. Tiedemann*, 204 N. C. 682, 169 S. E. 422 (1933).

No Allowance Where Plaintiff, in Law, Has No Case.—Discretion in allowance of support to a wife while suing her husband under this section is confined to consideration of necessities of the wife on the one hand, and the means of the husband on the other, but to warrant such allowance the court is expected to look into the merits of the action, and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. *Butler v. Butler*, 226 N. C. 594, 39 S. E. (2d) 745 (1946).

Either Party May Apply for Modification.—The amounts allowed for reasonable subsistence and counsel fees upon application for alimony pendente lite are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. *Tiedemann v. Tiedemann*, 204 N. C. 682, 169 S. E. 422 (1933).

B. Counsel Fees.

Allowance of Counsel Fees Authorized.—Laws 1919, c. 24, amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was held to be that it superseded the allowance for alimony and hence no allowance for attorney's fees was permissible. *Allen v. Allen*, 180 N. C. 465, 105 S. E. 11 (1920).

By Laws 1921, c. 123, the section was further amended. And now, while the al-

allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by this amendment the court may allow her attorney's fees. *Moore v. Moore*, 185 N. C. 332, 117 S. E. 12 (1923).

Discretion of Court.—When allowable, the amount of attorneys' fees in an action for alimony without divorce is within the sound discretion of the court below and is unappealable except for abuse of that discretion. The statute itself, however, contains some guides to the exercise of that discretion, and practice has developed others. Within the rule of reasonableness the court must consider along with other things the condition and circumstances of the defendant. Generally speaking, in this respect this section runs parallel with § 50-15 regarding allowances for attorneys' fees. *Stadium v. Stadium*, 230 N. C. 318, 52 S. E. (2d) 899 (1949).

Elements to Be Considered.—There are many elements to be considered in a pendente lite allowance of attorneys' fees for a wife suing for alimony without divorce. The nature and worth of the services, the magnitude of the task imposed, reasonable consideration for the defendant's condition and financial circumstances, and many other considerations are involved. *Stadium v. Stadium*, 230 N. C. 318, 52 S. E. (2d) 899 (1949).

Effect of Abandonment of Suit.—The fact that after the institution of an action for alimony without divorce the client abandons the suit instituted in this State and institutes a suit for divorce in another state, and counsel employed here are permitted to withdraw, since no further services could be performed, does not affect such counsel's right to an order allowing them counsel fees out of the property of defendant for the services performed here in good faith. *Stadium v. Stadium*, 230 N. C. 318, 52 S. E. (2d) 899 (1949).

In an action under this section, for alimony and counsel fees pendente lite and for alimony without divorce, plaintiff, on the day set for hearing of the motion for alimony and counsel fees pendente lite, filed "certificate and affidavit" stating that there had been a reconciliation between plaintiff and defendant and that plaintiff "withdraws and renounces the complaint" and "takes a voluntary nonsuit . . . and prays the court to dismiss" the action as of nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant,

and defendant's attorney filed plaintiff's "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. After the petition was filed and after the court had announced its intention of allowing same, judgment as of nonsuit was tendered and signed by the court. It was held that at the time the petition for counsel fees was filed, the complaint was still a part of the record and the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant was affirmed. *McFeters v. McFeters*, 219 N. C. 731, 14 S. E. (2d) 833 (1941).

Court May Enter Second Order Allowing Additional Counsel Fees.—The fact that an order allowing counsel fees has been entered in an action under this section does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services. *Stadium v. Stadium*, 230 N. C. 318, 52 S. E. (2d) 899 (1949).

Amount of Additional Counsel Fees Held Not Unreasonable.—On an appeal from an order allowing additional counsel fees under this section, the amount was held not so unreasonable as to constitute an abuse of discretion. *Stadium v. Stadium*, 230 N. C. 318, 52 S. E. (2d) 899 (1949).

VI. THE ORDER AND ENFORCEMENT THEREOF.

A. In General.

No Final Judgment under Section.—A final judgment cannot be entered under this section, as the necessity of such provisions for the wife and children will cease if the parties resume the marriage relation, and cannot properly be continued if the husband procures a divorce for the fault of the wife. *Skittleharpe v. Skittleharpe*, 130 N. C. 72, 40 S. E. 851 (1902); *Hooper v. Hooper*, 164 N. C. 1, 80 S. E. 64 (1913); *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918).

An order for the payment of alimony is *res judicata* between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed conditions of parties. *Barber v. Barber*, 217 N. C. 422, 8 S. E. (2d) 204 (1940).

Finding of Facts by Judge Unnecessary.—In a wife's application for alimony without divorce, it is not required that the judge hearing the matter shall find the

facts as a basis for his judgment, as in proceedings for alimony pendente lite, § 50-15, although it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. *Price v. Price*, 188 N. C. 640, 125 S. E. 264 (1924); *Vincent v. Vincent*, 193 N. C. 492, 137 S. E. 426 (1927).

Modification or Vacation of Order.—Where, within the exercise of his sound discretion, the superior court judge, having jurisdiction has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of this section, the order of allowance may be thereafter modified or vacated as the statute provides upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

Amendment of Prior Orders.—The court may reopen and amend prior orders awarding subsistence to wife and children. *Wright v. Wright*, 216 N. C. 693, 6 S. E. (2d) 555 (1940).

Amount Due under Prior Orders May Be Determined upon Motion.—The wife may have the amount of alimony due under prior orders determined by the court upon motion in the cause. *Barber v. Barber*, 217 N. C. 422, 8 S. E. (2d) 204 (1940).

An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the original controversy, especially judgments allowing alimony with or without divorce, and where the defendant makes a general appearance in the original action for subsistence without divorce in which judgment is duly rendered for plaintiff, the court acquires jurisdiction over defendant by the proper service of notice of plaintiff's subsequent petition to recover past due installments, and defendant may not challenge the court's jurisdiction to hear plaintiff's motion and petition for such recovery by special appearance. *Barber v. Barber*, 216 N. C. 232, 4 S. E. (2d) 447 (1939).

Infant's Guardian May Subsequently Attack Consent Judgment.—Where the court in proceedings under this section approves a consent judgment, providing for the support and subsistence of the defendant's wife and child, the validity of such consent judgment may be later attacked by the child's authorized guardians on the ground of irregularity and that it is not binding on the minor. *In re Reynolds*, 206 N. C. 276, 173 S. E. 789 (1934).

Effect of Consent Judgment.—Where the parties by reason of this section entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate, and the husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's rights were remitted to the prior judgment. *Turner v. Turner*, 205 N. C. 197, 170 S. E. 646 (1933).

A judgment for subsistence survives a judgment of absolute divorce obtained by defendant. *Simmons v. Simmons*, 223 N. C. 841, 28 S. E. (2d) 489 (1944).

Divorce Decree Does Not Affect Prior Order for Alimony.—A decree of absolute divorce on the ground of separation as provided in § 50-6 will not affect a prior order for alimony without divorce rendered under this section. *Howell v. Howell*, 206 N. C. 672, 174 S. E. 921 (1934).

Action for Divorce Is Not Defeated by Order for Support.—An order for support, either pendente lite or under this section, without more, would not perforce defeat an action for divorce under § 50-6. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943).

A money judgment for arrears of alimony, not by its terms conditional and on which execution was directed to issue, was not subject to modification or recall under this section; and hence was entitled to full faith and credit. *Barber v. Barber*, 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 114 (1944).

B. Amount of Allowance.

Discretion of Judge.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in her proceedings against her husband under the provisions of this section is within the sound discretion of the judge hearing the same and having jurisdiction thereof. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197 (1895); *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922); *Best v. Best*, 228 N. C. 9, 44 S. E. (2d) 214 (1947); *Barwick v. Barwick*, 228 N. C. 109, 44 S. E. (2d) 597 (1947), citing *Oldham v. Oldham*, 225 N. C. 476, 35 S. E. (2d) 332 (1945).

Limitation in § 50-14 Does Not Apply.—The limitation to one third of the net annual income from the husband's estate, provided by § 50-14, which applies when the court adjudges the parties divorced from bed and board, does not apply when the wife institutes the proper proceeding for alimony pendente lite under § 50-15,

nor when she applies for a reasonable subsistence under this section. *Hodges v. Hodges*, 82 N. C. 122 (1880); *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

Section 50-14, may be considered in an action under this section, in determining the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees, based on the defendant's means and condition in life. *Kiser v. Kiser*, 203 N. C. 428, 166 S. E. 304 (1932).

C. Enforcement.

Technical Alimony and Alimony without Divorce Distinguished.—Technical alimony is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of this section, where a divorce is not contemplated, and where, in accordance with this section, the order allowing her such subsistence may secure the same out of the husband's estate. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

While as to technical alimony the ordinary rule is that the title to the property designated to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of this section, and the words used in the beginning of this section, "alimony without divorce," will not be construed to give the words "reasonable subsistence" for the wife, the meaning of technical alimony. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

Corpus of Husband's Estate May Be Assigned to Secure Allowance.—The court is authorized to assign the corpus of the husband's property to secure the allowance, and therefore it is immaterial to defendant whether the home place is taken and rents and profits therefrom used to provide a suitable residence for the wife and children or whether they are granted the right of occupancy of the home place, and it being found that such arrangement is most feasible and appropriate, the order will not be disturbed. *Wright v. Wright*, 216 N. C. 693, 6 S. E. (2d) 555 (1940).

The husband's "estate," from which the court may secure its order allowing a rea-

sonable subsistence, etc., to the wife in her proceedings under the provisions of this section, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918); *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

Husband's Interest in Estate by Entireties Chargeable.—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of this section, and for her counsel fees by Laws 1921, c. 123, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue, § 50-17, to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee simple title for the purpose of paying the allowance is erroneous. *Holton v. Holton*, 186 N. C. 355, 119 S. E. 751 (1923).

Defeasible Fee in Part of Husband's Land.—Where the judge, in the proceedings of the wife for an allowance of reasonable subsistence, has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee cannot prejudice him, and his exception on that ground cannot be sustained. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

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 (1945).

Attachment Will Lie.—An attachment against the husband's land will lie in favor of the wife abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. *Walton v. Walton*, 178 N. C. 73, 100 S. E. 176 (1919).

Priority of Wife's Claim.—The wife's inchoate right to alimony makes her a creditor of her husband, and is enforceable by attachment, in case of her abandonment, which puts everyone on notice of her claim and her priority over other cred-

itors of her husband. *Walton v. Walton*, 178 N. C. 73, 100 S. E. 176 (1919).

Where the wife has obtained an order for support from her husband, which has been declared a lien on his property under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. In this case it was questioned whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

Homestead and Personal Property Exemptions.—The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922). See also, *Wright v. Wright*, 216 N. C. 693, 6 S. E. (2d) 555 (1940).

Contempt in Failure to Comply with Consent Judgment.—Under a consent judgment, entered in an action by a husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the husband to the wife and that it should be more than a simple judgment for debt and as binding upon plaintiff as if rendered under this section, and, upon proper cause shown, should subject him to such penalties as the court may require in case of contempt of its orders, the court may

commit the plaintiff upon his failure to make the payments required. *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942).

Findings Required to Support Judgment for Contempt.—In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay, under the provisions of this section, a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt. *Smithwick v. Smithwick*, 218 N. C. 503, 11 S. E. (2d) 455 (1940).

Evidence of Willful Noncompliance with Order.—The mere fact that a defendant ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. *Smithwick v. Smithwick*, 218 N. C. 503, 11 S. E. (2d) 455 (1940).

Habeas Corpus after Commitment for Contempt.—See *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163 (1940).

Husband Held in Contempt.—In *Little v. Little*, 203 N. C. 694, 166 S. E. 809 (1932), the defendant was held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under this section.

§ 50-17. **Alimony in real estate, writ of possession issued.**—In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (1868-9, c. 123, s. 1; Code, s. 1293; Rev., s. 1568; C. S., s. 1668.)

Cross Reference.—See note to § 50-16.

Title to Specific Property Remains in Husband.—Where alimony is allotted to the wife in specific property of the hus-

band, the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. *Taylor v. Taylor*, 93 N. C. 418 (1885).

Chapter 51. Marriage.

Article 1.

General Provisions.

Sec.

- 51-1. Requisites of marriage; solemnization.
- 51-2. Capacity to marry.
- 51-3. Want of capacity; void and voidable marriages.
- 51-4. Prohibited degrees of kinship.
- 51-5. Marriages between slaves validated.

Article 2.

Marriage Licenses.

- 51-6. Solemnization without license unlawful.
- 51-7. Penalty for solemnizing without license.
- 51-8. License issued by register of deeds.
- 51-8.1. Nonresidents required to apply for license forty-eight hours before issuance.

Sec.

- 51-9. Health certificates required of applicants for licenses.
- 51-10. Exceptions to § 51-9.
- 51-11. Who may execute certificate; form; filing copy with Department of Health.
- 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.
- 51-13. Penalty for violation.
- 51-14. Compliance with requirement by residents who marry outside of State.
- 51-15. Obtaining license by false representation misdemeanor.
- 51-16. Form of license.
- 51-17. Penalty for issuing license unlawfully.
- 51-18. Record of licenses and returns; originals filed.
- 51-19. Penalty for failure to record.
- 51-20. Marriage license tax.

ARTICLE 1.

General Provisions.

§ 51-1. **Requisites of marriage; solemnization.**—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. No justice of the peace who holds the office of register of deeds shall, while holding said office, perform any marriage ceremony. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839.)

Cross References.—As to statutes concerning married women, see § 52-1 et seq. As to divorce and alimony, see § 50-1 et seq.

Editor's Note.—The 1945 amendment added the last sentence.

History of Marriage Laws.—See State v. Bray, 35 N. C. 290 (1852); State v. Parker, 106 N. C. 711, 11 S. E. 517 (1890); State v. Wilson, 121 N. C. 650, 28 S. E. 416 (1897).

There is no such thing as marriage simply by consent in this State. State v. Samuel, 19 N. C. 177 (1836); State v. Patterson, 24 N. C. 346 (1842); State v. Bray, 35 N.

C. 290 (1852); Cooke v. Cooke, 61 N. C. 583 (1868); State v. Parker, 106 N. C. 711, 11 S. E. 517 (1890); State v. Melton, 120 N. C. 591, 26 S. E. 933 (1897); State v. Wilson, 121 N. C. 650, 28 S. E. 416 (1897). For article on common-law marriage in North Carolina, see 16 N. C. Law Rev. 259.

Essentials of Section Must Be Followed.

—While consent is essential to marriage in this State, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. State v. Wilson, 121 N. C. 650, 28 S. E. 416 (1897).

Legislature May Dispense with Formal

ity.—The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the legislature to dispense with any particular formality as it was to prescribe such. *State v. Whitford*, 86 N. C. 636 (1882), citing *State v. Harris*, 63 N. C. 1 (1868).

When Marriage Complete.—Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. *State v. Patterson*, 24 N. C. 346 (1842).

A marriage procured by force or fraud is void ab initio, and may be treated as void by every court in which its validity may be incidentally drawn in question. *Scroggins v. Scroggins*, 14 N. C. 535 (1832).

Sham Marriage a Nullity.—A marriage pretendedly celebrated before an unauthorized person is a nullity and not capable of being legalized by consent. *State v. Wilson*, 121 N. C. 650, 28 S. E. 416 (1897).

Indian Custom Not Valid Marriage.—There is but one law of marriage for all the residents of this State. Hence cohabitation between an Indian man and woman according to the customs of their tribe, by which the parties are at liberty to dissolve the connection at pleasure, does not constitute a marriage. *State v. Ta-cha-na-tah*, 64 N. C. 614 (1870).

Marriage during Seduction Proceedings

§ 51-2. Capacity to marry.—All unmarried persons of eighteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that persons over sixteen years of age and under eighteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of any such person or signed by the person standing in loco parentis to such male or female, and the fact of the filing of such written consent shall be set out in said special license: Provided, that when the special license is procured by fraud and misrepresentation, the parent or person standing in loco parentis of the male or female shall be a proper party plaintiff in an action to annul said marriage. When an unmarried female between the ages of twelve and sixteen is pregnant or has given birth to a child and such unmarried female and the putative father of her child, either born or unborn, shall agree to marry and consent in writing to such marriage is given by one of the parents of the female, or by that person standing in loco parentis to such female, or by the guardian of the person of such female, or by the superintendent of public welfare of the county of residence of either party, such written consent shall be sufficient authorization for the register of deeds to issue a special license to marry. All couples resident of the State of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the State, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with the marriage license in his office; the fee for the

Valid.—A marriage contracted while one is under arrest for seduction is not contracted under duress. *State v. Davis*, 79 N. C. 603 (1878).

Elder in Colored Church.—An elder in the "colored Methodist Church" was held "an ordained minister" of a religious denomination within the meaning of the statute, and authorized to celebrate the rites of matrimony. *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890).

Personating Minister Not Criminal.—A private citizen who personates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law. *State v. Brown*, 119 N. C. 825, 25 S. E. 820 (1896).

Evidence of Marriage.—It is sufficient evidence of a marriage that it was solemnized by one in the known enjoyment of the office of justice of the peace, and acting as such. His commission need not be produced. *State v. Robbins*, 28 N. C. 23, 44 Am. Dec. 64 (1845).

Validation by Retroactive Legislation.—It is competent for the legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the nonobservance of some solemnity required by statute. It is otherwise where such marriage is a nullity. *Cooke v. Cooke*, 61 N. C. 583 (1868).

filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (R. C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C. S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2.)

Cross References.—As to penalty for marrying female under sixteen, see § 14-319. As to what marriages may be declared void on application of either party, see § 50-4. As to requirement that persons married outside the State file with register of deeds a certificate showing compliance with §§ 51-9 to 51-14 on their return, see § 51-14.

Editor's Note.—The 1923 amendment increased the legal age of marriage for females from fourteen to sixteen, and made other changes. See 1 N. C. Law Rev. 295.

The 1933 amendment added the proviso at the end of this section, and the 1939 amendment added the second proviso to the first sentence.

The 1947 amendment increased the legal

age of marriage to eighteen, and made other changes. See 25 N. C. Law Rev. 414.

Annulment.—As to annulment under the 1939 amendment, see 17 N. C. Law Rev. 353.

Effect of Lack of Special License.—The marriage of a female between the ages of fourteen and sixteen (now between sixteen and eighteen) without the written consent of her parent and without the special license required by this section is not void but voidable. *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929).

Male of Marriageable Age Indictable for Seduction.—A male at the marriageable age of eighteen years is indictable for seduction. *State v. Creed*, 171 N. C. 837, 88 S. E. 511 (1916).

▷ § 51-3. **Want of capacity; void and voidable marriages.**—All marriages between a white person and a negro or Indian, or between a white person and person of negro or Indian descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., s. 2495; 1947, c. 383, s. 3; 1949, c. 1022.)

Cross References.—As to suits to nullify marriages which were entered into contrary to the provisions of this section, see § 50-4. As to penal provisions for miscegenation, see §§ 14-181, 14-182. As to penal provisions for bigamy, see § 14-183. As to penal provisions for incest, see §§ 14-178, 14-179. As to penalty for marrying female under sixteen, see § 14-319.

Editor's Note.—The 1911 amendment substituted "Indians of Robeson County" for "Croatan Indians," and the 1913 amendment substituted "Cherokee Indians of Robeson County." See *Goins v. Trustees*, 169 N. C. 736, 86 S. E. 629 (1915).

The 1947 amendment substituted "sixteen" for "fourteen" in reference to the age of females. For brief comment on amendment, see 25 N. C. Law Rev. 414.

The 1949 amendment added the last proviso at the end of the section. For brief comment on amendment, see 27 N. C. Law Rev. 453.

Power of Legislature.—The competency of the General Assembly to impose, implies the right to remove, the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641 (1884).

What Marriages Void Ab Initio.—Constructing this section and § 50-4 together, it is held that the only marriages that are void ab initio are those where one of the parties was a white person and the other a negro or an Indian or of negro or Indian descent to the third generation, inclusive, or bigamous marriages. And any other marriage need to be "declared void." *Watters v. Watters*, 168 N. C. 411, 84 S. E. 703 (1915). See *Parks v. Parks*, 218 N. C. 245, 10 S. E. (2d) 807 (1940).

Section Expresses Public Policy against Interracial Marriages.—The general public policy of the State prevails in this section and inhibits the intermarriage of white and colored persons. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889).

Constitutionality.—The prohibition of the marriage of white and colored persons is held not to be repugnant to the Constitution of the United States, or legislation under it. *State v. Hairston*, 63 N. C. 451 (1869).

Cohabitation Following Interracial Marriage Is Fornication.—A white person and a person of color cannot intermarry in North Carolina, and if an invalid marriage is contracted between persons of the two races and the parties cohabit together they are guilty of fornication. *State v. Hairston*, 63 N. C. 451 (1869); *State v. Reinhardt*, 63 N. C. 547 (1869).

What "Negro Descent" Includes.—In order to have a marriage annulled on the ground that it is "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown that the ancestor of the generation stated must have been of pure negro blood. *Ferrall v. Ferrall*, 153 N. C. 174, 69 S. E. 60 (1910).

Every person who has one-eighth negro blood in his veins is within the prohibited degree within the meaning of the Constitution and this section. *State v. Miller*, 224 N. C. 228, 29 S. E. (2d) 751 (1944).

Marriage Valid Where Celebrated Is Valid Here.—The marriage relation, if legally created elsewhere, is recognized as a valid subsisting relation when the parties come into this State from that of their former residence. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889), citing *State v. Rose*, 76 N. C. 242 (1877), holding that a marriage, solemnized in a state whose laws permit such marriage, between a negro and a white person domiciled in such state is valid here.

Attempt to Evade Provisions of Section.—The validity of a foreign marriage is not recognized here when parties having their domicile here, to evade our laws, go to a

state which allows such marriage, with intent to return and keep up their domicile. *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889), citing *State v. Kennedy*, 76 N. C. 251 (1877), holding that a marriage, in another state whose laws permit such marriage, between a negro and a white person domiciled in this State and who leave it for the purpose of evading its laws and with intent to return, is not valid in this State.

Bigamous Marriages Are Void.—Where a wife attempts to marry again when no valid divorce a vinculo has been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. *Pridgen v. Pridgen*, 203 N. C. 533, 166 S. E. 591 (1932).

The fact that a presumption which had arisen at the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband be, in fact, alive. *Ward v. Bailey*, 118 N. C. 55, 23 S. E. 926 (1896).

Impotency Renders Marriage Voidable.—Impotency in a husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. *Smith v. Morehead*, 59 N. C. 360 (1863).

The marriage of a party under the minimum age required by statute is voidable and not void. Such marriage may be ratified by the subsequent conduct of the parties. *Koonce v. Wallace*, 52 N. C. 194 (1859); *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890); *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929); *Parks v. Parks*, 218 N. C. 245, 10 S. E. (2d) 807 (1940).

Proviso as to Death of Party.—The proviso as to the death of a party is broad and comprehensive in its declaration. It applies to marriages contracted before its enactment as well as those contracted thereafter. And it has been applied to an incestuous marriage between an uncle and a niece. *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641 (1884).

Same—Purpose.—The intention of the legislature was to confine the power conferred upon the court in § 50-4, to declare void, or in a judicial proceeding to treat as void, except where the intermarriage is between the specified races or involves the offense of bigamy, to cases, whenever the power is exercised, during the lifetime of the parties, or after death, only when there

has been no issue born to them. That is, after the death of one of the parties, a marriage must then stand with all its legal consequences, and its validity no longer open to controversy. *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641 (1884).

Same—What Must Be Proven.—To

bring a case within the proviso it must be shown not only that one of the parties is dead but that cohabitation and the birth of issue followed the unlawful marriage. *Ward v. Bailey*, 118 N. C. 55, 23 S. E. 926 (1896).

§ 51-4. **Prohibited degrees of kinship.**—When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood. (1879, c. 78; Code, s. 1811; Rev., s. 2084; C. S., s. 2496.)

§ 51-5. **Marriages between slaves validated.**—Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the General Assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married. (1866, c. 40, s. 5; Code, s. 1842; Rev., s. 2085; C. S., s. 2497.)

Cross Reference.—As to inheritance of children born of certain colored parents, see § 29-1, Rule 13.

Section Is Valid.—The validity of this section in creating retroactively a legal marriage relation between slaves is upheld in *Cooke v. Cooke*, 61 N. C. 583 (1868); *State v. Harris*, 63 N. C. 1 (1868); *State v. Adams*, 65 N. C. 537 (1871); *State v. Whitford*, 86 N. C. 636 (1882); *Long v. Barnes*, 87 N. C. 329 (1882); *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641 (1884). For other cases decided under the statute, see *Woodard v. Blue*, 103 N. C. 109, 9 S. E. 492 (1889); *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897); *Bettis v. Avery*,

140 N. C. 184, 52 S. E. 584 (1905).

Declarations as to Paternity.—Where a marriage between slaves was validated by this section, declarations as to the paternity of a child born subsequent to the marriage, made *anti litem motam* by the alleged father and mother, were admissible in evidence without regard to § 49-12, which legitimates children born out of wedlock whose parents subsequently intermarry. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98 (1921).

ARTICLE 2.

Marriage Licenses.

§ 51-6. **Solemnization without license unlawful.**—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498.)

Officer or Minister Penalized.—The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of \$200 prescribed by the next section. *State v. Robbins*, 28 N. C. 23 (1845); *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890); *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893).

Actual Delivery of License Required.—This section requires an actual delivery, and constructive delivery will not suffice.

So performance of the ceremony by a justice after a telephone communication informing him that the license has been mailed subjects him to the penalty prescribed by the next section. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628 (1922).

Marriage without License Valid.—The failure to procure a license to marry will not invalidate a marriage otherwise good. *State v. Robbins*, 28 N. C. 23 (1845); *State*

v. Parker, 106 N. C. 711, 11 S. E. 517 (1890); Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919 (1893); Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628 (1922).

Marriage under Illegal License.—A mar-

riage is not invalid because solemnized under an illegal license. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919 (1893); Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628 (1922).

§ 51-7. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C. S., s. 2499.)

Marriage Not Affected.—The failure to comply with the requirements as to the license subjects the officer or minister to the penalty under this section, but the marriage is, notwithstanding, good to every intent and purpose. State v. Parker, 106 N. C. 711, 11 S. E. 517 (1890). See § 51-6 and note.

Statute of Limitations.—A summons

was issued to recover the penalty against a justice of the peace, under this section, for performing the marriage ceremony without the delivery of the license therefor to him, within less than a year from the time he had performed it: It was held that the plea of the statute of limitations, § 1-54, par. 2, could not be sustained. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628 (1922).

§ 51-8. License issued by register of deeds.—Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C. S., s. 2500.)

This and § 51-17 are in pari materia and should be construed together. Bowles v. Cochran, 93 N. C. 398 (1885); Joyner v.

Harris, 157 N. C. 295, 72 S. E. 970 (1911). See note to § 51-17 where decisions relating to both sections have been treated.

§ 51-8.1. Nonresidents required to apply for license forty-eight hours before issuance.—No marriage license shall be issued by any register of deeds for the marriage of any two persons, both of whom are nonresidents of the State of North Carolina, unless application for such license has been on file in the office of the register of deeds issuing the license for at least forty-eight hours. Such application must be made in writing and filed subject to public inspection in the office of the register of deeds to which the application is made and shall give the names of the parties to the marriage, their race, ages, and residence addresses. For receiving and filing such application, the register of deeds shall collect a fee of fifty cents (50c).

Any register of deeds who knowingly or without reasonable inquiry, personally or by his deputy, violates any of the provisions of this section shall forfeit and pay two hundred dollars (\$200.00) to any parent, guardian, or other person standing in loco parentis, who sues for the same.

This section shall only apply to Bertie and Pamlico counties. (1945, cc. 1046, 1103; 1947, cc. 288, 289, 391, 538; 1949, cc. 13, 62, 329.)

Editor's Note.—The original section applied to Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pamlico, Pasquotank, Perquimans, Tyrrell and Washington counties. The 1947 amendments struck out Chowan, Currituck, Dare, Gates, Martin, Pasquotank

and Perquimans from the list of counties. And the 1949 amendments struck out Camden, Hertford, Tyrrell and Washington. The title of the act (1949, c. 13) striking out Tyrrell and Washington refers only to Washington County.

§ 51-9. Health certificates required of applicants for licenses.—No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by the original report from a laboratory approved by the State Board of Health for making such tests showing that the Wassermann or any other approved test of this nature was made, such tests to have been made within thirty days of the time application for license is made. Before any laboratory shall make such tests or any serological test required by this section, it shall apply to the North Carolina State Board of Health for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the North Carolina State Board of Health. The North Carolina State Board of Health may, in its discretion, revoke or suspend a certificate of approval issued by it for the operation of such a laboratory; and a notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be not subject to epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929.)

Editor's Note.—For comment on the 1939 law, see 17 N. C. Law Rev. 354.

The 1941 amendment substituted the words "thirty days" for "seven days" with reference to the physician's certificate, and for "two weeks" with reference to the laboratory report.

The 1945 amendment struck out the words "in the infectious or communicable stage" formerly appearing after the word "disease" in the second sentence, and substituted in the third sentence the words

"was made" for the words "is negative."

The 1947 amendment added the last two sentences of the first paragraph.

Defense to Breach of Promise of Marriage.—The fact that at the time of the breach of promise of marriage, license for the marriage of the parties could not be lawfully issued under this section is a defense to an action for damages for breach of promise of marriage. *Winders v. Powers*, 217 N. C. 580, 9 S. E. (2d) 131 (1940).

§ 51-10. Exceptions to § 51-9.—Exceptions to § 51-9, in case of persons who have been infected with a venereal disease, are permissible only under the following conditions:

(1) When the applicant has completed treatment and is certified by a regularly licensed physician as having been cured or probated, and when said physician has certified that he has informed both the applicant and the proposed marital partner of any possible future infectivity of the applicant,

(2) When the applicant is found to be in that stage of such disease that is not communicable to the marital partner as certified by a regularly licensed physician, provided that the applicant signs an agreement to take adequate treatment until cured or probated,

(3) When the applicant is pregnant and it is necessary to protect the legitimacy

of the offspring, provided that the applicant signs an agreement to take adequate treatment until cured or probated,

(4) When the applicant and the proposed marital partner are both infected with the same disease and have signed an agreement to take treatment until cured or probated. (1939, c. 314, s. 2; 1945, c. 577, s. 2.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 51-11. Who may execute certificate; form; filing copy with Department of Health.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the State of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health officer or county physician.

Such certificate form shall be designed by the State Board of Health and shall be obtained by the register of deeds from the State Board of Health upon request.

Every examining physician under the provisions of §§ 51-9 to 51-14 shall make and immediately file with the Department of Health of North Carolina a true copy of such certificate. (1939, c. 314, s. 3.)

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, subject to epileptic attacks, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with State laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641.)

Editor's Note.—The 1943 amendment inserted the provision relating to being adjudged of sound mind. For comment on amendment, see 21 N. C. Law Rev. 348.

§ 51-13. Penalty for violation.—Any violation of §§ 51-9 to 51-14, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars (\$50.00) or imprisonment for thirty days, or both. (1939, c. 314, s. 3.)

§ 51-14. Compliance with requirement by residents who marry outside of State.—Residents of the State who are married outside of North Carolina, shall, within sixty days after they return to said State, file with the register of deeds of the county in which they live, a certificate showing that they have conformed to the requirements of the examination required by §§ 51-9 to 51-14 for those who are married in the State. (1939, c. 314, s. 2½.)

§ 51-15. Obtaining license by false representation misdemeanor.—If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (1885, c. 346; Rev., s. 3371; C. S., s. 2501.)

Cross Reference.—As to false pretenses generally, see § 14-100 et seq.

§ 51-16. **Form of license.**—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for.....county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:.) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this day of, 19.....

.....L. M.,

Register of Deeds of County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored," or "indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the day of, 19...., at the house of P. R., in (here name the town, if any, the township and county), according to law.

.....N. O.

Witness present at the marriage:

S. T., of (here give residence).

(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C. S., s. 2502.)

Local Modification.—Bladen: 1941, c. 95.

License Not Issued Until Filled Out.—A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to the person who is to be married, or to some one for him, and, if at the time of such issuance the

register has become functus officio, the failure to record it does not render him liable to the penalty imposed by §§ 51-18 and 51-19, for failure to record the substance of each marriage license issued. *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893).

§ 51-17. **Penalty for issuing license unlawfully.**—Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same.

(R. C., c. 68, s. 13; 1871-2, c. 193, s. 7; Code, s. 1816; 1895, c. 387; 1901, c. 722; Rev., s. 2090; C. S., s. 2503.)

- I. In General.
- II. Duties of Register.
- III. Diligence Required.
- IV. Consent of Parent, etc.
- V. Action for Penalty.

I. IN GENERAL.

Editor's Note.—Section 51-8 and this section have generally been construed together as they relate to the same subject. Therefore, the cases decided under both sections have been treated in the note to this section.

Object of Statute.—The statute is a wise and beneficent one, the object being to prevent hasty and improvident marriages. *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970 (1911). See also, *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

The statute is remedial in its nature. *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

This section and § 51-8 are in pari materia and should be construed together. *Bowles v. Cochran*, 93 N. C. 398 (1885); *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970 (1911); *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

Register Not Indictable.—The issuing of a marriage license by a register of deeds in violation of the section is not an indictable offense, unless the illegal act be done mala fide. *State v. Snuggs*, 85 N. C. 542 (1881).

II. DUTIES OF REGISTER.

Duties Are Highly Important.—The duties of the register of deeds in issuing marriage licenses are most important and solemn. He must exercise them carefully and conscientiously, and not as a mere matter of form. *Agent v. Willis*, 124 N. C. 29, 32 S. E. 322 (1899); *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Julian v. Daniels*, 175 N. C. 549, 95 S. E. 907 (1918).

Duties Cannot Be Delegated.—A register of deeds cannot delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. *Cole v. Laws*, 108 N. C. 185, 12 S. E. 985 (1891).

Inquiry by Deputy Will Not Excuse Register.—If a party to a marriage is under the age authorized by law, the register cannot excuse himself from liability, because his deputy or agent made proper inquiry, if he did not make the inquiry himself. The

trust is personal to him. *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893).

Delivery to Third Party Prohibited.—The register is not authorized to permit the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. *Coley v. Lewis*, 91 N. C. 21 (1884).

Where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it, it was held that the register is liable to the penalty. *Coley v. Lewis*, 91 N. C. 21 (1884).

III. DILIGENCE REQUIRED.

Reasonable Inquiry.—The register is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 786 (1888); *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172 (1889); *Agent v. Willis*, 124 N. C. 29, 32 S. E. 322 (1899); *Laney v. Mackey*, 144 N. C. 630, 57 S. E. 386 (1907); *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

Same—Not a Mere Formality.—The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. *Julian v. Daniels*, 175 N. C. 549, 95 S. E. 907 (1918).

By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. *Bowles v. Cochran*, 93 N. C. 398 (1885).

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664 (1905); *Joyner v. Harris*, 157 N.

C. 295, 72 S. E. 970 (1911); *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

Register Not Required to Examine Witnesses.—Section 51-8 does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have “the power to do so.” His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664 (1905); *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970 (1911).

When Sworn Statements Insufficient.—It is not sufficient that the register takes the sworn statements of the parties or their friends not known to him. *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619 (1920), citing *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

Question for Jury.—See “Action for Penalty” this note.

Instances of Reasonable Inquiry.—When a man of good character and reliable applied for a license, and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of the parents, and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. *Bowles v. Cochran*, 93 N. C. 398 (1885). For other cases where the inquiry was held reasonable, see *Walker v. Adams*, 109 N. C. 481, 13 S. E. 907 (1891); *Harcum v. Marsh*, 130 N. C. 154, 41 S. E. 6 (1902).

Instances of Lack of Reasonable Inquiry.—When the register issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, it was held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect. *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172 (1889). Again, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, the same rule applies. To the same effect are the following cases: *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 786 (1888); *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521 (1906); *Laney v. Mackey*, 144 N. C. 630, 57 S. E. 386 (1907); *Joyner v. Harris*, 157 N. C.

295, 72 S. E. 970 (1911); *Julian v. Daniels*, 175 N. C. 549, 95 S. E. 907 (1918); *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619 (1920).

IV. CONSENT OF PARENT, ETC.

Consent Must Be Written.—A register of deeds is not permitted to issue a marriage license, where one of the parties is under eighteen years of age, until the consent in writing of the person under whose charge he or she is, shall be delivered to the register. The written consent is a condition precedent to the issuance of the license. *Coley v. Lewis*, 91 N. C. 21 (1884).

Section 51-8 fixes the order in importance of those from whom the register should obtain the written consent for the marriage of minors under eighteen years of age. *Littleton v. Haar*, 158 N. C. 566, 74 S. E. 12 (1912); *Owens v. Munden*, 168 N. C. 266, 84 S. E. 257 (1915).

The statute requires the written consent of the father if living and not unable or disqualified in some way to give it. *Littleton v. Haar*, 158 N. C. 566, 74 S. E. 12 (1912).

Thus, when a minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and does not preclude her father from suing the register of deeds for the penalty provided for issuing a license without his consent. *Littleton v. Haar*, 158 N. C. 566, 74 S. E. 12 (1912).

Otherwise the Mother's Consent Is Sufficient.—It was held in *Littleton v. Haar*, 158 N. C. 566, 74 S. E. 12 (1912), that the consent of the persons named in § 51-8 and in the order named should be obtained, the effect of the decision being that if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient. *Owens v. Munden*, 168 N. C. 266, 84 S. E. 257 (1915).

The word “father” used in the statute does not include “stepfather,” and the written consent of the mother, the father being dead, authorizes the issuing of the license. *Owens v. Munden*, 168 N. C. 266, 84 S. E. 257 (1915).

V. ACTION FOR PENALTY.

Action Abates upon Register's Death.—Under § 1-74, an action for a penalty, against a register of deeds and the surety on his official bond, abates on the death of the officer. *Wallace v. McPherson*, 139 N. C. 297, 51 S. E. 897 (1905).

Jurisdiction and Venue.—As to jurisdic-

tion, see *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917 (1893); *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1 (1912).

An action for the penalty under this section should be tried in the county wherein the cause of action arises. And if brought in the wrong county, it should be removed and not dismissed. *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1 (1912).

Allegations in Complaint.—In an action under this section it is essential that the complaint should allege that the register issued the license knowingly or without reasonable inquiry. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Burden of Proof.—The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664 (1905); *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970 (1911).

Presumption as to Time of Issuance.—The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it. *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893).

Evidence.—In a civil suit against a register evidence of *nolo contendere* pleaded by the husband in a criminal action is not admissible. *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619 (1920).

Proof of the officer's failure to administer the oath to the applicant for the license is admissible to show a lack of reasonable inquiry. *Laney v. Mackey*, 144 N. C. 630, 57 S. E. 386 (1907).

The testimony of a witness as to the age of the woman depending solely upon her statements to him which he repeated to the register when the license was applied for, is not substantive evidence of her age. *Joy-*

ner v. Harris, 157 N. C. 295, 72 S. E. 970 (1911).

Question for Jury as to Reasonable Inquiry.—Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions. *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645 (1894); *Harcum v. Marsh*, 130 N. C. 154, 41 S. E. 6 (1902); *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664 (1905).

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024 (1917).

Same—Nonsuit Erroneous.—If the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. *Lemmons v. Sigman*, 181 N. C. 238, 106 S. E. 764 (1921).

Reasonable Inquiry Question of Law When Facts Admitted.—It is well-settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the court. *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645 (1894); *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662 (1903); *Julian v. Daniels*, 175 N. C. 549, 95 S. E. 907 (1918); *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619 (1920).

Same—Instructions to Jury.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. *Spencer v. Saunders*, 189 N. C. 183, 126 S. E. 420 (1925).

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of, from the day of, 19., to the day of, 19., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color;

in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504.)

§ 51-19. Penalty for failure to record.—Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same. (1871-2, c. 193, s. 10; Code, s. 1819; Rev., s. 2092; C. S., s. 2505.)

The penalty given by this section is in the alternative, either for the failure to record the substance of the license issued or for failure to record the substance of the return. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Jurisdiction.—Notwithstanding the penalty imposed does not exceed \$200 (and if only one was sought to be recovered a justice of the peace would have jurisdiction), a plaintiff may unite several causes of action for several penalties against same party, in the same complaint, and if the aggregate amount thereof exceeds \$200 the superior court will have jurisdiction. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891), cited in *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917 (1893).

Prosecution in Name of Person Suing for Penalty.—An action against a register of deeds to recover the penalties imposed for a failure to comply with the provisions

of the statute in relation to issuing marriage licenses under this section must be prosecuted in the name of the person who sues therefor, and not in the name of the State. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Where Register Functus Officio.—If the filling up and handing the paper previously signed to the party proposing to be married was done, not by the register but by an agent, and at the time the register was functus officio, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893).

A statute relieving the register from the penalty imposed by this section, passed after an action was brought to recover the penalty, but before judgment, was held constitutional. *Bray v. Williams*, 137 N. C. 387, 49 S. E. 887 (1905).

§ 51-20. Marriage license tax.—The board of commissioners of any county may levy a tax of four dollars (\$4.00) on each marriage license issued, which tax shall be collected by the register of deeds of the county in which the license is issued. All such marriage license taxes collected by the register of deeds shall promptly be placed in the county general fund.

The register of deeds of each county shall submit to the board of commissioners on the first Monday in January, April, July, and October of each year a sworn statement or report in detail, showing the names of the persons to whom marriage licenses have been issued during the preceding three months, and accompany such sworn report or statement with the amount of such taxes collected by him or that should have been collected by him in the preceding three months.

This section shall not be construed to modify in any manner the provisions of §§ 51-2 or 51-8.1.

Nothing in this section shall prevent any register of deeds whose compensation is derived from fees from retaining such fees as heretofore allowed by law to such register of deeds for issuing said license. (1947, c. 831, s. 1.)

Chapter 52. Married Women.

Article 1.

Powers and Liabilities of Married Women.

- Sec.
52-1. Property of married woman secured to her.
52-2. Capacity to contract.
52-3. Capacity to draw checks.
52-4. Conveyance or lease of wife's land requires husband's joinder.
52-5. Separation by divorce or deed; husband non compos.
52-6. Abandonment by husband.
52-7. Husband cannot convey, etc., wife's land without her consent; not liable for his debts.
52-8. Capacity to make will.
52-9. May insure husband's life.
52-10. Earnings and damages from personal injury are wife's property.
52-11. [Repealed.]
52-12. Contracts of wife with husband affecting corpus or income of estate.

Sec.

- 52-13. Contracts between husband and wife generally; releases.
52-14. Wife's antenuptial contracts and torts.
52-15. For wife's torts, husband not liable.
52-16. Estate by the curtesy.
52-17, 52-18. [Repealed.]

Article 2.

Acts Barring Reciprocal Property Rights of Husband and Wife.

- 52-19. Divorce a vinculo and felonious slaying a bar.
52-20. Wife's elopement or divorce a mensa at husband's suit a bar.
52-21. Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.

Article 3.

Free Traders.

- 52-22 to 52-25. [Repealed.]

ARTICLE 1.

Powers and Liabilities of Married Women.

§ 52-1. **Property of married woman secured to her.**—The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Const., Art. X, s. 6; Rev., s. 2093; C. S., s. 2506.)

Cross References.—See also the North Carolina Constitution, Art. X, § 6. As to conveyances by husband and wife, see § 39-7 et seq. As to capacity to dispose of property by will, see § 31-2. As to curtesy, see § 52-16. As to dower, see § 30-4 et seq. As to power of minor husband to give written assent to wife's conveyance, see § 30-10.

Editor's Note.—For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Paquin, 140 N. C. 83, 52 S. E. 410 (1905). For a discussion of the early law regarding married women's contracts, see the notes under the following section.

It will be noted that this section is identical with the Constitution, Art. X, § 6, and the note to that section should be referred to.

Common-Law Rules.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife died to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one. O'Connor v. Harris, 81 N. C. 279 (1879).

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security

to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. *O'Connor v. Harris*, 81 N. C. 279 (1879).

Power of Legislature.—The legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. *Pippen v. Wesson*, 74 N. C. 437 (1876).

When Constitutional Provision Took Effect.—The Constitution of 1868, Art. X, § 6, took effect for purposes of domestic policy, in April, 1868, and not when Congress approved it. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402 (1918).

Vested Rights Protected.—Where a husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate, was vested, under the law then in force, no subsequent legislation could deprive him of it without his consent. *Morris v. Morris*, 94 N. C. 613 (1886).

This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property, as if she were unmarried, except in the single respect of conveying it. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891).

Section Applies to Property Not Otherwise Secured.—This section does not apply to cases where the property is secured to the wife by marriage settlement, or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the section is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. *Cooper v. Landis*, 75 N. C. 526 (1876).

Wife May Hold Legal as Well as Equitable Estate.—Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891), the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to pro-

tect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402 (1918). See also *Pippen v. Wesson*, 74 N. C. 437 (1876).

Since the adoption of the Constitution of 1868, a married woman has or can have the legal as well as the equitable estate, but this of itself does not give her the unrestricted disposition of her property. Its only effect was to do away with the necessary concurrence of the trustee by vesting in her the legal title. *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55 (1898). As to wife's power to contract so as to affect her property, see § 52-2 and note.

Contracts Strictly in Personam.—In construing § 6 of Art. X of our Constitution and the statutes passed on the subject, it has been held that neither the constitutional provision nor this section had the effect of enabling a married woman living with her husband to bind herself by contracts strictly in personam, but that the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to charge her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privity examination taken. *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915). See *Pippen v. Wesson*, 74 N. C. 437 (1876); *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567 (1889); *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998 (1890); *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410 (1905). See also *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55 (1898). As to contracts of married woman, see § 52-2 and note.

Property Free from Debts, Obligations and Engagements of Husband.—A married woman holds her separate real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our Constitution and this section. *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998 (1912).

Property Not Protected from Wife's Own Obligations.—The purpose of this section was to protect the estate of the wife from liability for her husband's debts arising under the common law by reason of the coverture, but it was not intended to protect the property from her own obligations. *Brinkley v. Ballance*, 126 N. C. 393, 35 S. E. 631 (1900); *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904); *Royal*

v. Southerland, 168 N. C. 405, 84 S. E. 708 (1915).

Lien on Married Woman's Property.—By construing §§ 6 and 3 of Art. X of the Constitution in connection with § 44-1, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410 (1905).

Acquisition of Property Not Affected.—It is settled law in North Carolina that this section imposes no limit upon the wife's power to acquire property by contracting with her husband or any other person, but only operates to restrain her from, or protect her in, disposing of property already acquired by her. *Osbourne v. Wilkes*, 108 N. C. 661, 13 S. E. 285 (1891).

Meaning of "Convey."—The word "convey" must be restricted in its operation to such property as is by law required to be transferred by a written instrument. The words "convey" and "devise" are technical terms, relating to the disposition of interests in real property. It would not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last will and testament. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904).

Disposition of Personalty.—A married woman has the absolute power to dispose of her property by will, and she can convey it "with the written assent of her husband," which does not restrict her freedom in the disposition of her personal property, as conveyances apply only to realty. *Everett v. Ballard*, 174 N. C. 16, 93 S. E. 385 (1917).

There is no restriction whatever upon the right of a married woman to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904); *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410 (1905); *Rea v. Rea*, 156 N. C. 529, 72 S. E. 873 (1911).

What Is Sufficient Written Assent to Make Wife's Deed Valid.—Since the deed of the husband conveys no title to his wife's land, but evidences his written assent to her conveyance, upon reason and authority, subscribing his name under seal to her deed, and acknowledging his execution thereof as required by law, is a sufficient written assent to make her deed valid. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (1934).

Chapter Creates No New Rights in Hus-

band.—The provisions of this chapter, in so far as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949).

Interest of Husband.—The real property of the wife, whether acquired before or after marriage, remains her sole and separate property, N. C. Const., Art. X, § 6, and therein the husband has no vested interest, but merely the power to refuse his written assent to her conveyance thereof. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904); *Kilpatrick v. Kilpatrick*, 176 N. C. 182, 96 S. E. 988 (1918).

Money from Sale of Wife's Realty.—Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. *Kirpatrick v. Holmes*, 108 N. C. 206, 12 S. E. 1037 (1891).

Presumption as to Property Delivered to Husband.—Under the change made in the law of married women's property rights by this section and the Constitution, Art. X, § 6, where a married woman receives checks from her parents as personal gifts to her, which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. *Etheredge v. Cochran*, 196 N. C. 681, 146 S. E. 711 (1929).

A husband may not maintain an action against his wife for a personal tort committed by her against him during coverture, since this common-law disability has not been abrogated or repealed by statute. *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949).

Statute of Limitations.—Since a wife may now maintain an action without the joinder of her husband, when it concerns her separate property, and against her husband, when it is between the husband and wife,

and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. *Graves v.*

Howard, 159 N. C. 594, 75 S. E. 998 (1912). See § 1-18.

Cited in Martin v. Bundy, 212 N. C. 437, 193 S. E. 831 (1937).

§ 52-2. **Capacity to contract.**—Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the Constitution, and the execution of the same acknowledged or proven as required by law. (1871-2, c. 193, s. 17; Code, s. 1826; Rev., s. 2094; 1911, c. 109; C. S., s. 2507; 1945, c. 73, s. 16.)

- I. In General.
- II. Powers Conferred.
- III. Liabilities Incurred.
- IV. Remedies for Breach.

Cross Reference.

As to conveyances by husband and wife, see § 39-7 et seq.

I. IN GENERAL.

Editor's Note.—The 1945 amendment omitted the requirement of privity examination of the wife. As to effect of amendment on this and other sections, see 23 N. C. Law Rev. 357. For repeal of all laws requiring privity examination of married women, see § 47-116.

At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge, must refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. *Frazier v. Brownlow*, 38 N. C. 237 (1844); *Knox v. Jordan*, 58 N. C. 175 (1859); *Pippen v. Wesson*, 74 N. C. 437 (1876); *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55 (1898).

The common-law rule continued to be the law in this State until the adoption of the Constitution of 1868. *Pippen v. Wesson*, 74 N. C. 437 (1876). Chapter 193, s. 17, Laws 1871-2, known as the Marriage Act, was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was required in order to allow her to charge her separate estate. See *Arrington v. Bell*, 94 N. C. 247 (1886). The present section, known as the Martin Act, was passed March 6, 1911

and has entirely changed the law. See 13 N. C. Law Rev. 62.

Section Constitutional.—This section is constitutional and valid. *Warren v. Dial*, 170 N. C. 406, 87 S. E. 126 (1915).

Legislature Has Power to Remove Restraints.—The restraints upon a married woman's power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the legislature to do so, and indeed the court in many instances has indicated to the legislature that justice might be facilitated by more liberal legislation in that regard. *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 390 (1902).

This section operates prospectively and does not apply to contracts made prior to its adoption. *Stephens v. Hicks*, 156 N. C. 239, 72 S. E. 313 (1911).

Section Does Not Apply to Estates in Entirety.—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in *Jones v. Smith*, 149 N. C. 318, 62 S. E. 1092 (1908), as not affecting estates held by husband and wife as tenants by the entirety. *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924).

Conveyance without Husband's Assent Invalid.—This statute contains a permanent delimitation making a conveyance of real estate invalid unless with the written assent of the husband. *Buford v. Mochy*, 224 N. C. 235, 29 S. E. (2d) 729 (1944).

Statute providing that earnings and damages from personal injury are wife's property (§ 52-10), should be read in light of this section. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Cited in Etheredge v. Cochran, 196 N. C. 681, 146 S. E. 711 (1929).

II. POWERS CONFERRED.

Married Women Made Sui Juris.—The effect of the Martin Act (this section) is

to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, *sui juris*. *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820 (1914); *Royall v. Southerland*, 168 N. C. 405, 84 S. E. 708 (1915); *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915); *Thrash v. Ould*, 172 N. C. 728, 90 S. E. 915 (1916); *Satterwhite v. Gallagher*, 173 N. C. 525, 92 S. E. 369 (1917); *Dorsey v. Corbett*, 190 N. C. 783, 130 S. E. 842 (1925); *Tise v. Hicks*, 191 N. C. 609, 132 S. E. 560 (1926); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930). See *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322 (1937).

By virtue of this section, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that her husband's written consent must be had to conveyances of her real property, and the requirements of § 52-12 must be met in contracts between her and her husband affecting her real property or the corpus of her personal property. *Martin v. Bundy*, 212 N. C. 437, 193 S. E. 831 (1937).

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by § 52-12, must still be observed, and except in conveyances of her real estate, in which case her husband's written consent must be had, a married woman can now make any and "all contracts so far as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried." *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820 (1914); *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915); *Everett v. Ballard*, 174 N. C. 16, 93 S. E. 385 (1917); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930). See *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322 (1937).

This section practically constitutes married women free traders as to all their ordinary dealings. *Price v. Charlotte Electric Railway Co.*, 160 N. C. 450, 76 S. E. 502 (1912); *Croom v. Goldsboro Lumber Co.*, 182 N. C. 217, 108 S. E. 735 (1921).

Section 52-12 Not Affected.—This section does not alter the effect of § 52-12, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void. *Singleton v. Cherry*, 168 N. C. 402, 84 S. E. 698 (1916); *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915).

This section recognizes that § 52-12 ap-

plies only to contracts, and that the only restriction upon conveyances by a married woman is that constitutional one requiring the written assent of her husband as to conveyances of realty, and her privy examination (now her acknowledgment or proof of execution) in such cases. *Rea v. Rea*, 156 N. C. 529, 72 S. E. 573 (1911). But see *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915). See also § 52-12 and note.

Husband and Wife May Form Business Partnership.—This section has been held to vest the wife with the power to contract with the husband so as to create a business partnership. *Eggleston v. Eggleston*, 228 N. C. 668, 47 S. E. (2d) 243 (1948).

Oral Agreement to Hold Land in Trust for Husband.—A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. *Carlisle v. Carlisle*, 225 N. C. 462, 35 S. E. (2d) 418 (1945).

III. LIABILITIES INCURRED.

Liability for Breach of Contract.—

When the legislature authorized a married woman "to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried," it authorized contracts for breach of which she would be liable as fully as if she had remained unmarried. *Everett v. Ballard*, 174 N. C. 16, 93 S. E. 385 (1917).

Same—Contract to Convey Realty.—On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915). And this though the contract to convey is made without the written consent of the husband. *Everett v. Ballard*, 174 N. C. 16, 93 S. E. 385 (1917).

Liability of Wife Where Husband Agent.—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence. *Richardson v. Libes*, 188 N. C. 112, 123 S. E. 306 (1924).

Where Husband Is Alien.—Under the former law it was held that a married woman whose husband was an alien and never visited or resided in the United States was personally liable on her contracts. *Levi v. Marsha*, 122 N. C. 656, 29 S. E. 832 (1898).

Liability as Partner or Surety.—Since the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. *Bristol Grocery Co. v. Bails*, 177 N. C. 298, 98 S. E. 768 (1919).

Where Wife Is Surety for Husband.—A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. *Royal v. Southerland*, 168 N. C. 405, 84 S. E. 708 (1915).

Estoppel.—Since, in this State, the common-law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. *Tripp v. Langston*, 218 N. C. 295, 10 S. E. (2d) 916 (1940). See also *Builders, etc., Co. v. Joyner*, 182 N. C. 518, 109 S. E. 259 (1921), wherein the question whether the doctrine of title by estoppel applies to a married woman was raised but not decided.

Assessments on Stock.—In *Robinson v. Turrentine*, 59 F. 554 (1894), construing the former provisions of this section, it was held that the purchase of stock by a married woman was not a "contract" within the terms of the section, and that the wife was liable upon an assessment, although the stock was purchased without the written consent of her husband.

Husband Still Liable for Funeral Expenses and Necessaries.—The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of *indebitatus assumpsit*. *Bowen v. Daugherty*, 168 N. C. 242, 84 S. E. 265 (1915).

IV. REMEDIES FOR BREACH.

Inability to Get Husband's Consent Im-

§ 52-3. Capacity to draw checks.—Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof. (1891, c. 221, s. 30; 1893, c. 344; Rev., s. 2095; C. S., s. 2508.)

§ 52-4. Conveyance or lease of wife's land requires husband's joinder.—No lease or agreement for a lease or sublease or assignment by any

material.—The rule that a married woman is liable in damages for failure to perform her contract to convey her lands under the Martin Act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith. *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915).

Specific Performance.—When a married woman makes an executory contract to convey land and the requirements of § 39-7, regarding instruments affecting a married woman's title, are not complied with, she can only be held in damages, and specific performance may not be enforced. *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915).

Since a wife's contracts are valid without the written assent of her husband, and she is liable in damages for a breach thereof, specific performance may be decreed where the husband has subscribed his name under seal to her deed. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (1934).

Judgment against Wife as Surety.—In *Royal v. Southerland*, 168 N. C. 405, 81 S. E. 708 (1915), it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. *Thrash v. Ould*, 172 N. C. 728, 90 S. E. 915 (1916).

Judgment Enforced by Execution.—It was held in *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820 (1914), construing this section, that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. *Thrash v. Ould*, 172 N. C. 728, 90 S. E. 915 (1916).

Wife May Claim Personal Property Exemption.—Under the provisions of Art. X, § 1 of our Constitution, and of this section, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of § 52-12, and each has consented that such exemption should be allowed to the other therefrom. *Bristol Grocery Co. v. Bails*, 177 N. C. 298, 98 S. E. 768 (1919).

married woman of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proven or acknowledged by them. (1871-2, c. 193, s. 26; Code, s. 1834; Rev., s. 2096; C. S., s. 2509; 1945, c. 73, s. 17.)

Cross References.—As to the formalities necessary in married women's conveyances, see § 39-7 et seq. As to exceptions, see §§ 35-12, 52-5, and 52-6. As to title to swamp lands reclaimed vesting in board of education by written consent, see § 146-81. As to power of minor husband to give written assent to wife's conveyance, see § 30-10.

Editor's Note.—The 1945 amendment omitted the requirement of privity examination of the wife. For repeal of all laws requiring privity examination of married women, see § 47-116.

Written Assent of Husband Required.—The power of a married woman to convey her property is regulated by the Constitution, Art. X, § 6, and must be exercised by the written assent of her husband. *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544 (1899); *Kilpatrick v. Kilpatrick*, 176 N. C. 182, 96 S. E. 988 (1918); *Stallings v. Walker*, 176 N. C. 321, 97 S. E. 25 (1918).

Same—How Expressed.—The husband's assent need not be by deed, for he has nothing to convey, and his joining with the wife in the instrument is sufficient. *Stallings v. Walker*, 176 N. C. 321, 97 S. E. 25 (1918).

Husband's Indorsement Does Not Validate Deed.—The written assent of her husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for a married woman to make a valid conveyance. *Council v. Pridgen*, 153 N. C. 443, 69 S. E. 404 (1910).

Probate or Acknowledgment after Wife's Death.—Where a husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection

to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof. *Frisbee v. Cole*, 179 N. C. 469, 102 S. E. 890 (1920). See § 39-8.

Privity Examination.—Before the 1945 amendments to this section and chapter 39, in order to convey a married woman's separate real estate or fix a charge upon it, her privity examination was required. *Council v. Pridgen*, 153 N. C. 443, 69 S. E. 404 (1910); *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913).

Deed Made in Foreign State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this State, without privity examination of the wife as formerly required by § 39-7, was void. *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902).

Conveyance as Executrix.—Under this section as it stood before the 1945 amendment, it was not necessary that a married woman should be privately examined as to the execution of a lease for land, signed by her as executrix under the will of a former husband, and when she was a feme sole. *Darden v. Neuse, etc., Steamboat Co.*, 107 N. C. 437, 12 S. E. 46 (1890).

Action for Breach of Contract.—A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884 (1920), distinguishing between suits for specific performance on the leases mentioned in this section and actions for damages on same. See note to § 52-2.

§ 52-5. Separation by divorce or deed; husband non compos.—Every woman who is living separate from her husband, either under a judgment of divorce by a competent court or under a deed of separation executed by said husband and wife and registered in the county in which she resides, or whose husband has been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and may convey her personal estate and her real estate without the assent of her husband. (1871-2, c. 193, s. 23; 1880, c. 35; Code, s. 1831; Rev., s. 2116; C. S., s. 2529.)

Cross Reference.—As to alternative method by which wife of lunatic may convey real estate, see § 35-12.

Editor's Note.—As to separation agreements, see 2 N. C. Law Rev. 193.

Section Constitutional.—This section is

a valid exercise of the legislative power. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919).

When Husband's Assent Unnecessary.

—The husband's assent cannot be required when either by reason of mental incapacity he is unable to give assent, or by his conduct in abandoning his wife or maliciously turning her out of doors he has practically emancipated her, for in both cases she must rely upon her property or her labor for her support. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919).

This section has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband to a married woman's conveyance, though not directly construed. In these cases it is stated that the husband's assent to the conveyance of the realty is required except in cases under §§ 52-5 and 52-6. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919). See *Sparks v. Sparks*, 94 N. C. 527 (1886); *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567 (1889); *Hodges v. Hill*, 105 N. C. 130, 10 S. E. 916 (1890); *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998 (1890); *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55 (1898); *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644 (1903); *Council v. Pridgen*, 153 N. C. 443, 69 S. E. 404 (1910).

Validity of Separation Deeds.—Separation deeds were formerly held absolutely void in North Carolina. See *Collins v. Collins*, 62 N. C. 153 (1867). But in *Sparks v. Sparks*, 94 N. C. 527, 532 (1886) it was said: "This section, passed in February, 1872, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a possible legal separation of the parties, by voluntary agreements, and defines her condition and rights resulting therefrom." And in *Archbell v. Archbell*, 158

N. C. 408, 74 S. E. 327 (1912), although the separation deed in that case was held to be void because of an invalid certificate of the probate officer, the court said that due to the "distinct recognition of deeds of this character . . . we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law."

Separation deeds are not regarded with favor.—*Smith v. King*, 107 N. C. 273, 12 S. E. 57 (1890). See also *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197 (1895).

The requisites of a valid separation deed are as follows: (1) That there must be a separation already existing or immediately to follow the execution of the deed; (2) that the separation deed must be made for an adequate reason, of such a kind that it is necessary for the health or happiness of one or the other; (3) that it must be reasonable and fair to the wife, considering the condition of the parties. In North Carolina, in addition, the separation deed must conform to the statutory requirements, concerning deeds between husband and wife. *Archbell v. Archbell*, 158 N. C. 408, 74 S. E. 327 (1912). See 2 N. C. Law Rev. 193.

Declaration of Insanity Required.—In order for a wife to become a free trader because of the insanity of her husband it is necessary that he shall be declared insane. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268 (1898).

Section 35-12 an Alternative Method.—Section 35-12 is not in contradiction of this section, but is an optional alternative method to which the wife can resort if for any reason it should be desirable that in the future the record of the deed should show that at the time of the conveyance the husband had been adjudged a lunatic. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919).

Cited in *Fisher v. Fisher*, 217 N. C. 70, 6 S. E. (2d) 812 (1940).

§ 52-6. Abandonment by husband.—Every woman whose husband, abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband. (1871-2, c. 193, s. 24; Code, s. 1832; Rev., s. 2117; C. S., s. 2530.)

Section Constitutional.—This section was held constitutional in *Hall v. Walker*, 118 N. C. 377, 24 S. E. 6 (1896); *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242 (1897); *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890 (1902).

There is no constitutional inhibition on the legislature to declare by statute when and how a wife may become a free trader, and notwithstanding the provisions of Art. X, § 6, to the effect that a married woman may convey her separate realty with the

written consent of her husband, the provision of this section is valid, and in such cases § 52-4 does not apply. *Keys v. Tuten*, 199 N. C. 368, 154 S. E. 631 (1930).

Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder. *Pardon v. Paschal*, 142 N. C. 538, 55 S. E. 365 (1906); *Bachelor v. Norris*, 166 N. C. 506, 82 S. E. 839 (1914); *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941); *Campbell v. Campbell*, 221 N. C. 257, 20 S. E. (2d) 53 (1942).

When Husband an Alien.—In *Troughton v. Hill*, 3 N. C. 406 (1806), it was held that when the husband became an alien the wife became a feme sole for the purpose of contracting, and might acquire and transfer property. *Hall v. Walker*, 118 N. C. 377, 24 S. E. 6 (1896).

An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife. *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516 (1887).

When Husband Fugitive from Justice.—In an action against a married woman whose husband is a nonresident and a fugitive from justice, the husband is not a necessary party. *Heath, etc., Co. v. Morgan*, 117 N. C. 504, 23 S. E. 489 (1895).

Departure from State Not Required.—This section does not require the departure of the husband from the State to enable the wife to use her property for her support. *Vandiford v. Humphrey*, 139 N. C. 65, 51 S. E. 893 (1905).

§ 52-7. Husband cannot convey, etc., wife's land without her consent; not liable for his debts.—No real estate belonging at the time of marriage to females nor any real estate by them subsequently acquired nor any real estate of a married woman shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and effectuated by deed and due proof or acknowledgment according to law. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void. (1848, c. 41; R. C., c. 56; Code, s. 1840; Rev., s. 2097; C. S., s. 2510; 1945, c. 73, s. 18.)

Cross Reference.—As to estate by curtesy, see § 52-16 and note.

Editor's Note.—See 8 N. C. Law Rev. 476.

The 1945 amendment omitted certain dates and the requirement of privy examination. For repeal of all laws requiring privy examination of married women, see § 47-116.

Formerly Husband Could Lease and Convey.—At common law the husband, upon the marriage, was seized in right of

Tort Actions.—Under a reasonable construction of the Constitution and this section, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998 (1897). See § 52-10.

Wife Need Not Wait Six Months.—Under this section a wife is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. *Vandiford v. Humphrey*, 139 N. C. 65, 51 S. E. 893 (1905). See *Keys v. Tuten*, 199 N. C. 368, 154 S. E. 631 (1930).

Evidence of Abandonment to Be Submitted to Jury.—In order for a wife abandoned by her husband to become a free trader under this section, it is not necessary that the wife be abandoned for the statutory time necessary to constitute grounds for divorce, and where, in an action by her to set aside her deed executed without the written consent of her husband, the defense is set up that at the time of its execution she had been abandoned by her husband, and pleadings in her action for divorce alleging abandonment at the time are introduced in evidence, the issue of abandonment should be submitted to the jury even though abandonment was not an issue in the divorce proceedings, and the granting of a judgment on the pleadings in her favor is error. *Keys v. Tuten*, 199 N. C. 368, 154 S. E. 631 (1930).

Cited in *Hudson v. Hudson*, 208 N. C. 338, 180 S. E. 597 (1935).

his wife of a freehold interest in her lands during their joint lives. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy initiate. This estate, if he survived his wife, was called tenancy by the curtesy consummate, and inured to his benefit for life. Either as tenant by martial right or as tenant by curtesy initiate, the husband was entitled to the rents and profits and might lease or convey his estate, and it might be sold under execution against him.

Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019 (1893).

Former Right to Rents and Profits.—

Where a man was married, and the land was acquired by his wife before the adoption of the Constitution of 1868, and the act called the "Marriage Act," he was a tenant by the curtesy initiate, notwithstanding this section. *Houston v. Brown*, 52 N. C. 161 (1859). If he was the tenant by the curtesy initiate, he was necessarily entitled to the possession. *Wilson v. Arentz*, 70 N. C. 670 (1874). And if entitled to the possession, he had a right to the permanency of the rents and profits, etc. *Morris v. Morris*, 94 N. C. 613 (1886).

Purpose and Effect of Section.—Neither this section nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since the passage of this section such tenancy confers no right which the husband can assert against the wife as respects her real estate acquired after the section took effect—the intention and effect of the act being to provide for the wife a home which she cannot be deprived of either by her husband or his creditors. *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019 (1893).

It has been decided that neither this section nor the Constitution of 1868 destroyed tenancy by the curtesy initiate, although the husband was stripped almost entirely of his common-law rights therein during the coverture. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891); *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019 (1893).

Interest of Tenant by Curtesy Initiate.

—The tenancy by the curtesy initiate is stripped of its common-law attributes till there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning*, 79 N. C. 293 (1878)), and the right to the curtesy consummate contingent upon his surviving her. The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. He has by the curtesy initiate, a freehold interest, but not an estate, in the property. *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019 (1893). See *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891).

Vested Rights Not Impaired.—By this section the husband's vested rights as tenant by the curtesy initiate to the rents and profits were not impaired. *Cobb v. Rasberry*, 116 N. C. 137, 21 S. E. 176 (1895).

Curtesy Consummate Can Be Sold.—A tenant by the curtesy consummate may sell his estate, notwithstanding this sec-

tion. *Long v. Graeber*, 64 N. C. 431 (1870).

Lease Not Complying with Section Is Void.—A written lease of land for a term of five years, made subsequent to the passage of this section, without the privy examination of the wife required by this section before the 1945 amendment, was void as to the wife and passed no interest to the husband in the rents and profits thereof. *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510 (1909).

Husband Can Surrender Curtesy.—

Since the section was enacted a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. *Teague v. Downs*, 69 N. C. 280 (1873).

Land Purchased with Wife's Money.—

Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands affected by the same trust. *Lyon v. Akin*, 78 N. C. 258 (1878).

Who Can Sue to Recover Possession.—

A tenant by the curtesy initiate could have sued alone for and recovered possession of the lands and the rents and profits, in this State, before the adoption of the present Constitution. See *Wilson v. Arentz*, 70 N. C. 670 (1874). Since the adoption of the Constitution the husband cannot maintain an action in his name alone to recover lands of which he is tenant by the curtesy initiate, but the wife can maintain such action, either by joining her husband or suing alone. *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301 (1891); *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891).

Same—Where Husband Conveys Land to Wife.—A conveyance of land from husband to wife will pass the legal estate of the vendor and enable the vendee to sustain an action to declare title and recover possession. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891).

Statute of Limitations.—A tenant by the curtesy initiate has not such estate in the land of his wife that will put in operation the statute of limitations against him. *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84 (1891). As to running of the statute of limitations against a married woman, see § 1-18.

Applied in *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790 (1891).

§ 52-8. **Capacity to make will.**—Every married woman has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills. (1871-2, c. 193, s. 31; Code, s. 1839; Rev., s. 2098; C. S., s. 2511.)

Cross Reference.—See also § 31-2.

Wife May Defeat Curtesy by Will.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. *Tiddy v. Graves* 126 N. C. 620, 36 S. E. 127

(1900); *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655 (1903). And she can so devise her separate estate whether the trust is active or passive. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402 (1918).

§ 52-9. **May insure husband's life.**—Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture. (Rev., s. 2099; C. S., s. 2512.)

Cross Reference.—As to right of husband to insure life for the benefit of wife and children, see the North Carolina Constitution, Art. X, § 7.

§ 52-10. **Earnings and damages from personal injury are wife's property.**—The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried. (1913, c. 13, s. 1; C. S., s. 2513.)

Editor's Note.—In the concurring opinion in *Patterson v. Franklin*, 168 N. C. 75, 84 S. E. 18 (1915), Clark, C. J. states that this section was passed as a result of the decision in *Price v. Charlotte Electric Co.*, 160 N. C. 450, 76 S. E. 502 (1912). To the same effect, see *Kirkpatrick v. Crutchfield*, 178 N. C. 348, 100 S. E. 602 (1919).

Former Law.—The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor, but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. *Patterson v. Franklin*, 168 N. C. 75, 84 S. E. 18 (1915).

Section Read in Light of Constitution and § 52-2.—This section should be read in the light of Art. X, § 6, of the Constitution, which protects a married woman in the sole ownership of her property, and also in connection with § 52-2, which seeks to secure to her the free use of her property. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Extent of Wife's Power to Bring Actions.—A married woman has the fullest power to bring actions, even against her husband and in all cases whatever. *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920); *In re Will of Witherington*, 186 N. C. 153, 119 S. E. 11 (1923). And her right to sue her husband extends to tort actions. *Crowell v. Crowell*, 181 N. C. 66,

106 S. E. 149 (1921).

Husband Deprived of Former Rights.

—By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and choses in action. *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 126 S. E. 307 (1925).

The mutual rights and duties growing out of the marital relationship are not affected by this and the following sections, relating to the capacity of married women to contract and dispose of their property as if they were unmarried. *Richie v. White*, 225 N. C. 450, 35 S. E. (2d) 414 (1945).

A married woman is still a feme covert with the rights, privileges and obligations incident to such status under the law. *Coley v. Dalrymple*, 225 N. C. 67, 33 S. E. (2d) 477 (1945), citing *Buford v. Mochy*, 224 N. C. 235, 29 S. E. (2d) 729 (1944).

This section does not relieve a married woman of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmeet of her husband, when minded so to do. *Coley v. Dalrymple*, 225 N. C. 67, 33 S. E. (2d) 477 (1945), citing *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) im-

posed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of consortium. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Husband's Common-Law Right of Action Transferred to Wife.—A married woman is now entitled to recover in tort for all pecuniary loss sustained by her, including nursing and care, and loss from inability to perform labor or to carry on her household duties. This transfers to the wife, the husband's common-law right of action to recover for her services and for imposed nursing and care occasioned by the tort of another. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Overlapping Recovery Denied.—The effect of the legislation is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Action of Wife for Tort to Husband.—In *Hipp v. Dupont*, 182 N. C. 9, 13, 108 S. E. 318 (1921), the court said: "It follows therefore [from this section] that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no reason why she can sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband."

Wife's Recovery for Loss of Consortium.—It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320 (1899). See also, 3 N. C. Law Rev. 100.

Action against Seducer.—Under the provisions of this section, a married woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. *Hayatt v. McCoy*, 194 N. C. 25, 138 S. E. 405 (1927).

Nonresident Wife Has Right of Action for Husband's Tort.—The right of a married woman to maintain an action

against her husband to recover for negligent injury is not limited to residents of this State, and a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N. C. 51, 12 S. E. (2d) 649 (1941).

Services rendered by a married woman outside the home, and not within the scope of her household or domestic duties, would properly be recoverable on implied assumpsit or quantum meruit in her own name. *Coley v. Dalrymple*, 225 N. C. 67, 33 S. E. (2d) 477 (1945).

Services Rendered to Husband.—For a wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living with him under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to pay. *Dorsett v. Dorsett*, 183 N. C. 354, 111 S. E. 541 (1922).

Husband and Wife Employed Together.—Since the passage of the Martin Act (§ 52-2) and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. *Croom v. Goldsboro Lumber Co.*, 182 N. C. 217, 108 S. E. 735 (1921).

Joinder of Husband Unnecessary.—Since the passage of this section a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. *Kirkpatrick v. Crutchfield*, 178 N. C. 348, 100 S. E. 602 (1919).

Same—Not Improper.—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife

proceeded with. *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165 (1923).

Quoted in *Carlisle v. Carlisle*, 225 N. C. 462, 35 S. E. (2d) 418 (1945).

Cited in *Earle v. Earle*, 198 N. C. 411, 151 S. E. 884 (1930); *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949).

§ 52-11: Repealed by Session Laws 1943, c. 543.

§ 52-12. **Contracts of wife with husband affecting corpus or income of estate.**—(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proven as is required for the conveyances of land; and such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to her. The certificate of the officer shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

(b) This section shall not apply to any judgment of the superior court which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife. (1871-2, c. 193, s. 27; Code, s. 1835; Rev., s. 2107; C. S., s. 2515; 1945, c. 73, s. 19; 1947, c. 111.)

I. In General.

II. Transactions Included.

III. The Certificate.

IV. Effect of Noncompliance.

Cross References.

See also, § 52-2 and notes. As to conveyances by husband and wife, see § 39-7 et seq. As to separation agreements, see §§ 52-5, 52-13 and notes.

I. IN GENERAL.

Editor's Note.—The 1945 amendment omitted the requirement of privity examination of the wife. For repeal of all laws requiring privity examination of married women, see § 47-116.

The 1947 amendment added subsection (b).

Common-Law Rule.—All transactions of the wife with her husband in regard to her separate property were held void at common law. *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887). This was because at common law the husband and wife were deemed one person, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. *Sydnor v. Boyd*, 119 N. C. 481, 25 S. E. 92 (1896).

Section Passed to Protect Wife.—This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887). The law presumes that contracts between husband and wife affecting her real estate are exe-

cuted under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify. *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747 (1911); *Caldwell v. Blount*, 193 N. C. 560, 137 S. E. 578 (1927).

The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887); *Long v. Rankin*, 108 N. C. 338, 12 S. E. 987 (1891); *Stout v. Perry*, 152 N. C. 312, 67 S. E. 757 (1910).

Legislature Did Not Intend to Reduce Marriage to a Commercial Basis.—While [in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414 (1945).

Section Constitutional.—This section was held to be constitutional and valid in *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887); *Long v. Rankin*, 108 N. C. 338, 12 S. E. 987 (1891); *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747 (1911); *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915).

Strict Construction.—This section is an

enabling statute and must be strictly construed. *Caldwell v. Blount*, 193 N. C. 560, 137 S. E. 578 (1927).

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887); *Butler v. Bulter*, 169 N. C. 584, 86 S. E. 507 (1915).

Effect of Fraud or Want of Consideration.—Where the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with this section precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the provisions of this section could apply. *Garrett v. Garrett*, 229 N. C. 290, 49 S. E. (2d) 643 (1948).

Judgment on Pleadings.—In an action by a wife against her former husband to enforce a separation agreement between them, executed in accordance with this section, plaintiff was held entitled to have the court render judgment on the pleadings in her favor. *Smith v. Smith*, 225 N. C. 189, 34 S. E. (2d) 148 (1945).

Cited in *Bass v. Moore*, 229 N. C. 211, 49 S. E. (2d) 391 (1948).

II. TRANSACTIONS INCLUDED.

Section Applies to Contracts Only.—An examination of this section shows that it applies solely to contracts, and not to conveyances. The object of the legislature was clearly to prevent the wife from making any contract with her husband whereby she should incur a liability against her estate which in the future might prove a burden or charge upon it, or cause a change or impairment of her income or personalty. *Rea v. Rea*, 156 N. C. 529, 72 S. E. 573 (1911), holding valid a transfer of stock from a married woman to her husband, notwithstanding failure to comply with this section. But see *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915).

If this section extended to conveyances, it would be a violation of Art. X, § 6, of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his wise approval before a married woman can do what the Constitution guarantees that she may do "with the approval of her husband." Concurring opinion *Clark, C. J.* in *Frisbee v. Cole*, 179 N. C. 469, 102 S. E. 890 (1920).

Deeds of realty are embraced in the term "contracts," used in this section, for

a deed is an executory contract until delivered, and after delivery it becomes an executed contract. *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915), distinguishing *Rea v. Rea*, 156 N. C. 529, 72 S. E. 573 (1911). See *Singleton v. Cherry*, 168 N. C. 402, 84 S. E. 698 (1915).

Transfers of Personalty.—This section does not extend to transfers of personalty by the wife to the husband. *Rea v. Rea*, 156 N. C. 529, 72 S. E. 573 (1911).

As to conveyances of personalty there is no restriction whatever upon the right of a wife to dispose of her personalty as fully and as freely as if she had remained unmarried. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, (1904); *Deese v. Deese*, 176 N. C. 527, 97 S. E. 475 (1918).

Section Applies to Every Form of Conveyance Except Testamentary Devise.—A married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of this section. Any manner of conveyance—testamentary devises excepted—otherwise than as therein provided is void. *Ingram v. Easley*, 227 N. C. 442, 42 S. E. (2d) 624 (1947), containing specific examples of transactions that are void for want of compliance with this section.

Parol Transfer for Less than Three Years Valid.—A wife can upon a fair consideration give land by parol to her husband for a period less than three years under this section. *Wells v. Batts*, 112 N. C. 283, 17 S. E. 417 (1893).

Conveyance of Wife's Land to Third Party in Trust for Husband.—The law will not permit the salutary object of this section to protect married women to be circumvented by indirection, and a wife may not effectually convey her real estate to a third person to be held in trust by him for the husband or to be conveyed by him to the husband unless the examining or certifying officer incorporates in his certificate his conclusions that the conveyance "is not unreasonable or injurious to the wife." *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948). See *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924); *Best v. Utley*, 189 N. C. 356, 127 S. E. 337 (1925); *Garner v. Horner*, 191 N. C. 539, 132 S. E. 290 (1926).

Wife's Interest in Estates by Entireties.—During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by this section; and where the estate has been conveyed to one in trust for the husband, and the officer in taking

the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and the husband may not, by will or otherwise, dispose of her interest thereunder. *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924).

A deed by husband and wife conveying lands held by them by entireties to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of this section. *Fisher v. Fisher*, 217 N. C. 70, 6 S. E. (2d) 812 (1940).

Land Bought with Wife's Money and Conveyed by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband of her personal property, and though thus conveyed at her request creates a resulting trust in the lands in her favor. *Deese v. Deese*, 176 N. C. 527, 97 S. E. 475 (1918).

Agreement to Hold in Trust Land Conveyed to Wife by Third Party.—A married woman may enter a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit or for their joint benefit. Such an agreement would not involve her separate estate; consequently the contract is not required to be executed in the manner set forth in this section. *Bass v. Bass*, 229 N. C. 171, 48 S. E. (2d) 48 (1948).

An agreement by husband and wife to pool their respective lands for division among their children is not an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with this section. *Coward v. Coward*, 216 N. C. 506, 5 S. E. (2d) 537 (1939).

Appointment of Husband as Agent to Settle Wife's Debts.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of this section is not necessary. *Stout v. Perry*, 152 N. C. 312, 67 S. E. 757 (1910).

Confession of Judgment in Favor of Creditors.—A judgment by confession in favor of creditors against a husband and wife is valid, and the private examination of the wife is not necessary under this section, which is applicable only to contracts between husband and wife. *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322 (1937).

Consent Judgment.—Prior to the 1947

amendment to this section, it was held that a consent judgment that transferred the wife's title in her separate realty to her husband must be in conformity with this section. *Ellis v. Ellis*, 193 N. C. 216, 136 S. E. 350 (1927).

Deeds of separation, though not favored by law, are under certain circumstances recognized by this section and §§ 52-5 and 52-13, when signed in conformity therewith. *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1929). See also *Brown v. Brown*, 205 N. C. 64, 169 S. E. 818 (1933).

Notes Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction to secure notes given in part payment of the purchase price, payable to herself and her husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of this section. *Kilpatrick v. Kilpatrick*, 176 N. C. 182, 96 S. E. 988 (1918).

Contract Creating Business Partnership.—Husband and wife may enter into a contract creating a business partnership between them under § 52-2, but where the wife's separate estate is involved as a part of the partnership property, the provision of this section must be observed. *Eggleston v. Eggleston*, 228 N. C. 668, 47 S. E. (2d) 243 (1948).

Contract Fixing Monthly Allowance to Wife.—A contract between husband and wife, which does not purport to divest the wife of dower or the husband of curtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in affect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by this section, and, not being so executed, the same is void as to the wife and also as to the husband. *Daughtry v. Daughtry*, 225 N. C. 358, 34 S. E. (2d) 435 (1945).

Policy on Husband's Life.—An insurance policy on the life of her husband, payable to a married woman, being a vested interest, is embraced in the word "body" as used in this section, which requires all contracts between husband and wife affecting "the body or capital" of the latter's estate to be in writing and (for-

merly) accompanied by the privy examination of the wife. *Sydnor v. Boyd*, 119 N. C. 481, 26 S. E. 92 (1896).

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformly held that the deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to the deed the certificate of the probate officer as required by statute. *Caldwell v. Blount*, 193 N. C. 560, 137 S. E. 578 (1927).

Must Show Deed Not Unreasonable or Injurious.—A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with this section, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and (formerly) the wife's privy examination, the deed is not unreasonable and injurious to her. *Fisher v. Fisher*, 217 N. C. 70, 6 S. E. (2d) 812 (1940).

No deed from a wife to her husband, conveying her land to him, is valid, unless the certifying officer shall state in his certificate his conclusions that the deed is not unreasonable or injurious to her. The statute requires that both conclusions, to wit, that the deed is reasonable and that it is not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. *Caldwell v. Blount*, 193 N. C. 560, 137 S. E. 578 (1927).

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337 (1925).

Where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of this section, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507 (1915).

Defective Acknowledgment Not Cured by Prior Separation Agreement.—A defective acknowledgement of a deed conveying the wife's interest in land to her husband is not cured by a prior deed of separation properly executed. *Fisher v. Fisher*, 217 N. C. 70, 6 S. E. (2d) 812 (1940).

Testimony of Wife and Probate Officer.—Where the defendants alleged that certain of the requirements of this section were observed by the officer but omitted by mistake from his certificate, testimony

of the wife and the probate officer as to what transpired at the time was competent in rebuttal of the defendant's evidence, if he introduced any, and immaterial if he did not do so. *Anderson v. Anderson*, 177 N. C. 401, 99 S. E. 106 (1919).

Certificate Conclusively Presumed to Be True.—This section only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked. *Frisbee v. Cole*, 179 N. C. 469, 102 S. E. 890 (1920).

Evidence is not admissible to show that the facts stated in the certificate are not true. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337 (1925).

IV. EFFECT OF NONCOMPLIANCE.

Noncompliance Renders Deed Void.—The failure on the part of the probate officer to observe the requirements of the statute renders a deed absolutely void. *Wallin v. Rice*, 170 N. C. 417, 89 S. E. 239 (1915); *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834 (1921); *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924); *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571 (1924); *Best v. Utley*, 189 N. C. 356, 127 S. E. 337 (1925); *Barbee v. Bumpass*, 191 N. C. 521, 132 S. E. 275 (1926); *Garner v. Horner*, 191 N. C. 539, 132 S. E. 290 (1926).

Conveyance Void Where Officer Fails to State His Conclusions in Certificate.—A conveyance of her land by a wife to her husband is void if the officer taking the acknowledgment of the wife fails to state in his certificate his conclusions that the conveyance "is not unreasonable or injurious to her" as required by this section. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948). See *Farmers Bank v. McCullers*, 201 N. C. 440, 160 S. E. 494 (1931).

The deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in *Singleton v. Cherry*, 168 N. C. 402, 84 S. E. 698 (1915), by the unanimous opinion of the court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife.

Butler v. Butler, 169 N. C. 584, 86 S. E. 507 (1915).

Oral declarations of a wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with this section. Shermer v. Dobbins, 176 N. C. 547, 97 S. E. 510 (1918).

A separation agreement not executed in the manner required by this section and § 52-13 was void ab initio, and where execution of such agreement appeared from pleadings in a husband's action for divorce on the ground of two years' separation, allegations of the wife's answer must be weighed in the light of this fact. Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636 (1945); Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904 (1946).

Partnership Agreement.—A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or accruing income thereof for a longer period than three years next ensuing the agreement, the contract is void and unenforceable unless executed in accordance with this section. Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. (2d) 418 (1945).

Under Void Deed Husband Takes Only Curtesy.—Where the husband has had children by the wife of his first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure sale under a mortgage given by himself and his second wife, only such life estate may be conveyed to the purchaser. Caldwell v. Blount, 193 N. C. 560, 137 S. E. 578 (1927).

Defective Paper Good as Color of Title.—A paper-writing void for failure of compliance with this section is good as color of title. Whitten v. Peace, 188 N. C. 298, 124 S. E. 571 (1924); Best v. Utley, 189 N. C. 356, 127 S. E. 337 (1925).

If such deed is not color of title, it is at least some evidence, under the ancient document rule, to be submitted to the jury on the question of adverse possession for 20 or 30 years. Owens v. Blackwood Lbr. Co., 210 N. C. 504, 184 S. E. 804 (1936).

Same—When Possession Becomes Ad-

verse.—It seems well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. And this is true though the husband holds a deed to the land executed by his wife to him but which is void for failure of the certificate required by this section. The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. Kornegay v. Price, 178 N. C. 441, 100 S. E. 883 (1919). See Norwood v. Totten, 166 N. C. 648, 82 S. E. 951 (1914).

Invalid Deed Does Not Work Estoppel of Wife.—Where a husband has conveyed to his wife his title to lands held by them by the entirety, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of this section with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 52 (1930).

Estoppel of Wife's Heirs.—The land in question was held by tenants in common. The husband of one of the tenants bought the interest of another tenant, and thereafter the husband and the tenants entered into a parol agreement, and pursuant thereto deeds were exchanged between each of the tenants and the husband to effect a partition, but in the deed to the husband, signed by his wife as one of the tenants, the wife's privy examination was not taken and the certificate of the clerk was not executed as then required by this section. Thereafter the wife, prior to the effective date of the Martin Act (§ 52-2), with the written consent of her husband, conveyed the share allotted to her in the partition. It was held that upon the death of the wife, her husband surviving her, her inchoate dower in the share allotted to him was terminated, and even conceding that her joinder in the partition deed to him was inoperative under this section, her heirs would be estopped under the doctrine of estoppel by laches as existing prior to the Martin Act, from setting up any interest in the share allotted to him, since her valid conveyance of the share allotted to her prevented the parties from being placed in statu quo. Martin v. Bundy, 212 N. C. 437, 193 S. E. 831 (1937).

Estoppel of Husband.—Where a husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by this section, the void deed did not estop

the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce. *Fisher v. Fisher*, 218 N. C. 42, 9 S. E. (2d) 493 (1940).

§ 52-13. Contracts between husband and wife generally; releases.—Contracts between husband and wife not forbidden by § 52-12 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to § 52-12, any married person, may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C. S., s. 2516.)

Cross References.—See also §§ 52-5, 52-12 and notes. As to renouncement of rights of dower and curtesy by minors, see § 30-10.

At common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity it was always otherwise, and there many of their contracts with each other were recognized and enforced. *George v. High*, 85 N. C. 99 (1881).

Legislature Did Not Intend to Reduce Marriage to a Commercial Basis.—While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414 (1945).

What Contracts Included.—This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the contracts between the husband and the wife and third parties. *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913).

Separation Agreement Valid.—A deed of separation executed by the husband and wife is not against our policy, when prop-

erly made in accordance with § 52-12. *Archbell v. Archbell*, 158 N. C. 408, 74 S. E. 327 (1912).

Mutual Releases Do Not Bar Wife's Right to Alimony.—Mutual releases between husband and wife of their interests in each other's separate property do not bar the wife from making application for temporary alimony and attorney's fee in a subsequent suit for divorce. *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502 (1900).

Rent Notes Given Wife by Husband Valid.—Where a husband occupied his wife's land for nine years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constitute a valid indebtedness on the part of the husband to his wife. *Battle v. Mayo*, 120 N. C. 413, 9 S. E. 384 (1897).

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. *George v. High*, 85 N. C. 99 (1881).

§ 52-14. Wife's antenuptial contracts and torts.—The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C. S., s. 2517.)

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. *Hodges v. Hill*, 105 N. C. 130, 10 S. E. 916 (1890); *Beville v. Cox*, 109 N. C. 265, 13 S. E. 800 (1891). And the justice also

has jurisdiction where the action is on a contract made or a wrong done by her before the marriage. *Neville v. Pope*, 95 N. C. 346 (1886).

Wife May Appoint Husband as Agent.—A wife may appoint her husband to act as her agent to settle her antenuptial debts

in the same manner as one *sui juris* may appoint an agent, and compliance with the requirements of § 52-12 is not necessary. *Stout v. Perry*, 152 N. C. 312, 67 S. E. 757 (1910).

§ 52-15. **For wife's torts, husband not liable.**—No husband shall be liable for damages accruing from any tort committed by his wife, or for any costs or fines incurred in any criminal proceeding against her. (1871-2, c. 193, s. 25; Code, s. 1833; Rev., s. 2105; C. S., s. 2518; 1921, c. 102.)

Editor's Note.—At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although husband and wife were living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress." *Roberts v. Lisenbee*, 86 N. C. 136 (1882). This principle was modified by Laws 1871-2, c. 193, s. 25 (this section as it was formerly), so that the husband could

Where prior to their marriage the wife incurs liability for a negligent injury to the husband the subsequent marriage does not affect her liability. *Shirley v. Ayers*, 201 N. C. 51, 158 S. E. 840 (1931).

only be held liable for torts committed while the husband was living with the wife. *Young v. Newsome*, 180 N. C. 315, 104 S. E. 660 (1920). The present section, abolishing the husband's liability for the torts of his wife, was substituted for the former provision by Laws 1921, c. 102.

For cases decided under the former law, see *Roberts v. Lisenbee*, 86 N. C. 136 (1882); *Presnell v. Moore*, 120 N. C. 390, 27 S. E. 27 (1897); *Brittingham v. Stadiem*, 151 N. C. 299, 66 S. E. 128 (1909); *Young v. Newsome*, 180 N. C. 315, 104 S. E. 660 (1920).

§ 52-16. **Estate by the curtesy.**—Every man who has married or shall marry a woman, and by her has issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife has obtained a divorce a mensa et thoro, and is not living with her husband at her death, or when the husband has abandoned his wife, or has maliciously turned her out of doors, and they are not living together at her death; or if the husband has separated himself from his wife, and is living in adultery at her death, he shall not be tenant by the curtesy of her lands, tenements and hereditaments. (1871-2, c. 193, s. 30; Code, s. 1838; Rev., s. 2102; C. S., s. 2519.)

Cross References.—See § 52-7 and note. As to divorce a mensa et thoro and grounds therefor, see § 50-7. As to dower, see § 30-4 et seq. As to power of minor husband to renounce curtesy, see § 30-10.

This section retains curtesy consummate in practically its common-law form, but the rights of the husband in his wife's property have been so cut down by the Constitution, by statutes, and by pronouncements of the court, that his estate by curtesy initiate is of little value. See 11 N. C. Law Rev. 273.

Tenancy by the curtesy consummate remains as at common law. The husband may sell such interest. *Long v. Graeber*, 64 N. C. 431 (1870). And it is liable to sale under execution against him after his wife's death. *McCaskill v. McCormac*, 99 N. C. 548, 6 S. E. 423 (1888); *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301

(1891).

Where the court finds that a wife died intestate seized in fee of certain lands, and left her husband surviving and a child by such husband, the husband is entitled to an estate by the curtesy in the lands. *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937).

Actual Seizin Necessary at Common Law.—At common law it was essential that the wife, or the husband in the right of the wife, should have seizin in deed—that is, actual seizin—actual possession of the estate, to entitle the husband as tenant by the curtesy. *Nixon v. Williams*, 95 N. C. 103 (1886).

A tenant by curtesy consummate has an insurable interest in buildings and structures on the lands. *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937).

Nothing else appearing, a policy of fire

insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property brought by the life tenant with the proceeds thereof. *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937).

Incidents of Common-Law Curtesy Initiate Drastically Limited.—The common-law estate of the husband as tenant by the curtesy initiate in the lands of his wife was abolished by Art. X, § 6, of the Constitution, and now, by virtue of that provision and the statutes passed in pursuance thereof, while the husband has an interest, the right to enter upon and occupy the land with the wife, he has no estate therein until her death. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299 (1891).

When Right Attaches.—After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right. *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913).

Husband Has a Freehold Interest.—A husband has, by the curtesy initiate, a freehold interest, but not an estate, in the

property. *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301 (1891).

Bare Right of Occupancy.—The only right attaching to tenancy by the curtesy initiate in the wife's real estate is the bare right of joint occupancy with the wife with the right of ingress and egress. *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301 (1891).

Joinder of Minor Husband in Deed.—It was formerly held that when the husband, being a minor joins in the deed to lands of his wife, the conveyance is voidable, subject to his affirmance or ratification when he becomes of age; and where the deed has been disapproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void. *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913). By § 30-10, a minor spouse is now empowered to renounce dower or curtesy or to consent to a conveyance of real property with the same effect as though of age.

Husband a Necessary Party.—A husband, tenant by curtesy, has an interest in his wife's land is a necessary party to a suit concerning it. *McGlennery v. Miller*, 90 N. C. 215 (1884); *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6 (1913).

Applied in Caskey v. West, 210 N. C. 240, 186 S. E. 324 (1936).

§§ 52-17, 52-18: Repealed by Session Laws 1943, c. 543.

ARTICLE 2.

Acts Barring Reciprocal Property Rights of Husband and Wife.

§ 52-19. **Divorce a vinculo and felonious slaying a bar.**—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying, the party so convicted, shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only. (1871-2, c. 193, s. 42; Code, s. 1843; Rev., s. 2109; C. S., s. 2522.)

Cross References.—As to absolute divorce, see § 50-5. See also § 28-10.

Editor's Note.—In *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794 (1888), a wife who murdered her husband was held to be entitled to her right of dower irrespective of her crime. The legislature the following year adopted this section.

As to effect of subsequent divorce on right of spouse to take, see 12 N. C. Law Rev. 376.

Application to Estates by Entireties.—This and the following section deal with the rights of husband and wife growing

out of the marriage relation, such as dower, curtesy, and the like, and have no application to estates by entireties. *McKinnon, etc., Co. v. Caulk*, 167 N. C. 411, 83 S. E. 559 (1914).

In *Bryant v. Bryant*, 193 N. C. 372, 137 S. E. 188 (1927), it was held that where husband and wife hold an estate by entireties, and the husband has murdered the wife, and her expectancy of life has been legally determined to have been longer than his own, equity will decree that he hold the legal title to the lands held in entireties in trust for her heirs at

law until his death, subject to his right of management and the use of the rents and profits for his own life. As this decision was based upon equitable principles, it was not necessary to determine whether the provision of this section, in reference to the felonious slaying of the husband or wife, which was enacted after the decision in *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794 (1888), embraces estates held by entireties. For comment on *Bryant v. Bryant*, see 5 N. C. Law Rev. 374.

When Homicide Is Admitted.—This section does not require a conviction of the offense where it is admitted that the homicide has been committed. *Parker v. Potter*, 200 N. C. 348, 157 S. E. 68 (1931).

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate.—The fact that this section and the other statutory provisions that a murderer shall forfeit all interest in the estate of his victim, §§ 28-10 and 30-4, are applicable only to

the relation of husband and wife, does not deprive equity of the power of declaring an heir who has murdered his ancestor a constructive trustee for the benefit of those who would have taken if the murderer had predeceased the intestate. *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845 (1948). For suggested revision of this section and related statutes, see 26 N. C. Law Rev. 232.

Effect of Valid Foreign Divorce.—Where a wife who had resided here bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state and the husband, in this State, appeared by attorney and defended the action there, it was held that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminated from its date. *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200 (1889).

§ 52-20. Wife's elopement or divorce a mensa at husband's suit a bar.—If a married woman elopes with an adulterer, or willfully and without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death, or if a divorce from bed and board is granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein. (1871-2, c. 193, s. 44; Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; Rev., s. 2110; C. S., s. 2523.)

Cross References.—See § 30-4. As to forfeiture of wife's right to administer and to distributive share in personal estate, see § 28-11.

Application to Estates by Entireties.—See note to § 52-19.

Wife Deprived of Dower.—A wife who commits adultery and is not living with her husband at the time of his death is thereby deprived of her dower. *Phillips v. Wiseman*, 131 N. C. 402, 42 S. E. 861 (1902).

§ 52-21. Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.—If a husband separates from his wife and lives in adultery, or willfully and without just cause abandons his wife and refuses to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board is granted on the application of the wife, he shall thereby lose all right to curtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marriage, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall thereafter be barred of all claim and right to curtesy in such real property.

(1871-2, c. 193, s. 45; Code, s. 1845; 1893, c. 153, s. 4; Rev., s. 2111; C. S., s. 2524.)

Cross References.—As to estate by curtesy and forfeiture, see § 52-15. See also § 28-12.

Possibility of Condonation Recognized.

—This section recognizes the possibilities of a condonation and the resumption of the marriage relation. *Joyner v. Joyner*, 151 N. C. 181, 65 S. E. 896 (1909).

ARTICLE 3.

Free Traders.

§§ 52-22 to 52-25: Repealed by Session Laws 1945, c. 635.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

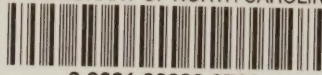
November 30, 1950

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of 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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